

The background of the cover features a close-up of a spider on its web, which is a vibrant green color. The web's threads are intricate and spread across the frame. In the upper right quadrant, there is faint, semi-transparent text in various languages, including Hebrew ("עורך דין"), English ("Advoc", "lawyer"), and Vietnamese ("LUẬT S", "trac").

**INTERLAW BANKING AND FINANCE  
SPECIAL BUSINESS TEAM**

**WORLDWIDE SURVEY  
ON  
TAKING SECURITY  
OVER  
PERSONAL / MOVEABLE  
PROPERTY AND COLLATERAL**

 **INTERLAW**<sup>®</sup>  
An International Association of Independent Law Firms

Interlaw thanks the following for leading the effort to collaborate with Interlaw firms worldwide to produce this Survey:

**Bruce Wood, Morton Fraser**, Edinburgh. Bruce leads Interlaw Banking and Finance Team in the EMEA Region.

**Maria Townsend, Hunt & Hunt**, Sydney, founded the Interlaw Banking & Finance Special Business Team and represents the SBT in the Asia Pacific Region

**Estif Aparicio, ARIFA**, Panama, **Irwin Gzesh, Neal Gerber Eisenberg, LLP**, Chicago and **Jack Cullen, Foster Pepper, PLLC**, Seattle lead the Banking & Finance Special Business Team in Latin and North America

The Interlaw Banking & Finance Special Business Team enhances intrinsic value to Interlawyers and their clients, particularly because of the global nature of banking and other types of finance, including asset-based lending, finance for such things as vehicles, ships, aircraft, debts or software. By understanding more fully each jurisdiction's rules, laws, regulations and restrictions, Interlawyers may navigate more fully the benefits of undertaking specific types of transactions in targeted countries.

Beyond the academic activities surrounding the laws and regulations that govern the financial aspects of complex transactions, members share best practices. Ongoing projects, such as this Banking and Finance SBT review of taking security over moveable property and collateral are a direct asset to clients and effectively build professional confidence and familiarity among law firms, further optimizing the client experience.

Practitioners include Interlawyers who act for banks and other financial institutions, those with experience on the regulation of the industry, and Interlawyers interested in the litigation and arbitration aspects of transactional finance and banking law.

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## Introduction

Interlaw Ltd., an Elite\* global law firm network, is delighted to present this survey of how practices differ across the world when a lender takes security or collateral over moveable property. Terminology can be an issue here - some talk of "security", others of "collateral" or "charge"; some call the assets in question "moveable", others talk of "personal property"; and that's before we bring other languages into consideration. By whatever name called, we're considering taking security for finance over such things as vehicles, plant and equipment, receivables, contractual rights - in other words both tangibles and intangibles, but generally not land and buildings.

With the globalisation of commerce and finance, it is of vital importance to lenders and other financiers to understand that the opportunities for taking collateral in their home jurisdictions may not exist in other jurisdictions or indeed that they may be greater in other jurisdictions. While no one can be an expert in all jurisdictions, it will be helpful to have some advance feel for what might be on offer elsewhere.

This survey has been prepared by Interlaw Member law firms that participate in the network's Banking and Finance Special Business Team. It is written in in layman's terms for the finance professional.

We start with some teaser questions - " Lenders Beware - Did you Know?" - highlights of what seems normal in one jurisdiction but which may cause consternation in another.

In some jurisdictions, for example, a lender can take a floating charge, valid as a security over all a debtor's assets from time to time without the need to specify those assets individually. Other jurisdictions would regard that as anathema. The Interlaw member firms can guide you through this labyrinth wherever you are or your debtor's assets are.

Five questions are then answered for each jurisdiction:

- How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?
- What, generally, is the priority of different types of security available for these types of assets?
- What taxes, duties or other fees are payable on these securities?
- What, generally, is the method of enforcement of these securities?
- What other issues should be considered when looking at securing such assets?

We hope you find this useful as a quick reference guide. But it is only a guide. Nothing in what follows should be relied on as legal advice; it is not intended as such. However, each contributing firm would be delighted to hear from you and expand on the simplified summaries given in this survey.

<http://interlaw.org/expertise/special-business-teams/Banking-and-Finance/>

\* Chambers & Partners ranks Interlaw as an "Elite" Global Law Firm Network, the highest ranking awarded.

## Lenders Beware: Did you know?

### [England](#)

1. **Did you know** that in the United Kingdom some of the constituent countries (for example, Scotland and Northern Ireland) have laws which are different from English law? So security over assets outside England but in the United Kingdom may differ from the security taken over assets in England.

2. **Did you know** that if in England you take a fixed charge on receivables but do not control the receipt of the payment of the receivables, your fixed charge will be downgraded to a floating charge and have priority only behind certain preferred creditors, mainly employee claims for pay and pensions?

### [Scotland](#)

3. **Did you know** that Scots law is significantly different from English law, though both Scotland and England are part of the United Kingdom? In particular, in Scots law the creation of security or collateral is done very differently from English law.

4. Did you know that Scots law does not recognise chattel mortgages or pledges over chattels, so if you have a valid English law chattel mortgage over a chattel in England and that chattel is moved within the United Kingdom but to Scotland, the chattel mortgage ceases to be valid?

### [Nigeria](#)

5. **Did you know** that in Nigeria different laws apply to the type of mortgage, which can be created over property, depending on whether the property to be charged is in the old Northern and Eastern states of Nigeria, in the old Western Nigeria, or in Lagos?

### [Switzerland](#)

6. **Did you know** that under Swiss law you can only take security over specified assets, not over all assets of a grantor or all assets of a specified class owned by a grantor?

7. Did you know that under Swiss law a debtor who has granted security or collateral to a creditor can insist on the creditor realising the security before claiming against the debtor for any balance due?

### [Sweden](#)

8. **Did you know** that enforcement in Sweden of a business mortgage can only be done by a bankruptcy receiver or through a forced sale administered by the state Enforcement Authority?

9. **Did you know** that in Sweden work in progress is covered by a business mortgage until the work has been finished and delivered, at which point the mortgage attaches to the claim for payment?

#### Germany

10. **Did you know** that if under German law you take by way of security or collateral secured assets to a value significantly higher than the amount of the loan to be secured, the security may be void as contrary to public policy?

#### Bulgaria

11. **Did you know** that when enforcing in Bulgaria a pledge over a commercial enterprise (the assets of a business) a bailiff determines the initial price from which purchasers may bid for the assets being sold.

#### Spain

12. **Did you know** that Catalonia has different rules from the rest of Spain in relation to the granting of security over moveable assets?

13. **Did you know** that in Spain on insolvency a person related to the insolvent (including group companies of an insolvent company in the group) is subordinated to the claims of secured and ordinary creditors?

#### Australia

14. **Did you know** that under Australian law, a security interest in certain personal property can be perfected by control? Security interests perfected by control have priority over security interests perfected by other means in the same collateral even when those securities are created or registered prior to the security interest perfected by control.

15. **Did you know** that in Australia, there is a distinction between commercial and consumer property? Secured parties have different enforcement remedies and can contract out of certain provisions of the legislation depending on whether the collateral is commercial and consumer property.

#### India

16. **Did you know** that in India, even if a hypothecation deed provides that a charge is a fixed charge, it may be classified as a floating charge if the hypothecator continues to deal with the charged asset in an unrestricted manner?

17. **Did you know** that under Indian law, if a company is classified as a "sick industrial company", then no suit for recovery of money or enforcement of security may be initiated against the company without the consent of the Board of Industrial and Financial Reconstruction?

### Japan

18. **Did you know** that in Japan, court enforcement procedure is required for pledges on tangible personal property, but not for pledges on monetary claims, SITT on tangible personal property, or SITT on monetary claims?

### New Zealand

19. **Did you know** that under New Zealand law, if a debtor defaults, the secured party with property may take possession of the collateral or sell the collateral in due course to satisfy their debt? Subordinate secured parties are deprived from exercising their contractual rights in the property.

20. **Did you know** if a debtor relocates to another jurisdiction, an already perfected security interest will continue to be perfected in New Zealand if it is also perfected in the other country within a specified timeframe?

### Singapore

21. **Did you know** that in Singapore if a registrable charge is not registered within 30 days of its creation with ACRA, it will be void against a liquidator and other creditors?

### Vietnam

22. **Did you know** that in Vietnam, there are specific types of security designed for money, precious metals and gemstones? They are deposit, secured deposit and escrow deposit.

23. **Did you know** that Vietnamese laws do not limit the methods of security enforcement so long as the parties have agreed upon such methods?

### Costa Rica

24. **Did you know** that payments for interest and other financial charges paid to foreign banks are subject to withholding taxes in Costa Rica but that the law allows certain exceptions?

25. **Did you know** that there is a new law in Costa Rica regulating security over moveable assets that will enter into force in 2015?

### The Netherlands

26. **Did you know** that in the Netherlands a company debtor can annul any agreement it enters into if it is contrary to its objects and the creditor knew or should have known of the transgression?

### [Malta](#)

27. **Did you know** that there is a new form of security in Malta giving the creditor better rights than most other forms of security where the creditor takes title to the relevant asset?

### [Oman](#)

28. Self-help remedies in respect of enforcement of security are not possible under Oman law and an agreement allowing a mortgagee to sell secured assets without a court judgment will not be valid.

### [Bahrain](#)

29. The Kingdom of Bahrain is the ultimate owner of all natural resources including mines, oil wells etc. As such, although it is possible to take security over such assets, it is not possible to execute judgment over such assets as they are immune from execution.

### [United Arab Emirates](#)

30. Self-help remedies in respect of enforcement of security are not possible under UAE law.

## INDEX OF COUNTRIES BY REGION

	<b>Page</b>	
<b>Europe/ Middle East/ Africa</b>		
1	Bahrain (contributed by Trowers & Hamlins LLP, Bahrain, in conjunction with Elham Ali Hassan & Associates, Bahrain)	10
2	Belgium (contributed by Janson Baugniet, Brussels)	15
3	Bulgaria (contributed by Andrey Delchev & Partners - Eurolex, Bulgaria, Sofia)	19
4	Germany (contributed by Arnecke Siebold, Frankfurt)	23
5	Malta (contributed by Camilleri Preziosi, Valletta)	27
6	The Netherlands (contributed by AKD, Amsterdam)	35
7	Nigeria (contributed by Ajumogobia & Okeke, Lagos)	39
8	Oman (contributed by Trowers & Hamlins LLP, Oman)	44
9	Spain (contributed by Gomez-Acebo & Pombo Abogados S.L.P., Madrid)	44
10	Sweden (contributed by Hamilton Advokatbyrå, Stockholm)	59
11	Switzerland (contributed by Poncet, Turrettini, Amaudruz, Neyroud & Associés, Geneva)	62
12	United Arab Emirates (contributed by Trowers & Hamlins LLP, Dubai)	67
13	United Kingdom - England and Wales (contributed by Morton Fraser LLP, Edinburgh and Glasgow)	73
14	United Kingdom - Scotland (contributed by Morton Fraser LLP, Edinburgh and Glasgow)	78
<b>Americas</b>		
1	Brazil (contributed by Tess Advogados, Sao Paulo)	82
2	Canada (contributed by Owen Bird Law Corporation, Vancouver)	89
3	Colombia (contributed by Cárdenas & Cárdenas Abogados Ltda, Bogota)	97
4	Costa Rica (contributed by Arias & Muñoz, San José)	100
5	Dominican Republic (contributed by Pereyra & Asociados, Santo Domingo)	100
6	Mexico (contributed by Ramirez, Gutiérrez-Azpe, Rodríguez-Rivero y Hurtado, S.C., Mexico City)	106
7	Panama (contributed by Arias, Fábrega & Fábrega, Panama City)	110
8	Peru (contributed by Rodrigo, Elias & Medrano Abogados)	113
9	USA (contributed by Foster Pepper PLLC, Seattle and Neal, Gerber & Eisenberg LLP, Chicago)	118



**Asia/ Pacific**

1	Australia (contributed by Hunt & Hunt, Sydney)	121
2	China (contributed by Zhonglun W&D Law Firm, Shanghai)	128
3	India (contributed by Luthra & Luthra, New Delhi)	132
4	Japan (contributed by Momo-o, Matsuo & Namba, Tokyo)	140
5	Malaysia (contributed by Lee Hishammuddin Allen & Gledhill, Kuala Lumpur)	143
6	New Zealand (contributed by Fortune Manning, Auckland)	148
7	Singapore (contributed by Colin Ng & Partners LLP, Singapore)	152
8	Vietnam (contributed by Vision & Associates, Hanoi)	157

## **Bahrain**

### **Taking security over moveable/personal property/collateral Questionnaire Answers under Bahrain law (applicable to Bahrain)**

#### **Questionnaire Answers under Bahrain Law**

(Produced by Trowers & Hamlins, Bahrain in conjunction with Elham Ali Hassan & Associates, Bahrain)

#### **Question 1**

*How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?*

- 1 A general right to grant security arises from Article 1021 of the Civil Code of Bahrain.
- 2 Although the Civil Code sets out the high level rules for creation and execution of security on moveables, where a specific law has been promulgated, such as the Civil Aviation Act no.14 of 2013 (**CAA**) which governs laws applicable to the mortgage on aircrafts, such specific laws would supersede the generality of the Civil Code.
- 3 Security over moveable assets can be created by way of a mortgage, a charge or an assignment.
- 4 To be considered valid, an instrument creating security over a moveable asset must:
  - 4.1 be in writing - The security document does not need to be in English as Arabic is the official language in Bahrain. However, where for example a mortgage is drafted in English only, once (and if) submitted to a court, it must be presented with an Arabic translation in order for it to be admissible. Similarly, if the document is to be notarised, the Notary public would require the Arabic translation for the document to be provided;
  - 4.2 specify a fixed and determinable date;
  - 4.3 specify the amount being secured, and
  - 4.4 specify the full details of the asset being secured.
- 5 Notarisation of the security document although not a legal requirement per se, may sometimes be a practical requirement, for example where the Ministry in which the security document is to be filed as part of its perfection process requires that the security document is notarised and the Notary

has verified to the Ministry's satisfaction that the parties have the requisite capacity to enter into the security document.

- 6 Depending on the type of asset, the security document once executed by the parties must comply with any other specific perfection requirements, such as registration (as to which please see further below).
- 7 The CAA sets out the requirements in relation to granting a mortgage over an aircraft. The CAA, amongst others, requires that any legal disposition of an aircraft registered on the Bahrain national register of aircraft registration maintained by the Ministry of Transport – Civil Aviation Affairs, including through granting a mortgage over the aircraft, shall take effect only once it is approved by the Aviation Affairs and entered in the national register.
- 8 The Promulgation of Registration of Ships & Determination of Safety Conditions Act no.14 of 1978 (**PRSDSCA**) sets out the requirements in relation to granting a mortgage over a ship. The PRSDSCA requires, amongst others, for any right to validly accrue over a ship, such as a security interest granted through a mortgage, it must be registered in the ship registration book at the Ship Registration Office of the relevant Ports and Coastguards Authority.
- 9 Shares in a company incorporated in Bahrain may be mortgaged. In order to perfect the mortgage after notarisation, the mortgage must be registered. In the case of a BSC (Bahraini shareholding company), the mortgage must be registered with the share registrar, and in the case of a WLL (limited liability company), the mortgage must be registered with the Ministry of Industry and Commerce.
- 10 Bank accounts may be charged by a document of charge and the bank's acknowledgment and confirmation as to the existence of the charge is sufficient. No further public filing of the charge is required.
- 11 Under Bahrain law, it is possible to create security over certain intangible assets, such as debts/receivables, insurance proceeds and contractual rights. In the case of receivables, security can be extended to both present and future debts/receivables. The security is affected by taking an assignment over all or part of the clearly identified intangible asset, such as a specified category of debts/receivables. It is necessary for notice of the assignment to be given to the underlying debtors in the case of receivables; the insurer in the case of insurance proceeds; and the relevant counterparty for the assignment of other types of contractual rights. In the case of an assignment of insurance proceeds, the insurer must also issue an endorsement of the assignment against the insurance policy for the assignment to be binding.

- 12 For there to be a valid charge created under an assignment over receivables, the creditor is also required to demonstrate control over the flow of proceeds from the assigned receivables. Control, however, can simply be effected by requiring the debtors in the receivables (who do not need to know of the existence of the secured creditor for this purpose) to be obliged to pay the proceeds of the receivables to a bank account that is either secured to, or held in trust for, the creditor.
- 13 Although under Bahrain law there is no concept of a floating charge, creditors may enter into a business mortgage by which the debtor charges the business, including all assets, machinery, stock in trade and goodwill in favour of the creditor. In addition to adhering with the formalities of creating the mortgage including the notarisation of the mortgage, it must also be registered with the Ministry of Industry and Commerce. The business mortgage is valid for a maximum of five years, but may be renewed by the parties. A mortgage will not be enforceable against third parties if it is not registered and perfected as required. Nevertheless the mortgage remains a valid contractual obligation between the parties thereto even when perfection formalities such as registration have not been completed adequately. In such a case the mortgagee can sue the mortgagor for breach and the unperfected mortgage will not be deemed null and void for failure to complete the perfection formalities.

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

- 1 Provided all the formalities are completed as required for the type of asset being secured, the creditor has priority over a bona fide subsequent creditor taking any security over the secured assets subsequently. If the creditor does not complete the required formalities, a bona fide subsequent creditor who completes the required perfection formalities will have priority over the first creditor, notwithstanding the earlier date of the first security created.
- 2 In the absence of a subordination agreement, such as a priority agreement among the relevant creditors, security held by different creditors over the same assets will rank according to the date that all the perfection formalities for the type of asset being secured were completed as required.

3 In the event that the debtor becomes insolvent, the following debts are preferred by law and therefore would need to be settled from the proceeds of any realisation of the sale assets of the debtor before other creditors' claims (including claims by secured creditors) are settled:

- certain costs relating to the declaration of bankruptcy;
- employees' wages for 30 days before the declaration of bankruptcy;
- amounts due to the General Organization for Social Insurance (the government department that administers private sector pensions for Bahraini employees and industrial injury compensation for all employees); and
- claims resulting from payments made by the bankruptcy trustee personally (or a third person) towards the settlement of the above amounts.

A liquidator may not prevent payment to secured creditors unless "personal considerations" are proven. This expression, although not defined in the law, has in the past been applied in the cases of family dispositions. Similarly, the Bankruptcy & Composition Law no. 11 of 1987 allows the liquidator to reverse transactions that were not at arm's length or which are at an under value if this is in the best interests of the creditors collectively.

### **Question 3**

What taxes, duties or other fees are payable on these securities?

No taxes or duties are payable. A nominal fee is payable on registration of a mortgage.

### **Question 4**

What, generally, is the method of enforcement of these securities?

- 1 In respect of shares, upon an event of a default, a charge that is a financial institution licensed by the Central Bank of Bahrain may enforce its security without a court order provided the parties had mutually agreed to that in the relevant contract.
- 2 In respect of the enforcement of security over other types of assets, a court order is required and typically proceedings may take six to twelve months. To expedite any court proceedings, the initial application to enforce specific security should be made through the Bahrain Urgent Matters Court.
- 3 The parties may directly present the security for enforcement at the Bahrain Court of Execution if the parties had agreed expressly that the mortgagee has this right in the mortgage document. However, if a dispute exists on whether a default has occurred, a substantive case will need to be filed.

The length of such cases at the Bahrain Court of First Instance is normally one to two years. Appeals to the Bahrain Court of Appeal and Court of Cassation can also take several years.

- 4 Since the establishment of the Bahrain Chamber for Dispute Resolution (**BCDR**), any claim by a CBB licensee for a value exceeding BD 500,000 falls under the jurisdiction of the judicial panel of the BCDR. Cases at the BCDR typically take six to twelve months and the right to appeal is very limited.

### **Question 5**

*What other issues should be considered when looking at securing such assets?*

- 1 It is also advisable to conduct comprehensive due diligence on the assets to be secured. This is in particular to ascertain whether there are other secured creditors of the company, and what kind of security such creditors may have over the assets of the company. This will assist in determining the appropriate intercreditor and priority arrangements required to put in place, if necessary, between the creditors to protect their interests.
- 2 Similarly, as a business mortgage only covers a company's business operations and relevant assets located in Bahrain, it is advisable to check that all substantial assets granted under the mortgage are located in Bahrain.

## Belgium

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under Belgian law

##### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

To start, some definitions:

A “*security*” on a moveable asset refers to a pledge (“*pand/gage*”) which confers to a specific creditor the right to be paid on certain assets by preference to other creditors. The Civil Code sets out the general legal framework applicable to the pledge, which is completed by specific laws depending on the type of assets.

“*Tangible assets*” are hard assets with material value, including inventory, but excluding ships and aircraft.

“*Intangible assets*” refer to anything not covered by the tangible assets category. This report focuses on debts and receivables (other than credit claims).

“*Financial assets*” refer to financial instruments, cash and credit claims. Those instruments are subject to a specific legal framework under Belgian law.

#### 1.1. Tangible and intangible assets

- The legal framework is set out in the Belgian Act of July 11, 2013 which will enter into force at a date determined by the King, at the latest on 1 December 2014. This Act modifies the existing rules of the Civil Code.
- A pledge can cover any moveable asset, present and future, provided that the securitized asset can be determined or is determinable. The pledged asset can be a specific asset of the debtor, or can cover the moveable assets of the debtor - the business assets (“*pand op de handelszaak/gage sur fonds de commerce*”) and agricultural assets (“*pandrecht op een landbouwexploitatie / droit de gage sur une exploitation agricole*”).
- The pledge can be created by mere agreement between the parties, upon either (i) filing with the national pledge register; or (ii) dispossession of the pledged assets, in so far as the pledge covers moveable tangible assets, cash and receivables. Under the previous legal framework, the goods had to be removed from the pledger’s possession and placed under the control of the pledgee or of a third-party pledge holder (“*dispossession requirement*”).
- When the debtor is a “*consumer*”, within the meaning of the Belgian Law on Market Practices and Consumer Protection of April 6, 2010, the pledge is only valid if there is a written agreement.
- Under the new Belgian law, a security trustee can create a pledge for the benefit and on behalf of third parties, and the bankruptcy of the security trustee will not affect the rights of beneficiaries. Unless otherwise agreed, the security

trustee and the beneficiaries can be held jointly liable for any default of the security trustee in the exercise of these rights.

## 1.2. Financial assets

- The legal framework is set out in the Belgian Act of 15 December 2004, which implements the European Collateral Directive 2002/47/EC.
- A pledge can be created on financial instruments, and rights on or with regard to such financial instruments, regardless of whether they can be traded on a capital market (e.g. shares in a BVBA/SPRL or CV/SC). However, the share transfer limitations applicable to BVBA/SPRL and CV/SC set forth in the Belgian Company Code apply.
- When a pledge is created on a financial instrument, the security beneficiary must acquire the possession of, or the control over, the assets. The deposit of financial instruments into a special account is in principle sufficient to transfer possession. With this, the pledge is valid and perfect, without any further formality.
- A pledge can also be created on cash on bank accounts and credit claims, which include not only loans made by credit institutions, but also loans made by institutions duly licensed to provide consumer credit or residential mortgage loans. No dispossession is required for a pledge on cash or credit claims.
- A security trustee can create a pledge in its name but for the benefit and on behalf of third parties. The pledge will be valid and enforceable against third parties provided that the beneficiaries' identities are determinable on the basis of the security agreement.
- If, and to the extent that, the terms of a security financial collateral arrangement so provide, the pledgee is entitled to exercise a right of use in relation to financial collateral provided under the security financial collateral arrangement.

### **Question 2**

What, generally, is the priority of different types of security available for these types of assets?

- Under Belgian law, creditors are ranked in accordance with the general rules set forth in the Mortgage Law of 16 December 1851. Those rules are as follows:
  - special privileges outrank general privileges;
  - specially privileged creditors outrank mortgagees and pledgees; and
  - mortgagees and pledgees outrank creditors with general privileges.
- The date of the pledge determines the ranking among creditors (filing date of the pledge with the register / dispossession date). Pledges filed on the same date are ranked equally.
- The pledgee will be overridden by the seller with a reservation of ownership and by the creditor with a right of retention related to the maintenance or conservation of an asset.



**Question 3**

What taxes, duties or other fees are payable on these securities?

In principle, no stamp duties apply to security agreements.

Under the new regime for tangible and intangible moveable assets, a fee will be due for each consultation, filing, amendment or deregistration of the security agreement. The amount of that fee has not yet been defined.

**Question 4**

What, generally, is the method of enforcement of these securities?

1.1. Tangible and intangible assets

- A simplified enforcement procedure applies - to the extent that the pledgee is not a consumer. No prior issuance of an enforceable title is required. The pledgee and pledger agree on the enforcement's form – public or private sale, lease of the pledged assets or appropriation of the assets.
- Enforcement must take place in good faith and in an economically responsible manner. Prior to enforcing the pledge, the pledgee must inform the debtor of its intention by means of a registered letter. The pledgee must then wait for 10 days before proceeding with execution. Enforcement occurs at the risk of the pledgee, whose liability cannot be limited or excluded.
- At any stage of the enforcement proceedings, the pledgee, pledger or any interested party can apply to the seizure judge, who has exclusive jurisdiction.

1.2. Financial assets

- The pledgee can execute the pledged financial instrument upon default, without prior notification of the pledger or court approval and notwithstanding any insolvency. However, if the collateral consists of receivables, a notification to the pledger is necessary. The “default” refers to any event of default – e.g., failure to an obligation of payment or information – on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the pledgee is entitled to realize or appropriate financial collateral. In principle, the agreement may provide that an insolvency procedure (bankruptcy or another insolvency procedure) constitutes a default.
- The pledgee proceeds to the public or private sale of the collateral or – insofar as expressly provided for in the security agreement – appropriation of the collateral by the pledgee at a value agreed upon in the security agreement.
- As regard to the pledge over bank account, the pledgee can immediately become the rightful owner – unless otherwise agreed by the parties – of the present amounts, notwithstanding any insolvency proceedings or seizure.

## Question 5

What other issues should be considered when looking at securing such assets?

Several guarantee mechanisms – not securities as such – are used in Belgium to grant to a specific creditor a right of preference over other creditors.

### 5.1. Tangible and intangible assets

- Reservation of ownership (“*voorbehoud van eigendom / reserve de propriété*”): the seller can sell goods on condition that ownership is transferred to the buyer only after payment of the full purchase price. If the buyer fails to pay the price in full on the agreed date, the seller can recover possession of the goods.
- Right of retention (“*retentierecht / droit de retention*”): the creditor can suspend the restitution of the good to the debtor until execution of its claim relating to this good.

### 5.2. Financial assets

- Netting clause: two persons who are debtors of one another agree on the conditions to compensate their reciprocal claims for the smallest amount. Since the Belgian Act of 15 December 2004, conventional netting can be exercised after the opening of an insolvency procedure under the conditions that the agreement was entered into before the opening of the insolvency procedure and the claim exists at the moment of the opening.
- Closeout netting clause: the underlying agreement is terminated upon default (e.g., bankruptcy or another insolvency procedure) of any of the parties whereby the parties will set off all their mutual claims arising from the termination of the agreement. Netting and related close-out provisions are excluded in transactions with non-merchants.

## **Bulgaria**

### **Question 1**

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

Under the acting legislation in the Republic of Bulgaria, the security over moveables is subject to several legal acts (laws), depending on the type of the moveable and the capacity of parties under the security agreement.

**1. “Pledge”** – secures all claims under civil transaction. The claim may be secured by way of a pledge on either moveable property or a claim.

In both cases, where the secured claim exceeds BGN 5, a document in writing showing the respective date, indicating the chattels and the claim, shall be required, in order to be enforced against third parties.

The pledged chattel shall be handed over to the Creditor.

In respect of the pledge on claims, the pledge shall be made known to the Debtor, in order to be pleaded against third parties.

**2. “Commercial pledge”** - secures rights ensuing from a commercial transaction. The types of commercial pledge are the following:

- Pledge of moveable items and bearer securities - transaction shall be considered concluded upon their delivery to the Creditor.

- Pledge of securities to order /registered securities - the transaction shall be considered concluded by endorsement for security and delivery to the Creditor.

**3. “Registered pledge”** - established without delivering the pledged property; the pledge contract shall be concluded in writing in order to be valid and entered in the Central Register of Registered Pledges, otherwise it can be opposed by third persons.

In the most cases of registered pledges, the law requires the pledge holder to be a merchant.

The following objects can be pledged in this category:

1. Receivables, securities and chattels, with the exception of ships and aircraft;
2. Company shares of partnership companies, limited joint-stock companies or limited liability companies;
3. Totality of receivables, machines and equipment, commodities or materials and of non cash securities;
4. Rights in patents for inventions and utility models, industrial designs, topologies of integral circuits and certificates for varieties of plants and breeds of animals.

5. Commercial enterprises (in this context meaning land, buildings, receivables and other rights).

**4. “Mortgage on a ship”** - the transactions on arranging a mortgage on a ship or on a ship under construction shall be carried out in written form with notarially certified signatures. The mortgage shall be valid after its entry in the special register for registration of the ships.

**5. “Pledge over aircraft”** - the establishing of real encumbrances in aircrafts must be done in writing. The establishing of a pledge over aircraft shall have effect from the date of entering into the register.

## Question 2

What, generally, is the priority of different types of security available for these types of assets?

1. The claims secured by a pledge take priority over all other claims except for the state claims for property taxes or motor vehicle taxes; claims on costs for securing and forcible execution; claims on costs for *actio surrogatoria* and *actio pauliana*. In the event there are several pledges on one property the Creditors shall be satisfied preferentially in the order the pledges were created in.

2. The claims secured by a commercial pledge have a priority to be satisfied before any other Creditors from the sale price of the pledge goods with no exceptions here.

3. The claims secured by a registered pledge shall be satisfied as set out in 1 above or, as the case may be, in 2 above. The priority of the registered pledges on one and the same property shall be determined by the priority of their registration.

4. The claims secured by mortgage on a ship or pledge over aircraft shall be satisfied as set out in 1 above or, as the case may be, in 2 above. In case of two or more mortgages/ pledges the order of preference of discharge shall be determined by the date of registration.

## Question 3

What taxes, duties or other fees are payable on these securities?

Registered pledge taxes - in order to be entered in the Central Register, a state fee of BGN 40 for the first page of the application form + BGN 10 for each next page must be paid.

Pledge over aircraft taxes – registration tax of BGN 500 to BGN 5 000, depending on the secured claim value.

Mortgage on a ship - registration tax of BGN 100

#### Question 4

What, generally, is the method of enforcement of these securities?

1. The claims secured by a pledge/commercial pledge shall be enforced by means of execution over the moveable object by the bailiff. The sale of the distrained object shall be carried out in a shop or commodity exchange, by way of public tender with verbal bidding or of public sale of estate.

In case of breach by the Debtor on the main contract the Creditor may without court intermediation sell the goods which are subject to a commercial pledge and collect the due money from the sale price of the goods. In order to sell the goods without court intermediation it must be written in the contract that in case of breach by the Debtor the Creditor shall be entitled to sell the goods and collect the due money and the contract must have a notarially certified date.

2. The claims secured by a registered pledge - the Creditor may without court intermediation sell the goods. He is obliged to declare in the register the start of the execution and to inform the pledge holder about the start of the execution. The Creditor is entitled to sell the pledged property by conducting the public sale. In this case, all the sums must be collected by the depository, who prepares distribution of the sums received by him.

The execution on a secured commercial enterprise deserves attention because it has its own special rules. The commercial enterprise consists of all land, buildings, receivables, contractual rights etc. According to the Registered Pledges Act, land is not the subject of security under this Act, but on the other hand it can serve as security by virtue of being part of the commercial enterprise. The pledge creditor can, by his choice, be indemnified by the commercial company for all rights, liabilities and actual relations or for only certain specified obligations. The land, buildings etc. as separate elements can be sold by the Creditor without complying with the rules with regard to the sale of mortgaged property, such as:

- the bailiff determines the initial price, from which the bidding starts.
- here, the Creditor is entitled to determine the sale price.
- the sale continues for one month. If no bidders have appeared or no valid bidding offers have been made, a new sale must be carried out by the rules of the first sale. It begins not earlier than six months from the conclusion of the first sale at a price equal to 80 percent of the valuation. If the property is not sold again, and within one week term a determination of a new initial price is not required, it must be released from execution at a request of the bailiff.

Here, the pledge creditor has the right to sell in his name and for the account of the pledgor the pledged property upon expiration of two weeks from the entry for starting the execution. If the sale is not carried out until the expiration of six months, each of the next creditors, who has entered start of execution, can sell the pledged property. As obvious, the Creditor has half a year to sell the property, without decrease of the sale price.

3. The claims secured by mortgage on a ship or pledge over aircraft – same as in paragraph 1 above.

**Question 5**

What other issues should be considered when looking at securing such assets?

The most important of all securities are those under the Registered Pledges Act.

The advantage for the pledge Creditor in case of establishment of special pledge under the conditions of the Registered Pledges Act is that the pledgee is not obliged to take care for the storage of the goods, subject to a registered pledge. The Debtor retains the possession on them and even may carry out disposal transactions in respect of the pledged property, in which case the pledgee creditor is entitled to be indemnified by the receipts from the expropriation of the pledged property/.

The special pledge is established without delivery of the pledged property. The Debtor is obliged to provide the pledgee with opportunities to examine the condition of the pledged property.

It should be mentioned that the pledge of a commercial enterprise gives the pledgee creditor the opportunity to be secured on all a company's properties, assets, etc. without describing them in the contract. In this case, the contract for pledge of commercial enterprise can be opposed by third parties, acquiring rights over separate assets of the pledged enterprise, when entered in the commercial trade register. If the contract for pledge of a commercial enterprise stipulates separate assets, the pledge has effect on them even after their separation from the enterprise.

## Germany

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under German law (only a small, but significant excerpt)

##### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

The German legal terminology for moveables serving as collaterals is “*Realsicherheiten*”, i.e. Real Securities. Real Securities transfer to the creditor or charge in his favour the property right in a physical object or in a right and entitle him to collect proceeds generated in the realization-process. The creditor may realize the collateral in case of a non performance of the secured debt (“event of default”).

##### 1. Pledge, Sec. 1204 et seq. German Civil Code (BGB) [*Pfandrecht*]

According to Sec. 1205 German Civil Code the contractual pledge on moveables is created by way of contract and delivery. For reason of the delivery, it is only used for pawn credit, not for bank finance, because borrowers need to keep possession and use of their moveables.

Pledges of rights and receivables are created according to Sections 1273 et seq. German Civil Code by way of contract and by notification to the debtor of the claim. Pledges of bank accounts, deposited securities, rent receivables, trade receivables, IP rights and shares in companies are very common in bank finance.

According to Sec. 1204 German Civil Code, the contractual pledge can be created only to secure a claim. It is “accessory”, i.e. subsidiary to the claim which it secures. If the claim expires, so does the pledge. If the claim is assigned to a Third Party, also the contractual pledge is devolved to this Third Party (Sections 1250, 401 German Civil Code). The pledge on moveables is terminated with the return of the goods subject to the lien.

##### 2. Reservation of Proprietary Right , Sec. 449 German Civil Code [*Eigentumsvorbehalt*]

Purchasers intend to use the acquired moveables, whereas vendors require real security on those. Hence, concerning the sale of moveable assets, the vendor’s rights can be secured by agreement on a Reservation of Proprietary Rights according to Sec. 449 German Civil Code. As a consequence the vendor reserves the ownership of the item and primarily transfers the possession only. The purchaser acquires no property/ownership until full payment of the purchase price but is entitled to an expectant right to acquire which provides protection against the insolvency of the vendor.

3. Property Transfer by Way of Security, sec. 929, 930 German Civil Code [*Sicherungsübereignung*]

At the in rem level, the Transfer by Way of Security effects a simple transfer of ownership according to Sec. 930 German Civil Code, whereby the handover of the moveable is substituted by a constructive possession title of the transferor/debtor. Regularly, the Transfer by Way of Security is related to the securing of cash loans. It secures the acquirer's claim (collateral taker) against the transferor/debtor. This security purpose marks out the limits of the (new) proprietor's rights. He may demand delivery of the "acquired" item only if the secured cash loan has not been paid. Therefore, in Transfer by Way of Security transactions regularly there are three contracts involved: a Loan Agreement, a Property Transfer Agreement according to Sections 929, 930 German Civil Code and a Security Agreement.

Contrary to the pledge, the collateral taker's secured item acquired by the Transfer by Way of Security effects a non-accessory security interest, i.e. it is not tied to the existence of certain claims.

4. Assignment of Rights and Receivables for Security Purpose, sec. 398 et seq. German Civil Code [*Sicherungsabtretung*]

Compared with a pledge of rights, the assignment is less rigid as a collateral instrument. To become effective, it only requires a contract (no specific form except in certain instances), and notice to the debtor of the assigned claim is not a prerequisite. Consequently, banks typically agree with borrowers an undisclosed assignment of trade receivables, rent receivables etc. Only if the loan becomes non-performing, will the bank disclose the assignment towards the third party debtor.

A second advantage of the assignment over the pledge is that it is not an accessory right, i.e., that it is not dependent on the secured claim.

Thirdly, not only can existing rights and receivables be assigned, but also future rights and receivables which need not be exactly specified in the agreement but only determined in a distinctive matter.

Regarding shares in companies, lenders would generally not agree assignments, because it is not intended to acquire the full position of the shareholder.

## **Question 2**

What, generally, is the priority of different types of security available for these types of assets?

In the provisions of the German Act on Civil Procedure concerning enforcement there is the general principle that claims that have first arisen are ranking prior to claims which have arisen thereafter. The time at which the claim arises is decisive. In



particular in the light of execution proceedings this circumstance results in a kind of 'racing duel' among the creditors.

By contrast, regarding the collective enforcement in insolvency proceedings [*Gesamtvollstreckung*] the proceeds of enforcement among the creditors is distributed according to quotas.

### **Question 3**

What taxes, duties or other fees are payable on these securities?

Under German law, all securities on moveables and rights are free from taxes.

### **Question 4**

What, generally, is the method of enforcement of these securities?

In case of an event of default the enforcement of the respective securities varies:

#### 1. Pledges

Generally, pledged moveables are realized via public auction. The owner of the pledged moveable and the pledgee (collateral taker) may also agree on a private sale. The proceeds from the auction (or the private sale) are then substituted in the pledge. If the pledged item has a stock exchange or market price the pledgee (collateral taker) may affect the sale privately at the current price.

Pledged claims and rights are realized by collecting the third party debts or rights. Pledged securities or bonds are sold at stock exchange price.

In the event of pledgor's insolvency there is the right of segregation of the pledgee (sec. 50 German Insolvency Code (InsO)).

#### 2. Reservation of Proprietary Right

According to the general provisions the vendor is entitled to withdraw from the contract if the purchaser does not effect payment in time. Due to the acquisition of ownership the vendor is entitled to demand return of the item only if he has withdrawn legally effective, Sec. 449 para. 2 German Civil Code.

According to Sec. 47 German Insolvency Code (InsO) in connection with Sec. 985 Civil Code there exists the right of segregation of the vendor in the event of insolvency of the purchaser.

#### 3. Property Transfer by Way of Security

In case of an event of default the collateral taker (creditor) is entitled to use the "item" by himself or sell it to a third party and to remunerate himself by the sale of the item.

In the event of the collateral provider's insolvency, equal to a pledgee, the collateral taker (creditor) can claim for segregation (Sec. 50, 51 German Insolvency Code (InsO)).

#### 4. Assignment for purpose of Security

In case of an event of default, the assignee creditor is entitled to collect the assigned claims from the third party debtors. To do this, the creditor discloses the assignment to the third party debtors.

Alternatively, he can sell the claim.

In the insolvency of the assignor the assignee has a right for segregation (Sec. 50, 51 German Insolvency Code (InsO)).

### **Question 5**

What other issues should be considered when looking at securing such assets?

- According to Sec. 138 para. 1 German Civil Code an initial over-collateralization could be considered as null and void being a transaction contrary to public policy. Over-collateralization occurs when the loan security's value is significantly higher than the risk to be secured. In such cases the collateral provider can demand from the collateral taker (creditor) the release of the collateral that is no longer needed, but the security agreement remains in force. Such an over-collateralization can arise only in case of non-accessory collaterals, which exist regardless of the secured claim.
- Collateral security granted just before a debtor's insolvency can be disputed by the insolvency administrator within specified time limits.
- In contrast to e.g. the land charge or shipping register there exists no registry for Real Securities in Germany. Therefore a creditor can not research whether he will be the prior ranking secured party.

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## Malta

- 1) How do you secure moveables (also known as personal property, moveables assets or collateral) both tangible and intangible in your jurisdiction?

### ***Introduction***

In terms of the Civil Code (Cap. 16) (the “**Civil Code**”) whosoever binds himself personally for the performance of an obligation, is obliged to fulfil his obligation with all his property, present and future. Third parties may also agree to bind themselves towards a creditor to satisfy the obligation of another person, if the latter fails to satisfy it himself. In either case, creditors would have an equal right to the property of the debtor or the surety/guarantor, as the case may be, unless there is a lawful cause of preference between the various creditors.

The most common types of security in transactions involving Maltese debtors or guarantors are pledges and hypothecs (whether general or special). A relatively recent amendment into Maltese law has seen the introduction of security by title transfer as a new mode of granting security over moveables. Mortgages are also common in transactions however these are limited to the shipping and aviation industry.

### ***Possessory:Pledges***

Pledges typically are possessory forms of security which are characterized as privileges in terms of Maltese law. The pledge may be given either by the debtor himself or by a third party as guarantor for the debtor. The things that may be given as a pledge are moveables things, debts, shares and other rights relating to moveables things. Pledge is technically a possessory security interest, since one is obliged to deliver moveables or the documents of title to the pledgee, thereby granting possession to the pledgee. Nevertheless when granting a pledge of intangibles (such as receivables) the pledgor cannot grant 'possession' to the pledgee since the receivables are not corporeal. If delivery cannot take place as aforesaid then the pledge has to result from a public deed or private writing.

Pledges over shares issued by a company registered and incorporated under the laws of Malta are granted in accordance with the Companies Act (Cap. 386) (the “**Companies Act**”). In terms of the Companies Act, the pledge of securities is constituted by means of an instrument in writing entered into between the pledgor and the pledgee. Notice of the pledge is to be delivered by the pledgor or the pledgee to the Registrar of Companies in Malta for registration within fourteen days of granting the pledge. The company whose securities have been pledged is also to be notified of the pledge in writing within the said period and is to accordingly record that fact in the register of holders of the respective securities.

The pledge requires registration only when there is a public registry of ownership such as the Registry of Companies in Malta where the

shareholders are notified to the Registrar of Companies. Pledges over receivables on the other hand require that either notice of the pledge has been given by a judicial act served on the debtor of the debt or other right or such debtor has acknowledged the pledge.

### ***Non Possessory: Hypothecs, Security by Title Transfer and Mortgages***

#### *General Hypothecs*

The non-possessory forms of security are hypothecs and security by title transfer. The only non-possessory security which may be granted over a specific category of moveable assets is the security by title transfer since in the case of a general hypothec, it attaches in a floating manner to all the present and future property of the security provider and therefore cannot be provided in relation to a specific category of moveable assets.

Insofar as special hypothecs are concerned, the law provides that special hypothecs may be registered over particular moveables as the Minister may from time to time establish - to date however, no such moveables have been identified by the responsible Minister.

Hypothecs<sup>1</sup> may be general or special and create rights over the property of a debtor or of a third party for the benefit of the creditor as security for the fulfillment of an obligation. A hypothec is general when it affects all the property present and future of the debtor. A general hypothec attaches to all the assets of the debtor, present and future. However once an asset is sold by the debtor, the security no longer attaches to such an asset.

#### *Security by Title Transfer*

This institute of security by title transfer entered into effect under Maltese law in 2010. It is a contract (hereinafter, "**title transfer contract**") by virtue of which a debtor, or a third party for the debtor, agrees to transfer or assign moveable things, whether by nature or by operation of law, to a present or future creditor or creditors so as to secure a present or future obligation of the said debtor.

Once such obligation has been completely satisfied, then the creditor or security trustee, as the case may be is bound to return the ownership of the moveable back to the debtor. A fiduciary relationship is created among the parties to the security arrangement. By virtue of a title transfer contract, the creditor to whom the property is transferred, is considered as the absolute owner, thus such property would not form part of the debtor's patrimony. This also applies to the fruits of the assigned property where such fruits will also be deemed to form part of the assigned property. While the creditor is seen as the absolute owner, he is to be considered as having acquired such title as a fiduciary for the sole purposes of:

(a) retaining the title and, if so agreed, possession of assigned property as security for the performance of the secured obligations;

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<sup>1</sup> Reference here is made to conventional hypothecs created by contract as opposed to legal, arising by operation of law or judicial, originates from a judgement

- (b) applying such assigned property or its value in settlement of the secured obligations in case of default; and
- (c) returning the assigned property, or its equivalent in case of fungible property, on performance of the secured obligations or of returning any excess in value to the transferor or debtor in case of enforcement.

Security by title transfer may take a possessory form or a non possessory form. This means that possession may either be retained by the debtor or else transferred to the creditor.

An acquisition of rights is in all cases subject to the observance of those formalities for perfection required for the particular kind of assigned property being transferred. In the case of the assignment of receivables for instance, the assignment is complete as soon as the debt, the right and the price have been agreed upon, and, except in the case of a right transferable by the delivery of the respective document of title, a (written) deed of assignment is made. That said, the assignee (or transferee) may not, in regard to third parties, exercise the rights assigned to it except after due notice of the assignment has been given to the debtor.

A title transfer Contract requires two parties; the debtor who agrees to transfer the moveables to a creditor, and the latter in whose favour the assignment is made to secure a present or future obligation. If additional parties are party to the contract, then acknowledgement is required for the purpose of perfecting the assignment.

### *Mortgages*

Mortgages are security interests which may not be created over all types of moveables but are limited to ships and aircrafts. In terms of Maltese law, ships and aircraft constitute a particular class of moveables, forming separate and distinct assets within the estate of their owner. Ships and aircraft may therefore constitute security for a debt, both by agreement and by operation of law.

The most common form of security over a ship or an aircraft is a mortgage. Under Maltese law, a mortgage is recognised as a voluntary encumbrance created over a ship or an aircraft by means of a unilateral statutory form, signed and registered by the mortgagor. Mortgages require registration in the respective public registries relating to ships and aircraft. Once registered, mortgages rank in accordance with the time and date of registration.

In terms of Maltese law, a foreign mortgage over an aircraft or a ship may also be granted the same status and all the rights applicable to a mortgage registered in Malta if it fulfils the following criteria:

- (a) such mortgage has been validly recorded in the registry of ships of the country under whose laws the ship is documented;
- (b) such registry is a public registry;
- (c) such mortgage appears upon a search of the registry and

(d) such mortgage is granted a preferential and generally equivalent status as a mortgage under the laws of Malta, under the laws of the country where the mortgage is registered.

Malta has also ratified the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interest in Mobile Equipment on matters specific to aircraft equipment (the “**Cape Town Regime**”). Accordingly, international interests (such as an interest granted by a chargor under a security agreement) applicable to aircraft may also be registered in the International Registry under Cape Town Regime in terms of the First Schedule of the Aircraft Registration Act, (Cap. 503)

## **Other**

### *Mandate by way of security*

Under Maltese law, mandate is regulated in terms of the Civil Code. In terms of the Civil Code every mandate must have for its object something lawful which the person granting the power of attorney might have done himself.

In general, a mandator may revoke the mandate whenever he chooses, unless the mandate is expressly stated to be granted by way of security in favour of the mandatary or of any other person, and that it is irrevocable, in which case it may only be revoked with the consent of the person whose interest is secured thereby.

An irrevocable mandate granted by way of security must be granted in writing on pain of nullity. Furthermore, a mandatary under an irrevocable mandate granted by way of security may sue on behalf of the mandator in order to protect or enforce the interests secured by the mandate.

- 2) What generally is the priority of different types of security available for these types of assets?

### **Privileges**

A privilege confers the right of preference on all other debtors, whether secured or unsecured as long as the secured asset is still within the patrimony of the guarantor. The relevant special privileges are best identified with reference to the particular assets over which they operate. Within the context of commercial transactions, the relevant privileged claim that a creditor might avail of is the privileged claim in respect of the debt due to the pledgee, over the thing which he holds as a pledge.

Pledges constitute a real security interest in relation to the property pledged and the pledgee will rank with privilege in priority to all and any rights of other creditors over the pledged property, saving for any statutory preferred creditors (as outlined elsewhere in this report).

Specifically with respect to pledges on shares of a company incorporated in terms of the Companies Act or the Merchant Shipping (Shipping Organisations – Private Companies) Regulations, a pledge of shares must be registered by the submission of the appropriate statutory form made.

## **Statutory Preferred Creditors**

### *The Employment and Industrial Relations Act (“EIRA”)*

EIRA provides creditors' whose claims relate to employment wages with the right to rank first prior to any other claim. It grants employees a privileged claim over the assets of their employer, notwithstanding the provisions of any other law. Claims in respect of this provision are capped at a maximum of 6 months of national minimum wage at the time of the claim.

### *Claims of the Director of Social Services*

Claims in relation to the National Insurance contributions rank equally with wages of employees over the entirety of the assets of the employers. Article 116 of the Social Security Act (Cap. 318), holds that these are to be paid in preference to all other claims (excluding wages) whether privileged or hypothecary.

### *Claims of the Commissioner of Inland Revenue*

Article 23(11) of the Income Tax Management Act (Cap. 372) , holds that privileges given to the Commissioner of Inland Revenue shall rank immediately after wages of employees and the claims of the Director of Social Security in preference to all other claim whether privileged or hypothecary.

### *Claims of the Commissioner for VAT*

The Commissioner for VAT enjoys a special privilege over the payment of amounts owing under the Value Added Tax Act (Cap. 406) and, notwithstanding anything contained in any other law, this claim shall be paid in preference to debtors having any other privilege except those which enjoy general privilege and debt is terms of article 2009(a) or (b) of the Civil Code.

## **Hypothecs**

Hypothecs always rank below privileges. However, a hypothec is ineffectual unless registered in the Public Registry and/or the Land Registry as the case may be.

Hypothecs depend on the date of registration when it comes to their ranking at law. Accordingly, in the event that there is a plurality of seemingly equally ranking security interests (such as more than one hypothec), the date of registration will be the determining factor as to the ranking between the creditors, that is, the earlier the registration the higher the ranking. If however, two hypothecs are registered during the same day, then the two will have an equal ranking.

## **Mortgages**

Mortgages are recorded by the registrar in the order of time in which they are produced for registration. If there are more mortgages than one registered in respect of the same ship or share, the mortgagees will be entitled in priority, one over the other, according to the date and the time at which each mortgage was recorded in the register.

Registration is the means of securing priority for the mortgagee over other debts such as subsequent mortgages and other debts. Once registered, a

mortgage will rank in accordance with the ranking allocated to other registered and privileged debts, if any. There are a number of special privileges accorded priority ranking over a registered mortgage, such as judicial costs, fees and other charges due to the relevant public authority in respect of the aircraft (including registration fees), wages due to crew and possessory liens. It must be noted that with respect to aircraft, international interests, prospective international interests and other rights or interests which are registered under the Cape Town Regime rank ahead of mortgages registered in the National Aircraft Register (unless the mortgage was registered in the National Aircraft Register prior to the date on which the Cape Town Regime became effective in Malta).

### **Security by Title Transfer**

As the moveable asset is vested in the creditor, property will not be included in the assets of the debtor. Hence the creditor will not rank among the other preferential creditors. This security can be seen as having a superior priority status and will be satisfied ahead of both secured creditors and unsecured creditors. This element distinguishes this type of security from the other securities available.

### 3) What taxes, duties or other fees are payable on these securities?

#### **Privileges and Hypothecs**

The First Schedule of Public Registry Act (Cap 56 of the Laws of Malta) contains the tariffs for the registration of or renewal of such hypothecs – typically in the region of *circa* 0.1% of the debt secured is paid as a tariff to the Public Registry.

In case of hypothecs granted to secure an obligation that is hugely in excess of the asset base of the security grantor, it is common to insert a cap in the hypothec to minimise on the registry fees. Furthermore, there would also be notarial fees to be paid.

#### **Pledge**

No fees are payable.

#### **Mortgages**

A nominal registration fee of €500 is charged by the registrar of ships for registration of a mortgage over a ship. There are currently no registration fees applicable to the registration of mortgages over aircraft.

### 4) What generally is the method of enforcement of these securities?

#### **Pledge**

The creditor cannot dispose of the thing pledged in case of non-payment, but he may cause the thing to be sold by auction under the authority of the court. The demand of the creditor for such sale may be made even by means of an application and it shall be lawful for the court upon such application to order the sale of the thing pledged. The sale of the pledge may be demanded at any time both by the debtor and by the creditor if it is shown that the thing pledged can no longer be preserved without deterioration.



Article 122 of the Companies Act allows the pledgee to dispose of securities in one's favour or appropriate securities in an event of a default under the pledge agreement. Once there is a notice of default, the value of the securities will be established by agreement. Prior agreements to such notice are not valid. In case of disagreement, the fair value for sale or appropriate is to be determined by an accountant appointed by the First Hall Civil Court.

### **Security by Title Transfer**

In case of default, a title transfer contract would generally regulate all matters between parties with respect to the transferred asset, including the right of the rights of the transferee and the transferor and the manner in which the property is to be valued when the creditor opts to sell or set off the property. In absence of such contract, the provisions of the Civil Code on Security by Title Transfer apply.

In the event of default, the creditor upon giving notice in writing to the debtor and the transferor of the property, if these are different parties, is entitled to realise the assigned property: i) by sale, ii) by settling off or netting their value and applying their values in discharge of the secured obligations, or iii) by the judicial sale of property.

Settling off or netting is only possible if it has been expressly agreed to in the title transfer contract. The creditor is to account to the debtor as to the value used for such enforcement. Also, any excess in value of the sold asset will be accounted for in favour of the debtor on a fair and reasonable basis.

### **Hypothecs**

The hypothecary enforcement procedure is exclusively a court procedure.

### **Mortgages**

The Merchant Shipping Act (Cap.234) provides that in the event of default of any term or condition of a registered mortgage or of any document or agreement referred to therein, the mortgagee, upon giving notice in writing to the mortgagor be entitled to take possession of the property, have power to sell such property and apply for extension, pay fees and receive certificates and do all such things in the name of the owner so as to maintain the status and validity of the registration of the ship.

In addition to these rights, The Aircraft Registration Act (Cap. 503) holds that the mortgagee also has the power to lease the aircraft, and receive any payments in relation to such lease.

### **The Financial Collateral Arrangement Regulations**

Maltese law allows for security to be granted and enforced in terms of the Financial Collateral Arrangement Regulations, legal notice 177 of 2004 (as amended) implementing directive 2002/47/EC on financial collateral arrangements (the "**Financial Collateral Regulations**"). The Financial Collateral Regulations provide for a simplified granting and enforcement of security and apply to financial collateral consisting of cash or instruments,

including shares and bonds, or credits claims, evidenced in writing or in any legally equivalent manner.

The Financial Collateral Regulations provide that both the collateral taker and the collateral provider must satisfy any one of the categories of persons mentioned therein, including banks or credit institution, investment services licence holders, financial institutions, securitisation vehicles or any other non natural person (e.g. limited liability companies).

In terms of the Financial Collateral Regulations, the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement is not dependent on the performance of any formal act. A formal act includes any judicial act, registration, notification, note in any public registry, acknowledgement, advertisement published in any newspaper or journal, any form of delivery, or any similar act upon which the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement may be dependent.

**5) What other issues should be considered when looking at securing such assets?**

In terms of the Civil Code, it is possible to grant security in favour of a trustee for the benefit of any creditor or creditors, whether present or future. A security trust enables one person, the Security Trustee, to be the legal owner of the property granted/settled as security, and the creditors to be the beneficiaries thereof.

The role of the security trustee generally includes holding and managing of the security, having the power to declare or waive an event of default relating to the property and to take enforcement action on behalf of the creditor/s.

## The Netherlands

### **How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

The form of security that can be created over tangible and intangible moveable property depends on whether the moveable property is a registered property (*registergoed*) or not. Vessels and aircraft, if registered in the Land Registry (*het Kadaster*), are registered moveable property under Dutch law. Registered property can only be encumbered with a right of mortgage (*hypotheekrecht*). A right of mortgage is created if the following requirements are fulfilled:

- (i) a valid title (*geldige titel*), e.g. an agreement;
- (ii) the mortgagor (*hypotheekgever*) has the right to dispose (*beschikkingsbevoegd*) of the property subject to registration; and
- (iii) creation of the mortgage:
  - a. a property-law agreement of creation; and
  - b. acts of establishment (*vestigingshandelingen*):
    - i. a notarial deed between parties (deed of mortgage); and
    - ii. registration of the notarial deed in the designated register maintained by the Land Registry Office.

Non-registered moveable property can be encumbered with a right of pledge (*pandrecht*). A right of pledge can be created over non-registered moveable property (*roerende zaken*) and all property rights (*vermogensrechten*) such as receivables (*vorderingsrechten*). Which specific right of pledge can be created depends on the type of pledged asset (please see below under (iv)).

In principle a right of pledge is created if the following requirements are fulfilled:

- (i) the object or right intended to be pledged is transferable (*overdraagbaar*);
- (ii) a valid title (*geldige titel*), e.g. an agreement;
- (iii) the pledgor has the right of disposal;
- (iv) creation of the pledge. This depends on the type of right of pledge. In case of:
  - a. a possessory right of pledge (*vuistpand*): delivery of the property to the pledgee (*pandhouder*);
  - b. a non-possessory right of pledge (*bezitloos pandrecht*): a notarial deed or a registered privately executed instrument (*geregistreerde onderhandse akte*);
  - c. a disclosed right of pledge (*openbaar pandrecht*): a notarial deed or a privately executed instrument, and a notification to the debtor; or
  - d. an undisclosed right of pledge (*stil pandrecht*): a notarial deed or a registered privately executed instrument;
- (v) the moveable property or property right to be secured has to be sufficiently identifiable (*met voldoende bepaaldheid omschreven*) in the deed of pledge; and
- (vi) the secured obligations are sufficiently determinable (*voldoende bepaalbaar*).

***What, generally, is the priority of different types of security available for these types of assets?***

Rights of mortgage and rights of pledge are considered to be the strongest security rights a creditor can have in the event of insolvency of a debtor. Holders of a right of pledge or a right of mortgage can execute their security rights as if there was no bankruptcy of the debtor. A Dutch court may suspend the enforcement of security rights against the debtor, which has been declared bankrupt or is granted a suspension of payment for a period of two months (extendable by another two months).

The ranking of a right of mortgage is determined by the date and time of registration of the right of mortgage in the Land Registry. The ranking of rights of pledge depends on the moment when the respective formalities for creating the right of pledge were fulfilled (please see here above under (iv)). The oldest security right ranks above the younger security right.

***What taxes, duties or other fees are payable on these securities?***

No stamp duties or other documentary taxes, other than the registration fees of the Land Registry, are payable in connection with the creation of rights of pledge or rights of mortgage. The costs of registration with the Land Registry of a deed of mortgage are €103.- up to and including €168.- as of January 2014. Registration of a deed of pledge with the Tax Authorities (*Belastingdienst*) is free of charge.

***What, generally, is the method of enforcement of these securities?***

**Right of pledge:** a pledgee (*pandhouder*) can enforce its security right by selling the collateral by means of a public sale in accordance with local practice and on the usual terms and conditions. A pledgee who wishes to initiate a public sale must give notice of his intention to the debtor and pledgor (*pandgever*) as well as to persons with a limited right on the pledged asset (*die op het goed een beperkt recht hebben*) and to persons who have seized the pledged asset (*die op het goed beslag hebben gelegd*). This notification must be given, as far as this is reasonably possible, at least three days before the intended day of the foreclosure sale, with announcement of the place and time of the auction and in accordance with the provisions issued to this end by Order of Council (*bij algemene maatregel van bestuur te bepalen wijze*).

A pledge of receivables is usually enforced by collecting the receivables and taking recourse on the proceeds to satisfy the secured claims. In the case of an undisclosed pledge over receivables, the debtors must be first notified of the pledge by the creditor before enforcement can take place.

**Right of mortgage:** in order to enforce a right of mortgage, the mortgagee (*hypothekhouder*) has to instruct a civil law notary to sell the mortgaged property in public by auction and to recover the secured claim from the sale proceeds. However, if, for instance, the creditor wishes to sell the encumbered asset privately (*onderhands*) a court authorization is required.

**What other issues should be considered when looking at securing such assets?**

The most important legal concerns and prohibitions in the Netherlands are:

- Prohibition on ownership of collateral (*fiduciaverbod*): Dutch law prohibits a transfer of property for the purpose of securing obligations.
- Actio pauliana: if a debtor, in the performance of a voluntary legal act, knew or ought to have known that his act would prejudice one or more other debtors, the legal act can be annulled. Any debtor whose possibility of recourse has been prejudiced by the aforementioned voluntary legal act may invoke this ground for annulment, irrespective whether his claim arose before or after the legal act. In the event of insolvency the receiver is allowed to annul such fraudulent legal act.
- Ultra vires: a legal act performed by a company can be annulled if, as a result, its object was transgressed and the other party was aware thereof or, without personal investigation, should have been aware. Only the company itself can annul such legal act.

## **Nigeria**

### **1. How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

Under Nigerian Law, moveables can be secured in Nigeria through the following means:

#### **a. CHARGE**

A charge arises from an agreement between a creditor and a debtor whereby a particular asset or class of assets is appropriated to satisfy a debt. A charge does not involve the transfer of ownership or possession of the assets involved as the goods remain in the possession of the debtor or a third party. In view of this, the creditor is entitled to have recourse to the asset or its proceeds to discharge the indebtedness.

A charge can either be a fixed or floating charge. With regard to company securities, the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004 ("**the Act**") defines a floating charge as:

*"An equitable charge over the whole or specified part of a company's undertaking and assets including cash and uncalled capital both present and future."*

The Act further provides that a floating charge does not preclude a debtor from dealing with the charged assets until the security becomes enforceable and the holder appoints a receiver or manager or enters into possession of such assets or a court appoints a receiver or manager of the assets on the application of the holder or in the case of a company where a company goes into liquidation.

It is important to note that where any of the above occurs, the floating charge crystallises and becomes a fixed equitable charge over the assets. A fixed charge on the other hand is a charge over definite assets and it involves the acquisition of immediate rights over an asset; the security is proprietary in nature, unlike a floating charge, a fixed charge imposes a restriction on the right of a charger to deal with a charged asset.

#### **b. LIEN**

A lien is a right exercisable over the property or asset of another person ("the Owner") which arises by operation of law and it gives the lien holder the right to

either retain the property until the Owner has settled a debt owed or to sell the property in satisfaction of the debt owed i.e it constitutes a security for any claim arising from the unfulfilled obligations of the Owner.

### ***c. PLEDGE***

A pledge can be described as the deposit of a chattel with a lender as security for a debt. Under a pledge, the owner of a chattel (pledger) transfers the possession and the right to use a chattel to another person (pledgee) as security for the payment of a debt. However the chattel will be redeemed when the debt is repaid. It is important for consideration be paid in order for the pledge to be valid.

### ***d. MORTGAGE***

A mortgage is a legal or equitable conveyance of title over a property as security for the repayment of a debt or the discharge of some other obligation for which the mortgage was given. This is however subject to a condition that title will be re-conveyed if the debt is paid. A mortgage can either be a legal mortgage or equitable mortgage. The creation of a legal mortgage under Nigerian law is dependent on the state where the mortgaged property is located. The applicable laws are the Conveyancing Act, 1881 ("CA") which is applicable to the old Northern and Eastern states of Nigeria, the Property and Conveyancing Law, 1959 ("PCL") applicable to the states comprising of the old western Nigeria, and the Registration of Titles Law ("RTL") applicable to some parts of Lagos state.

The methods of creating a legal mortgage can be by way of :

- i. an assignment of the unexpired residue of the term of a lease in states that apply the CA; or
- ii. a sub-demise of the term held by a mortgagor in all states except states to which the RTL is applicable; or
- iii. a charge by deed expressed to be by way of a legal mortgage in states that apply the PCL and charging the property with payment of money under the RTL.

An equitable mortgage on the other hand confers equitable interest on a mortgagee, this is preferred as a method of security for short term loans but it is not as secured as legal mortgage. It can be created by depositing the title deeds with the intention to use it as security for a loan, or by creation of a mere equitable charge over a property or by the creation of an equitable charge on a registered title.



**2. What, generally, is the priority of different types of security available for these types of assets?**

It is important to note that a fixed charge has priority over a floating charge. With regard to two floating charges, as a general rule, the first floating charge to be created has priority over other subsequent charges and a company cannot create a subsequent floating charge on the same assets that will rank in priority to or *pari passu* with the original floating charge.

As between a floating charge creditor and an unsecured creditor, the unsecured creditor has priority over the floating chargee prior to crystallisation if such creditor has levied and actually completed execution but not otherwise.

With regard to enforcing a mortgage, two maxims of equity apply i.e. where equities are equal, the first in time will prevail and where equities are equal, the law shall prevail. In view of this, where there is more than one interest created in respect of a mortgaged property, the courts recourse to the abovementioned principles for the purpose of determining priority.

**3. What taxes, duties or other fees are payable on these securities?**

Whenever a charge is created over the assets of a company, stamp duties must be paid. It is payable *ad valorem*. The applicable rate can be determined following an assessment of the security documents by a Stamp Duties Commissioner. Notably, where the charging instrument is executed outside Nigeria, the obligation to pay stamp duties must be suspended until the document is brought into Nigeria. Subsequently, stamp duties must be paid within thirty (30) days after the document is first brought into Nigeria. The Act provides that every charge created by a company is void unless the charge is registered at the Corporate Affairs Commission, Abuja; the fees payable for registering the security as a charge at the CAC in the case of a private company is 1% of the sum secured.

**4. What, generally, is the method of enforcement of these securities**

The abovementioned securities can be enforced in a number of ways. They include the following:

**a. Power of Sale**

A charge, mortgage, lien and pledge can be enforced through the power of sale. A chargee may apply to a court for the court to grant an order for a judicial sale. However, this power is usually contained in the document that created the charge.

A lien can also be enforced by sale, for example where there is a lien on shares, the Act empowers a company to sell the shares on which it has a lien, this sale can only be done where the sum payable in respect of the lien becomes due, and the sale cannot be carried out until the expiration of fourteen (14) days after notice has been given demanding payment.

As regards a pledge, the pledgee also has the power to sell a pledged property without recourse to the court. It is important to note that it is not uncommon for a debtor to apply to court for an injunction to stop a creditor from enforcing his/her security by selling the property in question.

With regard to a mortgage, in the event of a default by a mortgagor, i.e where the mortgage money has become due and the date for repayment has passed, a legal mortgagee has the power to sell the mortgaged property. However, before this can be exercised, there are certain pre-requisites which must be in place. They include:

- a. service of a notice requiring repayment, this must be served and three (3) months should have elapsed since the date of the service of the notice; and
- b. interest under the mortgage should be two (2) months or more in arrears and there must have been a breach of some provision contained in either the CA, PCL or in the mortgage deed.

It is important to note that the sale can be by private treaty auction or tender and the mortgagee is to take reasonable care to obtain adequate market value in a bona fide sale. There can also be enforcement by appointing a receiver to protect the interest of the mortgagee, or foreclosure which is a judicial procedure whereby the mortgagee acquires the property in question free from the mortgagor's equity of redemption.

#### ***b. Appointment of a Receiver***

A creditor who wants to enforce a security may appoint a receiver either where this right is contained in the security document or where the court grants an order to this effect. In the case of a mortgage, a creditor or mortgagor has the power to appoint a receiver once the debt becomes due.

A charge on the other hand does not give the automatic right to appoint a receiver; it can only be done where a court grants an order as the charge does not transfer ownership of the charged property. The Act provides that on the application of an interested person, a court may appoint a receiver or receiver and manager of the property or undertaking of a company where the principal money borrowed is in arrears or where the security or property of a company is in jeopardy. It is important

to note that the appointed receiver will be deemed to be an officer of the court. However where a receiver is appointed without an order of court, the receiver will be deemed to be the agent of the person who appointed him.

***c. Foreclosure***

This is applicable to mortgages and it is enforced through a judicial proceeding. This is an order of court that terminates the mortgagor's equity of redemption. This right arises once the secured obligation becomes due.

***d. Entering into Possession***

This is applicable to a legal mortgage. A mortgagee can enter into possession as soon as a mortgage is created, because of his/her legal title to a property.

***5. What other issues should be considered when looking at securing such assets?***

It should be noted that personal security in chattels are characterised by two (2) main features which may pose serious problems to creditors in the Nigerian sphere. First personal chattels unlike land generally have no essential title deeds which the creditor can appropriate to hinder further dealings by the mortgagor nor is there any register of title which may be relied upon in verifying title. For these reasons, creditors especially banks in Nigeria prefer to have land as security for loans and advances or shares or stocks.

## Oman

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under Oman Law

(Produced by Trowers & Hamblins, Oman)

#### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

In Oman, moveable assets typically include any moveable and tangible objects as opposed to land such as equipment, machineries, appliances and all types of vehicles. It may also include intangible assets such as shares, bonds and intellectual properties. Oman law provides for the following forms of security over moveable assets:

#### 3 Commercial Mortgage

- 3.1 A commercial mortgage in Oman can be taken over all tangible and moveable assets of a company, partnership or sole proprietorship registered with the Ministry of Commerce and Industry (**MCI**).
- 3.2 Oman law also allows for certain intangible assets and the mortgagor's business (including the commercial registration number, commercial name and goodwill) to be mortgaged by way of a commercial mortgage. It is common practice to mortgage intangible assets such as rights under insurance policies, certain rights under contracts, licenses and consents.
- 3.3 A commercial mortgage must be entered into by the parties by way of a formal written contract in Arabic or dual text (English and Arabic) which must contain a statement from the mortgagor acknowledging that the mortgagee has a security over the commercial concern.
- 3.4 The commercial mortgage must be registered with the MCI within 30 days of the date of its execution. Typically, the execution and registration process can be completed within one business day. The commercial mortgage must be renewed every five years, failing which, it shall lapse.
- 3.5 On the date that the commercial mortgage is signed, the assets secured by the commercial mortgage must be:
  - 3.5.1 owned by the mortgagor;
  - 3.5.2 in existence; and

- 3.5.3 clearly specified and described in the commercial mortgage. The commercial mortgage must contain sufficient information to ensure that the relevant assets are readily identifiable and should be very detailed and as comprehensive as possible. Typically information such as name of each asset, value, quantity, name of supplier and registration numbers, where applicable, should be included in the list of assets attached to the commercial mortgage. Where items included within the commercial mortgage are not precisely identified, as in a charge over the mortgagor's commercial registration, only the mortgagor's trade name, the right to lease, the right to contact clients and goodwill will be covered.
- 3.6 Future assets are not capable of being secured under a commercial mortgage. This includes contractual rights which are contingent or conditional upon a party performing certain obligations, as opposed to contractual rights which have been crystallised which can be effectively mortgaged. It is possible to include a mechanism in the commercial mortgage to capture future assets. In order to mortgage after-acquired property, it is usual practice to attach a fairly detailed inventory of assets to the original mortgage that is then periodically updated either at fixed intervals or on a milestone basis.
- 3.7 The MCI maintains a register of commercial mortgages and the list of commercial mortgages over the mortgagor's assets will be shown in the mortgagor's computer printout issued by the MCI. The information contains the name of the chargee, the date that the charge against the asset was registered and the assets charged. Any supplemental mortgage incorporating additional of assets must also be registered in MCI. It is not possible to register a commercial mortgage in Oman over assets located outside Oman.
- 3.8 There will also be additional registration requirements depending on the type of the assets. For a vessel to be secured, the vessel must be registered in Oman since the charge will be registered against the title to the vessel with the relevant authority in Oman. For example a charge taken over vehicles will be registered on the *Mulkiya* (title deeds) of that asset by the Royal Oman Police. A charge over equipment should be registered with the relevant authority that governs that specific type of equipment. In the event that a relevant authority does not exist, this charge should be registered at the MCI.
- 3.9 In syndicated and cross border transactions, where there are participations from foreign lenders, it is common for a "local security agent" to be appointed as mortgagee to hold the benefit of, and, if necessary, enforce,

the security on behalf of the syndicated lenders. There will typically be a separate security agency agreement between the local security agent and the lenders to deal with priorities and distribution of enforcement proceeds.

#### 4 **Pledge**

- 4.1 A pledge may be created over moveable assets and contractual rights. For a pledge to be effective over moveable assets, possession of the pledged item must be transferred to the pledgee or to a custodian and remain in the possession of that person.
- 4.2 Pledges are not often used in Oman, principally because of the uncertainty of how they work and the requirement for possession makes such a charge impractical. They tend to be used only for certificates of deposit and charges over shares where delivery and evidence of possession is relatively straightforward. There is no requirement for registration in respect of a possessory pledge but a pledge over shares of companies that are traded or listed on the Muscat Securities Market (**MSM**) must be registered at the Muscat Clearing and Depository Company in the prescribed format. It is not possible to pledge the shares (or share participations) of an Oman law limited liability company, or partnership company.
- 4.3 The creation of a pledge confers statutory duties upon the pledgee or custodian. Of particular concern is a duty to take all necessary measures to safeguard the pledged item (although the pledgor is liable to pay all costs incurred in this respect) and the imposition of liability for the destruction or damage of the pledged item, unless it is established that such damage was attributable to an inherent defect in the item or to an external reason beyond the pledgee's control.
- 4.4 A debtor's interest in the bank account vis-à-vis the account bank may be considered "rights" as there is a debtor-creditor relationship between them. Therefore, a pledge could be created over the bank account by means of an instrument of pledge and delivery of the passbook or an equivalent blocking measures. It is necessary to consider the general provisions in the Omani Commercial Code in relation to a pledge of moveable assets, which provide that a pledgee must be able to demonstrate "possession". For the pledge to be effective, possession of the pledged item must be transferred to the pledgee or to a custodian (in this case the account bank) and remain in the possession of that person. Possession is demonstrated by blocking the account.
- 4.5 It is common to enter into a pledge agreement covering cash deposits and also any other deposits which will come into existence during the security

period, after the date of the agreement. The pledge agreement usually includes a clause where the pledgor acknowledges that moneys in the account at any time in the future, including at the time of enforcement are pledged. So far as pledges are concerned, the legislation does not indicate that these are subject to any registration requirement and the MCI has not issued separate regulations in relation to registration of pledges. Although the use of bank account pledges as detailed above is common practice, we are not aware of any court decision on point.

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

- 1 As a general rule, priority is dependent upon date of registration of the security with the relevant authority. For a commercial mortgage, priority is determined by the date of entry of that commercial mortgage on the register of mortgages of the company's commercial register at the MCI. Mortgages registered on the same day or in favour of different mortgagees will be prioritised based on the timing of each registration.
  
- 5 It is unclear how priorities stand between different types of security, and where a security document is registered in more than one register. Priority of a security would be lost if a requirement for renewal of that security is not complied with. The registration of a new security after the renewal date will be considered as a new registration.
  
- 6 The priority of a secured creditor in respect of its security interest is subject to the rights of the government over all debts owed to it (secured or unsecured) and the rights of employees of the company in respect of wages and benefits owed to them by the company.

## **Question 3**

*What taxes, duties or other fees are payable on these securities?*

No taxes are payable to perfect a security interest. In relation to the registration of a commercial mortgage, the registration and attestation fee is currently charged at one hundred (100) Omani Rials.

## **Question 4**

*What, generally, is the method of enforcement of these securities?*

- 1 In order to enforce a mortgage, a judgment needs to first be obtained. A straightforward debt recovery action should take, on average, six to twelve months in the court of first instance and up to another six to ten months if the matter is appealed to the Appeal Court and then the Supreme Court.

Thereafter an application to enforce the security must be made to the commercial division of the courts of Oman together with the prescribed fees. For a commercial mortgage, there is no requirement for a mortgagee to seek the consent of the mortgagor prior to enforcement of that mortgage.

- 7 Once the court has granted an order for the sale of the secured assets following the application to the court for enforcement, the sale will generally be effected by way of court-supervised public auction. Enforcing a straight forward security typically takes between three to four months and for more complicated matters, the process could take between two to three years or longer.
- 8 Any party can bid for the secured assets under auction. Except for mortgages in respect of land, there are no requirements for a minimum price to be set at public auctions. The creditors do not have say on the sale price but is entitled to object to the enforcement proceedings if the sale price is too low although it will not stop the enforcement procedures from continuing. The only way secured creditors could prevent the acquisition of the assets for an unacceptable price would be to bid for the assets themselves. A mortgagee is only entitled to the proceeds of sale of the secured asset sufficient to discharge the secured debt once the item is sold by way of court process.
- 9 Whilst a mortgagee would normally only be entitled to receive the proceeds of the sale of the mortgaged assets, the court does have the discretion, if a mortgagee so requests, to transfer the assets in question to the mortgagee direct, in whole or partial satisfaction of the relevant debt. The court would need to be satisfied that such action would not be prejudicial to the general body of creditors. A second ranking mortgage cannot be enforced without the cooperation of the first ranking mortgagee.
- 10 For a pledge of shares, the court should order the sale of shares traded on the MSM through the brokerage system. The broker will auction the shares in accordance with the Omani Capital Markets Law and Regulations. The broker, after deducting commission, will remit the sales proceeds to the Omani court. The Omani court would then remit the amount of the sales proceeds, up to the value of the secured obligations (as determined by the Omani court) to the pledgee. Any surplus funds would be retained by the Omani court and returned to the pledgor.

### **Question 5**

*What other issues should be considered when looking at securing such assets?*

- 1 Self-help remedies in respect of enforcement of security are not possible and an agreement allowing a mortgagee to sell secured assets without a



court judgment will not be valid. Despite the express provision of the law, it is common for a mortgagor to grant a special security power of attorney (**SSPOA**) to a mortgagee so that the mortgagee may proceed to sell the mortgaged assets upon an event of default without reference to the court process. Oman courts have yet to determine whether a sale of any mortgaged asset pursuant to an SSPOA as opposed to an enforcement through court process as outlined above is valid.

- 11 Oman law does not regard an assignment as a true form of security and the assignee is not regarded as a secured creditor. There is no requirement for an assignment to be registered as it is only a contractual right. Acknowledgement of, or consent to, or receipt of a formal notice of the assignment typically perfects the assignment as a contractual arrangement.
- 12 Court proceedings in the courts in Oman are conducted exclusively in the Arabic language. Documents such as mortgage or pledge agreements must therefore be produced before the courts in Arabic, or an Arabic translation of the English text. If the latter, the Arabic text shall prevail over the English text.

## Spain

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under the Laws of the Kingdom of Spain

##### Question 1

**How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

##### 1.1 Overview:

- Under the Laws of the Kingdom of Spain there are two (2) types of *in rem* securities that can be granted over moveable assets: mortgages (*hipotecas*) and pledges (*prendas*).
- The following requirements are of the essence in contracts of any pledge and/or mortgage: **(i)** they must be created to secure the performance of a principal obligation; **(ii)** assets pledged or mortgaged must be owned by the pledgor or mortgagor; and **(iii)** the persons who grant the pledge or mortgage must be able freely to dispose of their property or, if not, must be legally authorized for such purposes.

##### 1.2 Types of security interests over moveable assets:

##### 1.2.1 Mortgages:

- There are two (2) types of mortgages that can be granted over moveable assets: “Chattel Mortgages” (*hipotecas mobiliarias*) –over those moveable assets detailed in the Chattel Mortgage and Non-Possessory Pledge Act (*Ley de 16 de diciembre de 1954. Hipoteca Mobiliaria y Prenda Sin Desplazamiento*)– and “Ship Mortgages” (*hipotecas navales*) over ships and vessels (*buques mercantes*).

##### (a) Chattel Mortgage (*hipoteca mobiliaria*):

- This *in rem* security can be granted over moveable assets, such as mercantile establishments, motor vehicles, trams, planes, industrial machinery, and industrial and intellectual property, as described in the Chattel Mortgage and Non-Possessory Pledge Act (*Ley de 16 de diciembre de 1954, Hipoteca Mobiliaria y Prenda Sin Desplazamiento*).
- The Chattel Mortgage shall be **(i)** granted before a public Notary and in a public deed (*escritura pública*) –which includes, among others, the identity of the debtor, the creditor and the owner of the asset; a description of the moveable assets; details of title of ownership of the moveable assets; the amount and type of currency of the principal, interest and expenses secured; and a description of the parties addresses for notifications and

filings– and **(ii)** registered at the Chattel Registry (*Registro de Bienes Muebles*) –failure in this registration will deprive creditors of their rights against third parties–.

- In the meantime –between the granting of the Chattel Mortgage (*hipoteca mobiliaria*) and the registration at the Chattel Registry (*Registro de Bienes Muebles*), the public Notary should fax a notification to the Chattel Registry (*Registro de Bienes Muebles*), thus blocking the register for ten (10) days and maintaining the priority ranking of the security during that period.
- Granting a Chattel Mortgage does not imply and does not require the transfer of possession of the moveable assets in favour of the secured creditors.

(b) Ship Mortgage (*hipoteca naval*):

- This *in rem* security can be granted over ships and vessels (*buques mercantes*) and it is mainly regulated by the Ship Mortgage Act (*Ley de 21 de agosto de 1893, Hipoteca Naval*).
- The Ship Mortgage (*hipoteca naval*) shall be **(i)** granted before a public Notary in a public deed (*escritura pública*) or notarial document (*póliza mercantil intervenida*) or by virtue of a private contract to be entered into among the debtor, the creditors and the owner of the vessel; and **(ii)** registered at the Chattel Registry (*Registro de Bienes Muebles*) and at the Directorate General of Merchant Shipping (*Dirección General de la Marina Mercante*).
- The Ship Mortgage (*hipoteca naval*) –entered into by any of the instruments detailed in the paragraph above– should include the following details: the identity of the debtor, the creditor and the owner of the vessel, description of the vessel (name, type, flag, registration); value of the vessel; and information about the main terms of the secured credit (such as principal, interest and maturity date).
- Once the Ship Mortgage (*hipoteca naval*) has been entered into, the parties shall present the Ship Mortgage (*hipoteca naval*) at the Chattel Registry (*Registro de Bienes Muebles*) for its registration within a period of sixty (60) days.
- Granting a Ship Mortgage does not imply and does not require the transfer of possession of the vessel in favour of the secured creditors.

1.2.2 Pledges:

- There are two (2) types of pledge that can be granted over moveable assets under the current Laws of Spain: “Possessory Pledges” (*prendas con desplazamiento*) or “non-possessory pledges” (*prendas sin desplazamiento*).

(a) “Possessory Pledge” (*prenda con desplazamiento*):

- This *in rem* security can be granted over any moveable assets arising from or used in trade, such as receivables or credit rights.
- The Possessory Pledge (*prenda con desplazamiento*) shall be granted before a public Notary and in a public deed (*escritura pública*) or notarial document (*póliza mercantil intervenida*) and it is not subject to any registration.
- However, in Possessory Pledges (*prendas con desplazamiento*) over receivables and/or credit rights, the pledgor and the secured creditors shall notify the granting of the Possessory Pledge (*prenda con desplazamiento*) in favour of the secured creditors in order to duly transfer the possession. This notification requirement, does not apply for Possessory Pledges (*prendas con desplazamiento*) over any moveable assets other than receivables and/or credits.

(b) “Non-Possessory Pledge” (*prenda sin desplazamiento*):

- This *in rem* security can be granted over moveable assets, such as expected harvest, animals, raw materials, inventory, paintings, sculptures, and any rights (i.e. credit rights) deriving from contracts, licenses, and subsidies.
- The Non-Possessory Pledge (*prenda sin desplazamiento*) shall be **(i)** granted before a public Notary and in a public deed (*escritura pública*) or notarial document (*póliza mercantil intervenida*) and **(ii)** registered in the Chattel Registry (*Registro de Bienes Muebles*) –to have effect against third parties–.
- Granting a Non-Possessory Pledge (*prenda sin desplazamiento*) does not imply the transfer of possession of the moveable assets in favour of the secured creditors.

**Question 2**

**What, generally, is the priority of different types of security available for these types of assets?**

2.1. Overview

- By granting an *in rem* security over moveable assets, secured creditors obtain priority over any subsequent security over those assets. The subsequent securities would be subject and subordinate to the rights of the earlier secured creditors over the moveable assets.

## 2.2 Mortgages

- The Chattel Mortgage and the Ship Mortgage, once registered at the Chattel Registry (*Registro de Bienes Muebles*) create a priority ranking security interest over moveable assets and/or the vessels over which they are created –first ranking security interest if there were no other charges and/or encumbrances over the moveable assets, or a subsequent ranking security interest–.

## 2.3 Pledges

- The **(i)** Possessory Pledge (*prenda con desplazamiento*), once the debtor has proceeded with its notification –if applicable as stated in the third paragraph of point 1.2.2 (a) above–; and **(ii)** Non-Possessory Pledge (*prenda sin desplazamiento*), once registered at the Chattel Registry (*Registro de Bienes Muebles*), create a first ranking security over the assets over which they are created.
- Pledges over present credits rights have priority over claims arising prior to the declaration of insolvency, as well as future credit rights arising after the declaration of the insolvency when those pledges –Non-Possessory– are registered at a Chattel Registry (*Registro de Bienes Muebles*) prior the declaration of the insolvency.

## 2.4 Priority in insolvency proceedings

- Under the Spanish Insolvency Act (*Ley 22/2003, de 9 de Julio, Concursal*) any claims of creditors shall be classified, for the purposes of the insolvency proceedings, as preferential, ordinary and subordinated.
- Preferential claims shall be classified as claims **(i)** with special preference, if they are secured on certain properties, goods or rights, and **(ii)** general preference claims, if they affect all the assets of the debtor.
- Among others, the following claims will have the consideration of “Special Preference Claims”: **(i)** claims secured with a voluntary or legal mortgage, either on moveable or immovable assets, or lien on mortgaged or pledged assets; and **(ii)** claims secured by a pledge constituted in a public deed or on the pledged goods or rights that are in the possession of the creditor or a third party.
- It will not be considered a “Special Preference Claim” if held by any of the persons specially related to the debtor –in terms of the Spanish Insolvency Act (*Ley 22/2003, de 9 de Julio, Concursal*)–. These claims are considered subordinated to the preferential and ordinary claims as well as any other creditor that the debtor may have at the time of the insolvency.

- In an insolvency proceeding, Special Preference Claims are paid out of the charged moveable assets in priority to the other current and future creditors.
- On the other hand, "General Preference Claims" are **(i)** claims of salaries that are not recognized as Special Preference Claims; **(ii)** the relevant amount for tax and Social Security withholdings owned by the debtor in fulfilment of a legal obligation; **(iii)** claims for free-lance work and those due to the author himself for the vesting of exploitation of works protected by copyright, accrued during the six (6) months prior the insolvency has been declared open; **(iv)** tortuous liability claims and civil liability claims arising from offences against the Public Treasury and Social Security; **(v)** claims arising from new cash flows granted under the framework of the refinancing agreement that fulfils the conditions foreseen under article 71.6 of the Spanish Insolvency Act (*Ley 22/2003, de 9 de Julio, Concursal*) in the amount not recognized as claims against the estate; and **(vi)** claims held by the creditor at the instance of whom the insolvency has been declared and that are not subordinated up to fifty per cent (50%) of their amount.

### Question 3

#### What taxes, duties or other fees are payable on these securities?

##### 3.1 Mortgages (Chattel Mortgages & Ship Mortgages)

- As a general rule, Chattel Mortgages (*hipotecas mobiliarias*) shall be entered into by virtue of a public deed (*escritura pública*) and registered at the Chattel Registry (*Registro de Bienes Muebles*); and Ship Mortgages (*hipotecas navales*) shall be entered into by virtue of a private document or notarial document (*póliza mercantil intervenida*) or public deed (*escritura pública*) and registered at the Chattel Registry (*Registro de Bienes Muebles*).
- Granting a Chattel Mortgage (*hipoteca mobiliaria*) involves Notary fees, stamp duties deriving from the public deed (*escritura pública*) –for amounts which vary, according to which local government district is involved, from 0.5% to 1.5% of the maximum mortgage liability–, and registry fees of the Chattel Registry (*Registro de Bienes Muebles*), which may vary depending on applicability of each fee by the different Chattel Registries (*Registros de Bienes Muebles*).
- Granting a Ship Mortgage (*hipoteca naval*) involves registry fees at the Chattel Registry (*Registro de Bienes Muebles*) but it will not involve Notary fees nor stamp duties as long as the Ship Mortgage is entered into as a private document. If the Ship Mortgage is entered into by virtue of a (*póliza mercantil intervenida*), then it will only involve Notary fees and registry fees of the Chattel Registry (*Registro de Bienes Muebles*) but not stamp duties. Finally, if the Ship Mortgage is entered into as public deed

(*escritura pública*) it involves all the duties, taxes and expenses detailed in paragraph above –Notary fees, stamp duties and registry fees–.

### 3.2 Pledges

- As a general rule, any pledge shall be entered into before a public Notary and can be entered as a public deed (*escritura pública*) or notarial document (*póliza mercantil intervenida*). Therefore, using any of these instruments to grant a Pledge –Possessory or Non-Possessory– involves Notary fees.
- Public deeds (*escrituras públicas*) and notarial documents (*pólizas mercantiles intervenidas*) differ from each other from a stamp duty point of view. While granting public deeds (*escrituras públicas*) involves stamp duties for an amount which vary, according to which local government district is involved, from 0.5% to 1.5% of the maximum mortgage liability; granting notarial documents (*pólizas mercantiles intervenidas*) does not involved any stamp duty obligations.
- Furthermore, while granting a Possessory Pledge (*prenda con desplazamiento*) does not involve any registry fee –since there is no requirement of registering the pledge–; granting a Non-Possessory Pledge (*prenda sin desplazamiento*) involves registry fees of the Chattel Registry (*Registro de Bienes Muebles*), which may vary depending on applicability of each fee by different Chattel Registries (*Registros de Bienes Muebles*).

## Question 4

**What, generally, is the method of enforcement of these securities?**

### 4.1 Overview

- There are different methods of enforcement, depending on the type of *in rem* security granted. The main and general principle is that according to Spanish Law a secured creditor may not directly appropriate the moveable assets given as a security upon a default of the secured obligations.
- Enforcement proceedings are designed to sell the charged moveable assets in a public auction to repay the creditors. There are two (2) different public auctions proceedings **(i)** the judicial proceedings to be followed before Spanish Courts and **(ii)** the extrajudicial proceedings to be followed before a Notary Public. However, the two (2) different types of public auction are not allowed in all cases.
- Once the creditors are paid and the secured obligation is cancelled, any excess of the sale will be returned to the owner of the moveable asset.

## 4.2 Mortgages

- As a general rule, under the Civil Procedural Law 1/2000 (*Ley de Enjuiciamiento Civil*), the following procedures of mortgage foreclosure are available **(i)** “Special Enforcement Proceedings” (*procedimiento de ejecución de bienes especialmente hipotecados*), which are set out in articles 681 et seq. of the Civil Procedural Act 1/2000 (*Ley de Enjuiciamiento Civil*); **(ii)** “General Enforcement Proceedings”, whose rules apply if the mortgage deed does not meet the required formalities for the special procedure; and **(iii)** “Out-of-court enforcement”, which must be agreed in the mortgage deed and executed before a Notary Public.
- As we will describe in the following paragraphs, Chattel Mortgages (*hipotecas mobiliarias*) and Ship Mortgages (*hipotecas navales*) have special features regarding their enforcement.

### 4.2.1 Chattel Mortgage

- Chattel Mortgages (*hipotecas mobiliarias*) can be enforced by virtue of; **(i)** out of court proceedings (*procedimiento extrajudicial*) in accordance with article 86 et seq. of the Chattel Mortgage and Non-Possessory Pledge Act (*Ley de 16 de diciembre de 1954. Hipoteca Mobiliaria y Prenda Sin Desplazamiento*); and **(ii)** “Special Enforcement Proceedings” (as defined above).

### 4.2.2 Ship Mortgage

- Ship Mortgages (*hipotecas navales*) can be enforced by virtue of **(i)** distraint proceedings (*procedimiento de apremio*) under the Civil Procedural Act 1/2000 (*Ley de Enjuiciamiento Civil*) in accordance with article 43 et seq. of the Ship Mortgage Act (*Ley Hipoteca Naval*); **(ii)** out of court proceedings (*procedimiento extrajudicial*) and **(iii)** “Special Enforcement Proceedings” (as defined above).

## 4.3. Pledges

### 4.3.1 Overview

- As a general rule, the secured creditors (pledgees) have two (2) mechanisms so as to enforce pledge –whether Possessory Pledge or Non-Possessory Pledge–. In this regard, the secured creditors (pledges) may initiate “Out-of-Court Proceedings” by means of an enforcement carried out by a Notary Public, or initiate enforcement proceedings regulated under the Civil Procedural Act 1/2000 (*Ley de Enjuiciamiento Civil*) instead.
- The only difference between the enforcement of a Possessory Pledge and a Non-Possessory Pledge is that when enforcing a Non-Possessory



Pledge the mortgaged/pledged moveable assets (in most cases vehicles) shall be deposited in favour of the secured creditors.

#### 4.3.2 Possessory Pledge over Credit Rights

- The secured creditor (pledgee) may initiate any of the proceedings to which it is entitled by law as stated in point 4.3.1 above and also the proceeding contemplated in Royal Decree 5/2005 (*Real Decreto Ley 5/2005, de 11 de marzo*).
- Royal Decree 5/2005 (*Real Decreto Ley 5/2005, de 11 de marzo*) establishes that the enforcement can take place by the compensation of the credit rights.

### Question 5

**What other issues should be considered when looking at securing such assets?**

#### 5.1 Granting a pledge over future credits rights

- Law 38/2011 of October 10<sup>th</sup>, 2011 has introduced important changes to the regulation applicable to pledges over future credit rights in case of insolvency of the pledgors. Among the novelties introduced the most relevant –regarding pledge over credit rights– is the modification of article 90.1.6 of the Spanish Insolvency Act (*Ley Concursal*).
- In this regard, in order to grant a pledge over future credit rights –and to have the consideration of special preference claim in an insolvency proceeding (see point 2.4. below)– the Non-Possessory Pledge (*prenda sin desplazamiento*) shall be registered at the Chattel Registry (*Registro de Bienes Muebles*) prior the declaration of the insolvency.

#### 5.2 Granting security interests in a refinancing transaction

- In a refinancing scenario, it shall be noted that acts that are detrimental to the assets or rights of the insolvent company, performed within the two (2) years prior to the declaration of insolvency may be rescinded, even if they were made without fraudulent intention –article 71.1 of the Spanish Insolvency Act (*Ley Concursal*)–.
- According to section 71.3 of the Spanish Insolvency Act (*Ley Concursal*), it is presumed that the “act is detrimental” –and thus subject to rescission according to the above– if the insolvent company has created security interests to secure pre-existing obligations during the two (2) years period to the insolvency declaration. In this case, it is the creditor who will have to prove that the relevant action is not detrimental to the assets of the insolvent company.

- For purposes of “protecting” the new securities granted in a refinancing scenario to secure pre-existing obligations creditors shall follow the “refinancing procedure” established in section 71.6 of the Spanish Insolvency Act (*Ley Concursal*). In this regard, refinancing agreements must **(i)** be entered into by creditors whose credits represent at least three fifths (3/5) of the liabilities of the debtor on the date of the adoption of the refinancing agreement; **(ii)** count with a report on its favor issued by an independent expert appoint by the Companies Registry (*Registro Mercantil*) of the domicile of the debtor; and **(iii)** be formalized in a public deed (*escritura pública*) or notarial document (*póliza mercantil intervenida*).

### 5.3 Securing moveable assets under the Book V of Catalanian Civil Code (*Código Civil de Cataluña*)

- It must be noted that Catalonia has its own regulations on granting security interests over moveable assets: Section 5 of Act 5/2010, 10 May, Catalanian Civil Code (*Código Civil Catalán*).
- Book V of Catalanian Civil Code (*Código Civil Catalán*) **(i)** shall be applicable when the owner of the moveable asset has its corporate domicile in Catalonia at the time of granting the security interest; and **(ii)** regulates, among others, the: **(a)** Catalanian Possessory Pledges (*prendas catalanas*) and and **(b)** right of retention over moveable assets.
- The effects of Catalanian Possessory Pledges (*prendas catalanas*) are **(i)** the retention of the possession of the moveable asset until the complete payment of the secured debt; and **(ii)** the sale of the moveable asset.

## Sweden

### **Taking security over moveable/personal property/collateral**

#### **Questionnaire Answers under Swedish law (applicable to Sweden)**

##### **Question 1**

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

Security over tangible assets, such as chattels, inventory, stock in trade and work in progress, is created by way of a pledge or as part of a business mortgage. In order to perfect a pledge, the pledged asset must be handed over to the creditor and thereafter remain in the creditor's possession and control during the entire security period, so that the pledgor is excluded from dealing with and not allowed to dispose of the asset. However, transfer of possession to the creditor is often neither desirable nor practicable. Whilst there is a formal procedure available under Swedish law whereby the creditor can purchase (or finance) the asset and benefit from a protected right to the asset (security) even though it remains in possession of the seller (or debtor) based on registration and public announcement of the purchase agreement in accordance with the provisions of an old Swedish Act of 1845, which is not further explored here, the most common way of creating security over such assets is instead by means of a business mortgage.

A business mortgage (Sw. *företagshypotek*) covers all moveable (both tangible and intangible) assets of a company, except (i) cash at hand and bank deposits, (ii) shares and other tradable financial instruments and securities and (iii) property such as real estate and aircraft that can be pledged through specific registration, and the security is created by a pledge of business mortgage certificates (Sw. *företagsinteckningsbrev*) taken out and registered in the company's business. Such pledge is perfected by delivery to the creditor of the business mortgage certificates, either through physical transfer of printed form certificates or through registration of the creditor as holder of computerised certificates. A business mortgage does not prevent the pledgor from disposing of its assets, even in a way that diminishes the value of the security.

Certain tangible assets (such as machinery) may be regarded as industrial accessory equipment, and thus part of a real property/site leasehold right (a fixture), that would be included in any security created over such real property by way of a real property mortgage, but this is not further explored here.

Security over intangible assets is created by way of a pledge, security assignment or as part of a business mortgage. For example, a pledge over patents and trademarks is perfected by registration, whilst a pledge over certain other intangible assets, such as receivables, contractual rights, insurances and funds standing to the credit of a bank account, is perfected by a notice of pledge to the debtor, contractual

counterparty, insurance company or account bank, as applicable. As the pledgor must not be allowed to dispose of or control the pledged assets (without the prior consent of the creditor, at its sole discretion, in each and every case), any proceeds of such assets must be paid directly to the creditor or to a bank account of which the pledgor must not be in control. A pledge over receivables in the form of a bearer promissory note (or similar), is perfected by transfer of possession of the relevant promissory note to the creditor.

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

A business mortgage will rank behind any pledge created and perfected over the same assets, even though such pledge is created or perfected after the business mortgage.

## **Question 3**

*What taxes, duties or other fees are payable on these securities?*

A pledge that is perfected through registration may incur nominal registration fees. The issuance of a business mortgage certificate attracts a stamp duty cost amounting to 1% of the amount secured, i.e. the face value of the business mortgage certificate. Once issued, a business mortgage certificate can be pledged again without incurring any additional stamp duty.

## **Question 4**

*What, generally, is the method of enforcement of these securities?*

There are provisions under Swedish law that provide for a formal procedure for enforcement and realisation of moveable assets subject to security, but contractual provisions in the security documents can override these (except for provisions under the Bankruptcy Act and certain provisions in special legislation). Hence, a pledge over tangible assets (Sw. *handpant*) may be enforced through realisation by the secured creditor of those assets by private or public sale or auction or in any other way and on such terms as the pledgee in its sole discretion deems fit, provided that it observes its duty of care and, as a fiduciary duty, does not enforce or realise the pledge or sell the pledged assets in a way that is unduly adverse to the pledgor, including obtaining a fair sales price at market level for the pledged assets and accounts for the surplus (if any) to the pledgor, so that, if the sales price exceeds the amount of the secured debt, the surplus is distributed to the pledgor following the sale.

Under Swedish mandatory law, a business mortgage can only be enforced by applying for bankruptcy of the pledgor or through execution, where enforcement is effected through a sale administered by the bankruptcy receiver or through a forced

sale administered by the Enforcement Authority. A creditor holding a business mortgage certificate is then entitled to receive payment of its claim out of the proceeds from the sale of assets subject to the business mortgage up to the face amount of the business mortgage certificate, subject to the ranking (date of registration) of its business mortgage certificate. Before a creditor can enforce a business mortgage through execution, it must have obtained a judgment claim (Sw. *exekutionstitel*).

A perfected pledge over e.g. receivables, contractual rights, insurances or funds standing to the credit of a bank account is enforced simply by the creditor applying any proceeds received by it against the debt owed by the pledgor and accounting for any surplus to the pledgor.

### **Question 5**

*What other issues should be considered when looking at securing such assets?*

Check whether there are other secured creditors of the company and what kind of security they have, in order to ensure that appropriate intercreditor and priority arrangements are put in place, if necessary. As a business mortgage only covers a company's business operations and relevant assets therein as carried out in Sweden, it should be checked that all substantial assets covered are located in Sweden.

### **Question 6**

*Did you know?*

Did you know that work in progress is covered by a business mortgage until it has been finalised and delivered, at which point the business mortgage attaches to the claim for payment (unless the receivables are subject to a factoring arrangement)?

## Switzerland

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under Swiss law

##### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

First, Swiss law operates under the **principle of a *numerus clausus* of limited rights *in rem***, meaning that securing moveables may in principle be done only in accordance with the institutions specifically provided by law. However, commercial practice also sees the use of transfer of property and assignment of intangible rights for use as collateral.

Specifically, **the applicable rules are to be found:**

- In the Swiss Civil Code (SCC) and Swiss Code of Obligations (SCO);
- In other specific laws, for instance in respect of ships, aircraft, and private insurance;
- In respect to enforcing a security, in the Swiss Federal law on debt enforcement and bankruptcy, as well as in the relevant specific laws.

The **following principles of Swiss property law** should also be borne in mind:

- **Speciality**, meaning that property rights and limited rights *in rem* may only bear on specified assets, which in principle (subject to the details and exceptions discussed below) means that so-called floating securities or charges (over all assets of the grantor, or specific classes of such assets) do not exist under Swiss law.
- **Priority in time**, meaning that normally, a security constituted before another has priority over the latter.
- The principle whereby transfer of title is not effected by the mere agreement between the parties (to transfer property or to create a security), but requires a further act of disposal by the seller/assignor/grantor.
- **Accessoriety**, meaning that the security, as a mere accessory to the claim or debt, automatically ceases to exist once the latter is extinguished.
- **“Beneficium excussionis realis”**, meaning that when a debtor having granted a security finds himself in default, he may compel the creditor first to enforce the

security, before seeking to enforce any remaining debt on the remainder of the debtor's assets. However, the debtor may waive this privilege.

**Tangibles (excluding ships and aircraft) may thus be secured in the following ways:**

- **Chattel pledge** (art. 884 and following SCC)
  - Crucially, chattel may only be pledged by transferring possession of the pledged object to the pledgee.
  - The chattel pledge doesn't require a written agreement.
  - As stated above, speciality prohibits the creation of a floating security. The parties may well, in the pledge agreement, extend this for instance to future assets of a certain type, but the pledge (i.e. title to the limited right in rem) will only come into effect once possession of those assets is actually transferred to the pledgee.
  - Speciality also applies to the secured claim or debt, which must be sufficiently determined (this is something of a fuzzy notion; for instance, a pledge may validly be made in guarantee of all claims arising from a commercial relationship between a bank and its client; however, a pledge would not be valid in guarantee of all future claims by the creditor against the grantor, without any limitation in time or in respect of a type of claim).
  - Specific rules apply to pledging of livestock (as well as ships and aircraft) whereby, essentially, the pledge doesn't require transfer of possession, which is "replaced" by entry in a special register.
  
- **Right of retention** (art. 895 and following SCC)
  - Art. 895 SCC provides that "*An obligee who, with the consent of the obligor, is in possession of chattels or securities belonging to the latter has the right to retain them until his claim is satisfied when such claim is due, and if there is a natural connection to the retained object*".
  - Other provisions, mainly in the SCC and SCO, provide for rights of retention under conditions that sometimes differ from the general provisions of art. 895 and following SCC.
  
- **Retention of ownership title** (art. 715 CC)
  - The idea is that, by way of entry into a special register kept by the debt enforcement office, the seller of a tangible asset may retain title to that asset until he has been fully paid by the purchaser.
  - Retention of ownership title is therefore not possible to secure claims other than to payment of the purchase price of the asset in question (this would be in violation of the *numerus clausus* of limited rights in rem).
  - Neither may this institution be used for ships, aircraft and livestock.

- **Transfer of property as security**

- This institution is not specifically regulated in Swiss law; it is simply the combination of an outright transfer of property with a fiduciary agreement concerning the use, and transfer back, of the relevant asset.
- Attention should be paid to art. 717 SCC, providing that *“In case the thing stays with the alienator based upon a special legal relationship, a transfer of ownership is ineffective against third parties if it is intended to put them at a disadvantage or to avoid the provisions on pawning”*.

- **Miscellaneous**: so-called debentures, and special rules applying to pawnbroking, ships, aircraft and train companies.

**Intangibles may be secured in the following ways:**

- Essentially, the same notions as above apply, meaning that intangibles may be either pledged (whereby art. 899 § 2 SCC provides that *“unless otherwise provided, the provisions on the pledge shall apply”*), or assigned (implying full transfer of the title thereto) to serve as guarantee.
- Except for securities (meaning shares, bonds and the like), the valid pledge requires a written agreement; in this respect, art. art. 900 § 1 SCC provides that *“The pledge agreement of a claim, as to which no document or only a promissory note exists, must be in writing and, moreover, the promissory note must be transferred”*; § 3 provides that *“the pledge of other rights requires, in addition to a written pledge agreement, compliance with the form established for the transfer”*.
- The written agreement is conceived as being simultaneously the act whereby the pledge is constituted, and the limited right in rem thus granted to the pledgee. This means that, contrary to tangible assets, intangible assets may in effect be the object of a floating security, since the granter may in principle pledge future rights, even conditional or uncertain rights. However, these must be sufficiently determined in the written pledge agreement with respect to the identity of the debtor, their legal basis and their content. The same principles apply to the outright assignment or transfer of intangible assets in guarantee of a claim/debt.
- The validity of the pledge or outright transfer doesn't depend upon the debtor (of the pledged or assigned claim or right) being notified by the parties to the pledge. However, the debtor, once notified of a pledge, may only pay to one of the granter or the latter's creditor with the other's consent. If the debtor of the pledged debt or right isn't able to secure both parties' consent towards paying to one of them, then he must deposit the owed amount (art. 906 SCC). Of course, this doesn't apply if the right or claim has been assigned outright, in which case its debtor, notified of the assignment, may only pay to the assignee.



- Special rules apply to the pledge or transfer of insurance policies, whereby, in addition to the requirement of a written agreement, the insurer must be notified in writing (art. 73 of the Federal law on the insurance contract).
- Special rules also apply in respect to the form of the pledge or outright transfer of securities (meaning shares, bonds and the like), whereby bearer securities, much like tangible assets, may be pledged through simple transfer of possession, with an endorsement or written declaration or assignment additionally required in respect of other securities.

## **Question 2**

What, generally, is the priority of different types of security available for these types of assets?

The rule, mentioned above, is a simple one: prior securities have priority over later constituted securities.

In this respect, art. 893 SCC provides in § 1: *“Pledgees are satisfied according to their rank if the object is encumbered by several security interests”*, and in § 2: *“The rank is determined by the date of the establishment of the security interests”*.

The Swiss Federal law on debt enforcement and bankruptcy does define in its art. 219 certain categories of creditors according to priority, but this applies only to remaining available funds once the proceeds from the sale of secured assets has been distributed to the secured creditors.

In any case, this rule or priority only applied to securities in the narrow sense: where assets have been transferred outright to serve as guarantee (in combination with a fiduciary agreement with the transferee/creditor), such property takes precedence over securities (subject of course to varying agreements between the parties and issues of good faith).

## **Question 3**

What taxes, duties or other fees are payable on these securities?

None (subject to special rules concerning livestock, ships and aircraft, and modest administrative fee having to be paid for the registration of the retention or ownership title)

**Question 4**

What, generally, is the method of enforcement of these securities?

Subject to cases where outright ownership (of tangible or intangible assets) has been transferred as guarantee, such securities may normally be enforced only in compliance with the Swiss Federal law on debt enforcement and bankruptcy.

However, the parties may agree, either simultaneously to the pledge agreement or at a later stage, that the creditor may privately sell the asset without having to go through the proceedings normally imposed under the above-mentioned law. This is most frequently the case in any agreements with banks.

But any agreement prior to default whereby the creditor would be entitled simply to keep the asset for himself, would not be valid. Though such an agreement can be reached after default. And obviously this limitation doesn't apply to cases where outright ownership has been transferred as guarantee.

The proceeding is initiated by way of the creditor issuing a request for commencement of enforcement proceedings, to be filed with the competent debt enforcement office. The proceeding is complex, and its progress will mostly depend on a) whether the debtor is registered in the companies registry and b) the substance of his assets. Broadly, the enforcement office will appoint an administrator.

**Question 5**

What other issues should be considered when looking at securing such assets?

Private international law (i.e. the Swiss Federal law on private international law, or PIL, particularly art. 97 and following) is complex regarding this issue, and should naturally be considered carefully in international situations.

Pledge agreements, particularly when seeking to include future or uncertain assets, tangible or intangible, need to be carefully worded in order not to fall foul of the speciality principle.

Creditors should keep in mind the possibility that they have to include a clause, in the pledge agreements, giving them the right, in case of default, to sell the pledged assets privately, without going through the proceeding according to the Swiss Federal law on debt enforcement and bankruptcy.

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## United Arab Emirates

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under UAE Law

(Produced by Trowers & Hamblins, UAE)

#### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

- 1 A distinction can be made between the laws of the United Arab Emirates (**UAE**) and a number of free zones in the UAE, with each free zone having its own set of laws, procedures and regulations. The information set out in this section relate to the laws of the UAE.
- 2 Three Federal laws govern the creation of security interests over UAE property. The UAE Civil Code No. 5 of 1985 (as amended) (the "**UAE Civil Code**"), the UAE Federal Commercial Transactions Law No. 18 of 1993 (the "**UAE Commercial Code**") and the UAE Companies Law No. 8 of 1984 (as amended).
- 3 Moveable property is distinguished from immovable property in the UAE Civil Code with regards to the type of security that can be created. Property classified as moveables under UAE law is everything other than immovable property and includes both tangible moveable property (or chattels) and intangible property, such as debts and securities. Note that the UAE courts treat money in a bank account as tangible moveable property.
- 4 UAE law provides for the following forms of security over moveable assets:
  - 4.1 **Commercial pledge of moveables**
    - 4.1.1 The taking of possession of the property by the pledgee creates the pledge. There are, however, exceptions to this, notably in relation to moveables the title to which can be registered with the relevant government ministry (e.g. cars, aircraft and ships). The existence of the registration system permits the debtor to retain possession of the relevant property whilst the relevant debt is being paid.
    - 4.1.2 The creation of a pledge confers statutory duties upon the pledgee or custodian, in particular an obligation to safeguard the pledged item (although the pledgor is liable to pay all costs incurred in this respect).

4.1.3 The creation and perfection requirements differ slightly depending on the type of moveable property being pledged. The three principal categories of property of most relevance are chattels, debts and other instruments and cash.

(a) *Commercial pledge of chattels*

- i The UAE Commercial Code provides that the relevant property to be pledged must be transferred to the pledgee or his nominee, and remaining in the possession of the pledgee (or his nominee) until termination of the pledge. The property may also be placed in the joint possession of the pledgor and pledgee in a manner which makes the pledgor unable to dispose unilaterally of the property. Transfer of possession of the property to be pledged is achieved when the object is placed at the disposal of the pledgee (or his nominee) in a manner leading others to believe that the property has come into his custody or if he takes receipt of an instrument of title to the property.
- ii While the provisions of the UAE Civil Code and UAE Commercial Code have conflicting provisions regarding the requirement for the pledge to be in writing, a prudent pledgee would insist on having a written, notarised pledge instrument.

(b) *Commercial pledge of debts*

- i The method of creation of a commercial pledge of a debt depends on whether the debt is a "security" pledged to a bank or an instrument such as a promissory note or cheque and whether it is a bearer or nominative instrument.
- ii If the debt is represented as a "security" and is to be pledged to a bank and it is a bearer instrument, transfer of possession in the same manner as a chattel is all that is required (although it is advisable to also have a written pledge document). If the security is not bearer but nominative, in addition to the transfer of physical possession, the pledge must be (1) in writing, (2) endorsed on the instrument and (3) entered recorded in the books or register of the issuer.

- iii If the debt instrument is a promissory note, it must be pledged by means of transfer of possession and an endorsement of the fact on the pledge instrument itself.
  - iv If the debt is not a security to be pledged to a bank or a bearer instrument, the pledge must be (1) in writing, (2) endorsed on the instrument and (3) entered/recorded in the books or register of the issuer.
  - v Where the debt is a "commercial debt" (being a debt arising out of commercial business), the UAE Commercial Code requires the pledge to be in writing in addition to delivery of possession of the instrument establishing the debt.
- (c) Commercial pledge of cash
- i UAE courts have held that security over bank accounts are to be treated as a pledge of cash (as if the asset constituted by the bank account was a tangible moveable property).
  - ii In order to create the pledge, the property (cash) must be transferred into the effective possession of the pledgor (e.g. by transferring the cash into a controlled account). Note that the security interest is a pledge of specified cash in the bank account at the time of the pledge.

#### 4.1.4 Perfection against the debtor and third parties

- (a) In the case of a commercial pledge of chattel, security over property which has a registrable title must be registered in order to create enforceable security. In the case of ships, the security must be registered in the Shipping Register of the relevant Emirate and in the case of aircraft the General Civil Aviation Authority will note the interest of the pledgee on the Aircraft Register (which effectively puts the aircraft in the constructive possession of the pledgee). If the property is not capable of registration, the creation steps specified above are sufficient to perfect the pledge with respect to the debtor and against the interests of third parties.
- (b) In the case of bearer and registered debt instruments, the creation steps specified above, including the delivery of the instrument to the pledgee are sufficient to perfect the pledge with respect to the debtor and against the interests of third parties.

- (c) In the case of a pledge of a commercial debt:
  - i the pledge is only effective against third parties if the pledgee is in possession of the instrument; and
  - ii for the pledge to become effective as against the debtor in respect of the commercial debt either the consent of the debtor to the pledge must be obtained or notice of the pledge must be served on the debtor.
- (d) In order to perfect a commercial pledge of cash against third parties, it is necessary for the third party to be aware of the fact that the money has been pledged and is no longer the unencumbered property of the pledgor.

## 4.2 Commercial business mortgage

- 4.2.1 The UAE Commercial Code provides that a mortgage can be taken over the business of a company.
- 4.2.2 The commercial mortgage must be registered in the Commercial Register; therefore it appears that such security interest may only be granted by a company registered in the Commercial Register. As at the date of writing, Commercial Registers exist only in Dubai, Abu Dhabi, Sharjah and Fujairah.
- 4.2.3 The commercial mortgage can only be granted in favour of a bank or a financial institution.
- 4.2.4 To create the security:
  - (a) there must be a written pledge agreement which clearly identifies the mortgaged assets which must be notarised – security can be taken over all tangible and intangible assets deemed necessary for the commercial activity of the company (but excluding immoveable property and stock in trade); and
  - (b) the mortgage must be entered into the Commercial Register of the company; and
  - (c) notice of the mortgage must be published in an Arabic language newspaper for not less than two weeks before registration.

**Question 2**

What, generally, is the priority of different types of security available for these types of assets?

**1 Commercial pledge of moveables**

- 1.1 Priority in the case of a commercial pledge of chattel is established by the time of creation of the pledge, unless the relevant security must be registered in which case priority will be established by the date of entry of the pledge in the relevant register.
- 1.2 Priority in the case of a commercial pledge of bearer instrument is established by the time of creation of the pledge.
- 1.3 Priority in the case of a commercial pledge of a registered debt instrument is determined by the date of entry of the pledge in the register or records of the issuer.
- 1.4 Priority in the case of a commercial pledge of a commercial debt is established by the "firm" date of the consent of the debtor or of the service of the notice. Note that the usual manner of establishing a "firm" date is by having the consent or notice notarised and in the case of the notice having it served by the court.

**2 Commercial business mortgage**

Priority in the case of a commercial business mortgage is established by the time of registration in the relevant Commercial Register.

**3 Priority between different types of security**

It is unclear how the UAE courts will establish priorities between different types of security. It is likely that the UAE courts will treat security held by different creditors over the same assets as ranking according to the date that all the perfection formalities for the type of asset being secured were completed as required.

**4 Preferred creditors**

The priority of a secured creditor in respect of its security interests is subject to the rights of the government over all debts owed to it (secured or unsecured) and the rights of employees of the company in respect of wages and benefits owed to them by the company.

**Question 3**

What taxes, duties or other fees are payable on these securities?

**1 Commercial pledge of moveables**

There are no taxes or duties payable with regards to the creation of a commercial pledge of moveables. Notarisation and registration fees may however apply if the instrument evidencing the pledge is to be notarised or security registered. Where a document is notarised in the UAE, a notarisation fee is payable based on 0.25% of the value of the secured assets at the date of registration, subject to a maximum of AED10,000.

**2 Commercial business mortgage**

There are no taxes or duties payable with regards to the creation of a commercial business mortgage. Registration fees will apply and should be checked at the time of entry into the commercial business mortgage.

**Question 4**

What, generally, is the method of enforcement of these securities?

The UAE Civil Code and the UAE Commercial Code provide in respect of all types of security, that enforcement of the security must be sanctioned by the court, normally by way of a court authorised sale of the secured asset. This means that "self-help" enforcement remedies are not permitted under UAE law.

**Question 5**

What other issues should be considered when looking at securing such assets?

- 1 Moveable property can only be pledged if:
  - 1.1 it is capable of delivery at the time the pledge is made;
  - 1.2 it is capable of being sold at public auction; and
  - 1.3 the pledgor is the owner of the property and competent to make dispositions of it.

Therefore, there can be no security interest over future property under UAE law.

- 2 The UAE Civil Code provides for assignments of obligations but not of rights. Notwithstanding this, the UAE courts have in certain cases enforced assignments of rights and a market practice has arisen of attempting to take security by way of an assignment of rights.



## United Kingdom - England and Wales

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under English law (applicable to England and Wales)

##### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

To start with, some definitions:-

"Fixed Security " or "Fixed Charge" refers to a type of security over specific property or over a specific type or types of property in a form which gives the greatest available priority over other creditors.

"Floating Security" or "Floating Charge" refers to security which may be over all the assets of the grantor, or a specific class or classes of such assets, which the grantor owns from time to time but which may have lesser priority over other creditors than the fixed security - see the answers to Question 2 below. Assets will fall out of charge when disposed of and will come into charge when acquired.

"Tangible Assets" refers to hard assets/chattels, including inventory, but excluding ships and aircraft.

"Intangible Assets" will be a reference to anything falling under that general category, but this questionnaire only focuses on debts and receivables.

#### 1.1 Tangible Assets/Fixed Charges

- Other than in relation to inventory, under English law a fixed security can be taken by way of chattel mortgage on a specified chattel or chattels.
- This security is not available where the mortgagor is a consumer or a partnership where a different very old-fashioned cumbersome procedure may be available by way of bill of sale but which is not further explored here.
- The chattel mortgage may have to be refreshed to cover after-acquired chattels and ensure a continuing effective fixed security on such after-acquired assets having the same priority as the original chattel mortgage on the original chattels.

#### 1.2 Re inventory:

- in theory, a similar fixed charge on inventory is possible, but in practice, it is usually the case, except with very slow moving inventory, that the creditor has insufficient control over the fluctuating nature of the inventory

for the charge to be regarded as fixed, and security over inventory, therefore, almost always takes the form of a floating charge - see below.

### 1.3 Intangible Assets - Debts/Receivables - fixed Charges

- Again, it is possible under English law to have a fixed charge over debts/receivables. Indeed, this is very commonly taken in any corporate borrowing.
- The charge can extend to both present and future debts/receivables.
- The charge is effected by taking a security assignment over all, or perhaps only the specified categories of, debts/receivables.
- It is not necessary for notice of the security to be given to the debtors in the receivables for the charge to be effective but the creditor has certain advantages if such notice is given - in particular, he then has priority over a bona fide second assignee likewise taking an assignment by way of security (or absolutely) who gives notice to the debtor subsequently. If the creditor does not give notice to the debtor a bona fide subsequent security assignee who gives notice to the debtor first, will have priority over the first creditor notwithstanding the earlier date of the first security assignment.
- A problem from recent case law: the foregoing security assignment will not be regarded as a fixed security if the creditor does not control the flow of proceeds from the receivables. Without such control, the supposed fixed security defaults to being simply a floating charge - see below. Control, however, can simply be effected by requiring the debtors in the receivables (who do not need to know of the existence of the secured creditor for this purpose) to be obliged to pay the proceeds of the receivables to a bank account which is either secured to, or held in trust for, the creditor.

### 1.4 Floating Charges - Tangible and Intangible Assets

- Under English law, a creditor can take a floating charge over all or any of the assets, present and future, of the borrower.
- While the floating charge is in place, the borrower is at liberty, subject to certain contractual stipulations, to dispose of its assets and acquire new assets, and, on enforcement on insolvency, the floating charge will attach to such assets as the borrower has at that time.
- As noted above, some charges such as security assignments over receivables, which purport to be fixed securities, may in fact default to being floating securities by virtue of the creditor having insufficient control over the flow of proceeds.

### 1.5 Methodology

- Chattel mortgages, security assignments and floating charges can all be taken as separate documents depending on what the creditor requires to have secured;
- In practice though, in many cases, particularly where banks are the lenders, the security will take the form of a single document called a

debenture or sometimes a fixed and floating charge. This document will combine all the foregoing forms of fixed security and, also, a floating charge over, probably, all the assets of the borrower which are not otherwise effectively charged by way of fixed charges under the document.

## Question 2

What, generally, is the priority of different types of security available for these types of assets?

Fixed charges:

- a valid fixed charge which takes effect as a fixed charge (see above) takes priority over all other creditors of the borrower and the expenses of any administrator or other insolvency practitioner appointed to the borrower.
- this is subject to agreed priority arrangements with other creditors likewise having fixed charges.
- in the absence of a priority agreement among the relevant creditors, fixed charges held by different creditors over the same assets will rank according to date or, in the case of intangibles, being debts or receivables, according to the date of the first to give notice to the relevant debtors where such notice is given.

Floating charges:

- have a more restricted priority and it is therefore important for creditors to ensure that if they have a fixed security, it does not rank behind another creditor's (or, indeed, that creditor's own) floating charge.
- the priority of a floating charge is postponed to:-
  - certain preferential debts set out in statute. Essentially, these are certain employee claims, including, importantly, pension arrears and pension liabilities;
  - a sum held back for ordinary unsecured creditors (with a maximum of £600K);
  - the expenses of the administrator administering the borrower's insolvency (the administrator being the insolvency practitioner most frequently appointed to borrowers on enforcement of, say, a floating charge. The same rule about priority of expenses, however, likewise applies to other forms of insolvency practitioner).

## Question 3

What taxes, duties or other fees are payable on these securities?

In English law, all securities are free from stamp duty or like documentary taxes.

Any security taken from a company or limited liability partnership, however, must, to be valid, be registered with the Registrar of Companies within 21 days of its creation. (Such registration costs £10 if done electronically, and £13 if done manually.)

## Question 4

What, generally, is the method of enforcement of these securities?

### 4.1 Tangible Assets

- A fixed charge by way of chattel mortgage will usually be enforced by the appointment by the secured creditor of a receiver, as provided for under the Law of Property Act 1925.
- The receiver acts on behalf of the creditor and will have the powers set forth in the chattel mortgage itself. He will also have statutory powers of possession and sale under the 1925 Act.
- It is possible that the mortgagee under a chattel mortgage may be able to recover possession of the chattel even from a bona fide purchaser of the chattel who has paid the mortgagor for it without knowledge of the chattel mortgage - this is open to doubt but arises from the fact that, in legal theory, the chattel mortgage is actually a transfer of title in the chattel to the creditor subject to the borrower's right to redeem the chattel on repaying the loan.

### 4.2 Intangible Assets - Debts/Receivables

- Security assignments of debts/receivables may similarly be enforced by the appointment of a receiver under the 1925 Act, again with the powers of enforcement provided for in the security assignment itself and under the 1925 Act.
- However, this will probably not be necessary as, simply by giving notice to the debtors of the security assignment, the creditor can ensure that the debtors in the receivables are legally obliged to pay the proceeds of the receivables to the creditor direct without the requirement for the appointment of any third party.

### 4.3 Floating Charges

- It is universally the case that the floating charge documentation will contain powers permitting the holder of the floating charge to appoint an insolvency practitioner to the borrower.
- In modern practice, this will usually be an administrator whose primary remit will be to save the business of the company if that can be done.
- The creditor holding the floating charge will usually be able to choose the identity of the administrator.
- There are also powers for the creditor holding the floating charge to apply to the court for the appointment of such an administrator. Sale proceeds and other funds recovered by the administrator are disbursed according to the priorities explained in question 2.

**Question 5**

What other issues should be considered when looking at securing such assets?

- Check what other creditors hold securities from the company and ensure that appropriate priority arrangements are put in place between creditors. In bigger corporate transactions, these priority arrangements can be extremely complex.
- Creditors should be aware that under conflict of laws rules, it will usually be the case that the efficacy of a chattel mortgage over tangible assets (other than ships and aircraft) will only be valid if the chattel mortgage is recognised as valid by the law of the place where the asset is, both at the time of the creation of the chattel mortgage and at the time of its enforcement. A chattel mortgage over readily moveable assets (for example, trucks and buses), therefore, should be viewed with caution.
- Conflict of laws in relation to security over receivables can be a complex issue. In the EU, this is dealt with by an EU Regulation - the Rome I Regulation. This provides that the validity of a transfer of a receivable will be determined by the law of the receivable, that is to say, of the contract under which the receivable arises. It is unsettled whether this rule under the Regulation also exhausts any issues as to proprietary rights, for example, a requirement under the law of the place where the debtor is for notice of the transfer to be given to the debtor before a security title in the receivable passes to the creditor.

## United Kingdom - Scotland

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under Scots law

##### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

To start with, some definitions:-

"Fixed Security " or "Fixed Charge" refers to a type of security over specific property or over a specific type or types of property in a form which gives the greatest available priority over other creditors.

"Floating Security" or "Floating Charge" refers to security which may be over all the assets of the granter, or a specific class or classes of such assets, which the granter owns from time to time but which may have lesser priority over other creditors than the fixed security - see the answers to Question 2 below. Assets will fall out of charge when disposed of and will come into charge when acquired.

"Tangible Assets" refers to hard assets, including inventory, but excluding ships and aircraft.

"Intangible Assets" will be a reference to anything falling under that general category, but this questionnaire only focuses on debts and receivables.

#### 1.1 Tangible Assets/Fixed Charges

- Generally speaking, except in relation to ships and aircraft, the only type of fixed security over chattels (referred to as "corporeal moveables" in Scots law) which Scots law recognises is a pledge.
- A valid pledge requires possession of the asset in question by the creditor and, consequently, fixed charges over tangible assets are virtually unknown in Scottish practice except for pawnbrokers in relation to consumer lending.
- It may be possible, however, with inventory, which is slow moving, to have such inventory kept in a warehouse controlled, either in fact or by contract, by the creditor and thus demonstrate the necessary possession for a fixed charge to be recognised. Whisky stocks lend themselves to this type of procedure, and as that is sufficiently important in Scottish practice it is worth mentioning here.

## 1.2 Intangible Assets - Debts/Receivables - Fixed Charges

- Similarly to English law, a fixed charge over debts/receivables (referred to as "incorporeal moveables" in Scots law) can be taken in Scots law by a security assignation (and where English law uses the word "assignment", Scots law uses "assignation").
- Crucially, however, in Scots law, unlike English law, there is no valid security by way of fixed security at all unless notice of the assignation is given to the debtor in the receivable. While this may be practicable in relation to security over a small number of specific debts or a flow of receivables under, say, a leasing agreement, clearly it may be impracticable where a ledger of constantly revolving debts is to be secured.
- It is also open to question whether it is valid in Scots law to take a security assignation over a receivable which does not exist yet, even if it can be described adequately to be certain as to what is being secured. Thus, a security assignation over after-acquired assets should be refreshed on those assets being acquired.
- Because of the practical difficulties outlined above, it is not the practice, even for banks, to take fixed charges over book debt ledgers in Scotland.

## 1.3 Floating Charges

- Companies and limited liability partnerships may grant a floating charge to a creditor over all or any part of their assets, present and future.
- While the floating charge is in place, the borrower is at liberty, subject to contrary contractual stipulations, to dispose of its assets and acquire new assets and, on enforcement on insolvency, the floating charge will attach to such assets as the borrower has at that time.

## 1.4 Methodology

Unlike in England, it is not possible to combine documents granting fixed and floating charges in Scots law. In particular, a floating charge must be taken as such.

### **Question 2**

What, generally, is the priority of different types of security available for these types of assets?

Fixed charges:

- a valid fixed charge takes priority over all other creditors of the borrower and the expenses of any administrator or other insolvency practitioner appointed to the borrower.
- this is subject to agreed priority arrangements with other creditors likewise having fixed charges.

- in the absence of a priority agreement among the relevant creditors, fixed charges held by different creditors over the same assets will rank according to date or, in the case of intangibles, being debts or receivables, according to the date of the first to give notice to the relevant debtors.

Floating charges:

- have a more restricted priority and it is therefore important for creditors to ensure that if they have a fixed security, it does not rank behind another creditor's (or, indeed, that creditor's own) floating charge.
- the priority of a floating charge is postponed to:-
  - certain preferential debts set out in statute. Essentially, these are certain employee claims, including, importantly, pension arrears and pension liabilities;
  - a sum held back for ordinary unsecured creditors (with a maximum of £600K);
  - the expenses of the administrator administering the borrower's insolvency (the administrator being the insolvency practitioner most frequently appointed to borrowers on enforcement of, say, a floating charge. The same rule about priority of expenses, however, likewise applies to other forms of insolvency practitioner).

### Question 3

What taxes, duties or other fees are payable on these securities?

In Scots law, all securities are free from stamp duty or like documentary taxes.

Any security taken from a company or limited liability partnership, however, must, to be valid, be registered with the Registrar of Companies within 21 days of its creation. (Such registration costs £10 if done electronically, and £13 if done manually.)

### Question 4

What, generally, is the method of enforcement of these securities?

#### 4.1 Tangible Assets

On the rare occasions when a fixed charge on tangible assets is competently taken in Scots law, the powers of enforcement will be those provided for in the fixed charge document. Generally, there will be a power to take possession and a power of sale, which the creditor may exercise itself.

#### 4.2 Intangible Assets - Debts/Receivables

Again, the powers of enforcement will be those provided for in the security assignment itself - no doubt, exercisable on default. This will invariably be by the creditor simply giving notice of the assignment to the debtors and then itself collecting the debts direct.



### 4.3 Floating Charges

- The floating charge becomes a fixed charge, subject to the priority rules above, in respect of the assets of the company held at the time of enforcement of the floating charge.
- This only takes place on the appointment of an insolvency practitioner to the company under the floating charge or generally by other creditors or the court.
- The holder of the floating charge will have the right to appoint an administrator to the company, who will then deal with the company's assets with a view to saving the company or its business, if possible but, in any event, accounting to the floating chargeholder, subject to the priorities above, for the proceeds of the secured assets.

#### **Question 5**

What other issues should be considered when looking at securing such assets?

- As Scots law does not recognise fixed securities over chattels without possession, a chattel mortgage or other fixed charge over chattels created in another jurisdiction will be ineffective if either the chattel in question was in Scotland at the time of creation of that fixed charge or is in Scotland at the time when that fixed charge is sought to be enforced.
- There can be complex issues of documentation where a borrower is to give a creditor fixed and floating security over its assets, and that borrower has assets both in England and in Scotland, given the difference between the security rules in the two jurisdictions.
- Given the difficulties in Scots law creating security over intangible property by way of debts/ receivables - that is to say, no valid security without notice to the debtors - it becomes important to consider what law governs the validity of a security over such assets. The Rome I Regulation seeks to resolve this difficulty as between different member states of the EU, and the same rules apply as between England and Scotland. The basic premise of the Rome I Regulation is that the validity of a transfer of a receivable, whether absolutely or in security, will be determined by the law of the receivable, that is to say, of the contract under which the receivable arises. However, there remains a doubt as to whether the Rome I Regulation is exhaustive of all proprietary rights in relation to the receivable or whether the lex situs of the debt (usually regarded as being the law of the jurisdiction where the debtor is) also has to be satisfied. A decision of the Scottish courts last year suggests that requirements of the law of the place where the debtor is also have to be satisfied before a security over the receivable will be valid - even though it is valid under the law of the contract under which the receivable arises. This is not thought to be the position under English law and therefore interesting questions can arise in cross-border cases.

## **Brazil**

### **Taking security over moveable/personal property/collateral**

#### **Questionnaire Answers under Brazilian law**

##### **Question 1**

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

##### **1.1 Legal Definitions:**

“Moveable Assets”, in view of Brazilian civil law, could be defined as follows:

(i) By Nature: assets/goods that are self-moved or removeable by external forces without modifying its substance or economic and social destination, as provided in Article 82 of the Brazilian Civil Code (“Civil Code”); or

(ii) By Legal Determination, as provided in Article 83 of Civil Code:

I – Energy that might have economic value;

II – Security interest over moveable assets and its correspondent actions;

III – The personal rights with patrimonial character and its respective actions.

“Tangible Assets” refers to assets/goods with physical existence, such as cars, furniture, equipment, etc.

“Intangible Assets” refers to assets with abstract existence, such as intellectual property, goodwill, etc.

“Fungible assets” – refers to assets that can be replaced by another of the same kind, quality and quantity.

“Non-fungible assets” – refers to assets that cannot be replaced by another of the same kind, quality and quantity.

##### **1.2 Types of Securities:**

###### **1.2.1. Pledge:**

A right *in rem* of the creditor over a moveable asset or ownership of a right of the debtor or of a consenting third party that are subject to alienation, by which its owner transfers the direct possession of the Moveable Asset to the creditor for binding the value of the moveable asset to the payment of a debt or fulfilment of an obligation.

The security lies on the market value of the asset for a private or public sale in case of default and not on the ownership of the asset itself.

The general rule provides that the creditor must hold the asset as possessor and trustee and the pledge will only be effective after the transfer of such possession and registering of security contract, as provided in answer to question 3. In specific types of pledges (Industrial and Commercial, Rural, and Vehicle pledges), Civil Code provides that the asset shall be maintained by the debtor (direct possession), which shall have trustee's duties.

Nevertheless, even in cases the transfer of possession is mandatory, it is possible for the creditor to nominate, on the security agreement, the debtor as trustee and. In such case, creditor shall have indirect possession of the asset.

There are 6 types of pledges provided in Civil Code:

- a) Regular pledge: general security that can be provided in any kind of contract;
- b) Rural Pledge: security over assets of agriculture (machinery and equipment, pending harvest, fruits in deposit, firewood and coal, animals for service) and livestock purposes;
- c) Industrial and Commercial Pledge: security over assets used for industrial and commercial purposes.
- d) Pledge over rights or debt instruments: security over rights and credits of debtor.
- e) Pledge over vehicles: security over vehicles, excluded ships and aircrafts, which are subject to mortgage or trust receipt.
- f) Legal Pledge: a security that is provided by law regardless of an agreement in case of:
  - (i) Hosting: hotels and hosting facilities have security over the assets of the client in room for payment of the staying, services and charges at the facility.
  - (ii) Lease: owner of land or building has security over the debtor's moveable assets maintained at the leased site for payment of outstanding rent and other debts.

Under Article 1.421 of Civil Code, the payment of one instalment or part of the debt will not result in partial exoneration of the pledge, even if the security is related to several assets, unless otherwise provided in the security agreement.

#### **1.2.1.1. Essential Provisions of a Pledge Contract:**

As set forth in Article 1.424 of the Civil Code, the contract must provide:

- a) debt value, its estimate or maximum value;
- b) place and term of payment;
- c) interest rate, if any;
- d) description of the asset, with indispensable elements for identification.

The provision establishing that the creditor may take ownership of the secured asset as payment if debtor fails to pay the debt is considered null and void under Article 1.428. However, under the same legal provision, debtor may voluntarily choose to give the asset as payment after the maturity of the debt, but such option is subject to acceptance of creditor (forfeiture agreement).

Regardless of contractual provision, debt will be subject to early maturity in the following events (Article 1.425, Civil Code):

- a) if the asset deteriorates or loses value and debtor, noticed by creditor to reinforce security or substitute it, fails to do so.
- b) if debtor becomes insolvent or bankrupt;
- c) if instalments are not paid on due dates; if creditor receives a late payment of an instalment, it is considered as a waiver for the early maturity and the possibility to promote the enforcement of the security;
- d) if the asset is expropriated by public authority, in which case debtor shall deposit part of the price necessary for the full payment of creditor.

In such cases, future interest to be paid will not be subject to early maturity and its payment shall occur on the respective due dates. Consenting third parties that give its assets for guarantee of debtor is not obliged to reinforce or substitute the security in case of loss or deterioration without guilty, unless otherwise provided in the agreement (Article 1.427, Civil Code).

#### **1.2.1.2. Obligations of Trustee (Article 1.432, Civil Code):**

Trustee must:

- a) custody: preserve the asset under custody, including incurring in expenses for conservation of its physical conditions, in case of tangible assets, and its economic value, as well as to defend its possession against third parties, including filing judicial lawsuit to retrieve possession of the asset ("Custody Costs"). Such expenses shall be refunded by debtor to owner in order to retrieve the asset.
- b) reimbursement: reimburse the asset's owner in case of loss or damages in the asset caused by his/her fault. The amount of reimbursement can be offset with debt up to its full amount;
- c) earnings of the asset: inform the value of the earnings derived from the asset during its possession that were withheld and used for Custody Costs of asset and payment of interest and capital of secured debt/obligation. Doctrine provides that such possibility must be accepted by debtor or consenting owner of asset.
- d) return: return possession of the asset to owner with the respective earnings, after full payment of debt and Custody Costs;
- e) return excess of cash: in case of excess of cash arising out of the sale of the asset must be returned to debtor (as informed in 4.1, last paragraph).

### **1.2.1.3. Rights of the Trustee (Article 1.433, Civil Code):**

Trustee may:

- a) possession: if it is the case, have the pledged asset under your possession;
- b) withhold: withhold the asset until full payment of Custody Costs;
- c) sale: perform amicable sale or file execution lawsuit (as informed in answer to question 4);
- d) damages: reimburse of damages incurred by trustee for vice/defect of the asset;
- e) earnings arising out of the FAsset: withhold earnings of asset until payment of debt and Custody Costs;
- f) early sale: perform early sale, through a judicial authorization, if there is a reasonable distrust that the pledged asset will deteriorate or lose its value, in which case trustee must deposit the assets' value with judicial authority; debtor will have the option to substitute the pledged asset or provide another reputable guarantee.

### **1.2.2. Trust Receipt (Fiduciary Alienation):**

A security established by an accessory contract whereby debtor transfers the solvable ownership and indirect possession of a non-fungible asset to the creditor to guarantee the payment of a debt or an obligation provided in the main contract, mainly loan or financing agreements. Trust Receipt on fungible assets is permitted only in operations with entities authorized to operate in financial and capital markets. Such operations have specific criteria and requirements.

The asset is maintained in direct possession of the debtor which may use it as it pleases under trustee's duties and shall have the right to have returned the asset's ownership after the payment of debt or fulfilment of an obligation. Thus, ownership of the asset by debtor is subject to a resolatory condition, that is, full compliance of main contract which the security contract is related.

The security lies on the solvable ownership of the asset by creditor and its market value for a private or public sale in case of default. There is no purpose for the asset to be kept by creditor since creditor shall have only a temporary ownership for purposes of guarantee of payment by the amount received out of the sale of the asset.

This is the most common security used in financing operational assets, especially machinery. The financier grants the cash to debtor for the purchase of an asset, provided that financier will keep the solvable ownership of the asset as a security until full payment.

Since ownership is a right *in rem*, creditor shall have priority to receive payment up to the value of the asset.

There are specific legal provisions regarding Trust Receipt in operations involving entities authorized to operate in financial and capital markets that must be complied.

Debt instruments, for an example, may only be object of Trust Receipt in operations involving such entities. For such assets, there is no transfer of the solvable ownership but an assignment, since credits are considered rights and not tangible assets.

Provided that the debtor has possession over the asset under security, debtor shall have custody obligation to preserve the asset's economic value and conditions (in case of tangible assets).

### **1.2.2.1. Essential Provisions of Trust Receipt Contract:**

The provision establishing that the creditor may take ownership of the secured asset as payment if debtor fails to pay the debt is considered null and void, under Article 1.365 of the Civil Code. However, under the same legal provision, debtor may voluntarily choose to give the asset as payment after the maturity of the debt, but such option is subject to acceptance of creditor (forfeiture agreement).

As set forth in article 1.362 of the Civil Code, the contract must contain some items of essential provisions, such as:

- a) total debt negotiated, or estimate;
- b) place and date of payment;
- c) interest rate and the rate of indexation, legally allowed, penalty clause, and commissions rate according with legal permission;
- d) description of the asset, with indispensable elements for identification.

The early maturity events and effects described above for pledge are also applicable to Trust Receipt, (pursuant to Article 1.367 of the Civil Code).

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

All the securities above are considered a right *in rem* of the creditor over debtor or consenting third parties' assets. Creditors with right *in rem* have priority over other creditors without right *in rem* over the secured assets of debtor. Such priority lies only on the value of the assets under security.

It is possible to constitute more than one Pledge over the same asset provided that the first creditor will have priority of payment over the latter.

In case of bankruptcy or judicial recovery (Chapter XI) of debtor, only labor creditors will have priority over creditors with right *in rem* securities. Thus, such creditors will have priority of payment over all other creditors.

### Question 3

What taxes, duties or other fees are payable on these securities?

#### **3.1. Duty of Registration and Publicity to Third Parties:**

Duty of registration is applicable for all types of securities described above.

The security is constituted through a public or private instrument that must be registered with the competent registry for each type of pledge in order to give publicity – in order to be known and enforceable before third parties - of the encumbrance over the assets to third parties and, if the case, also through the transfer of the possession. Usually, the instrument must be registered with Titles and Deeds Registry but, in some cases, other registrations are required. For an example, if the asset under security is a vehicle, the security must also be registered with Motor Vehicles and Traffic Authority for the purpose of registering the encumbrance in the certificate of ownership of the vehicle.

In case of a pledge, the absence of registration will not void the security, but the asset will not be secured for payment if the debtor sells the asset to a third party (otherwise, such purchase would be considered null) or becomes insolvent or subject to judicial recovery or bankruptcy. In this case, the debt will be subject to proportional payment to all creditors without priority of payment.

The costs for registration vary depending on the city and the competent registry where the security instrument will be registered, which generally is the debtor's domicile. Usually the costs of the registry fees are based on the value of the secured asset – from fixed values (i.e., in State of São Paulo, the equivalent to USD 80 to register with Motor Vehicles and Traffic Authority), or based on the value of the transaction (also in the State of São Paulo, costs at Titles and Deeds Registry, based on the value of the transaction, varies from USD 30 up to BRL 6,500).

#### **3.2. Taxes:**

There are no taxes assessed on the constitution of the securities discussed herein. Taxes will only be due over the obligations provided in the main contract from which the security agreement is related.

### Question 4

What, generally, is the method of enforcement of these securities?

#### **4.1. Pledge:**

If debtor fails to pay or to comply with obligation, pursuant to the conditions agreed under the security instrument, the enforcement measures shall include:

- a) Amicable sale by creditor under a power of attorney: Articles 1.422 and 1.433, IV, of the Civil Code establishes that the owner of the asset may grant, on the security agreement or by a separate instrument of power of attorney, powers to creditor in possession of the secured asset to perform its private sale, under the conditions agreed by creditor, debtor and, if the case, owner. Remaining balance arising from the sale of the asset must be delivered to debtor, if any;
- b) Lawsuit: if no power of attorney is granted, creditor must file an execution claim aiming the public sale of the asset for the payment of debt. Remaining balance arising from the sale of the asset must be delivered to debtor, if any.

If the amount derived from sale of the asset is not enough for the full payment of debt or obligation, the debtor shall continue to owe creditor under personal responsibility. In case of claim to enforce the described above after the public sale, the creditor may request to the judge the attachment of assets of the debtor for other public sales as far as it takes for receiving full payment.

#### **4.2. Trust Receipt:**

In case of default and/or late payment, as provided in the security agreement, creditor shall:

- a) submit notice to debtor informing the delay in payment or contractual default, giving to debtor a term for full payment;
- b) if debtor fails to pay, creditor automatically consolidates the ownership of the asset from solvable/temporary to regular ownership by notice to debtor;
- c) creditor may sell the asset to a third party or by a public auction, regardless of auction prior evaluation or any other judicial or extrajudicial measure, unless otherwise expressly provided in contract;
- d) shall apply the amount of the liquidation/sale of the asset to payment and collecting expenses and return the remaining balance to debtor, if any.

Since the direct possession of asset is held by debtor, a lawsuit for search and seizure must be filed to retrieve the asset if debtor refuses to give it for sale. Creditor shall prove the delay or default incurred by debtor in order to have an injunction to secure possession of the asset and then proceed with the sale and liquidation steps.

#### **Question 5**

*What other issues should be considered when looking at securing such assets?*

Creditor shall take due care and perform an investigation (limited due diligence) over the asset that is being offered as security by debtor to verify if there are any encumbrances over the secured asset, such as pledges, trust receipts and judicial attachment or restraint that may prevent the formation and registration of the security or the enforceability of security contract.

If the asset is in direct possession of debtor, creditor shall, from time to time, inspect the asset to verify if it is under proper custody and with its market value preserved.



## Canada

### 1 Interlaw – Banking SBT

#### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under British Columbia law primarily, and comments on certain Canadian Federal law (except Quebec)

##### Overview

Both federal (Canada-wide) and provincial law regulate secured transactions in Canada. The majority of transactions fall within the province's purview; however, the existence of federal regulation of some secured transactions can create extra due diligence requirements, and can create some uncertainty when determining priority.

Nine Canadian provinces and all three Canadian territories have adopted different versions of the *Personal Property Security Act* ("**PPSA**"), which governs provincially regulated secured transactions. The *PPSA* finds its roots in Article 9 of the Uniform Commercial Code developed in the United States. In Quebec, the remaining province, secured transactions are governed by the Quebec Civil Code, and security documents and practice are very different from the rest of Canada. Therefore, this summary does not apply to Quebec.

In this summary, we focus primarily on the law applicable in the province of British Columbia, which includes the British Columbia *PPSA* and federal legislation which applies throughout Canada. We also focus primarily on commercial transactions. In the event consumer (individual/personal) transactions are involved, other laws and considerations may also apply. In all jurisdictions in Canada except for Quebec, the laws are similar in concept to those applicable in British Columbia. However, as there can be significant differences between jurisdictions, further investigation may be needed to ensure the requirements of other jurisdictions are met. It is always important to determine who the parties are, where they are, and what assets are desired or offered as security.

"Personal property" usually refers to property that is not real property (ie. Interests in land). "Collateral" is the personal property that is subject to a security interest (these terms are explained more below). "Moveable" property is not a term customarily used in British Columbia, but the concept may be relevant in Quebec.

##### Question 1

*How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?*

##### Federal Law

The *Bank Act* (Canada) permits a Bank (this is as defined in this statute and does not include many foreign banks or all Canadian financial institutions) to obtain an assignment by a corporate borrower of its present and future inventory and receivables generated by the sale or use of that inventory.

The forms of documents required, and the information to be inserted in them, is technical and very precise, and to properly prepare these documents, information on the Borrower's business, and all of its business addresses, and a detailed description of its inventory, are needed. A form called a "Notice of Intention" must be filed in the appropriate office of the Bank of Canada (there are a number of them across Canada) BEFORE the security documents are executed, or the security is void. Also, only a corporate borrower may give this security for its obligations; it cannot be properly given by a corporate guarantor to secure its obligations under a guarantee, or by an individual.

Other legislation may apply if the assets which are the subject of the security, are regulated by other federal legislation; for example, assets that are ships, aircraft or intellectual property (eg. Patents, trademarks or copyrights). In Canada, although intellectual property is primarily a federally regulated matter, federal legislation is sparse on permitting security documents on these kinds of assets. Therefore, in some cases, and depending on the circumstances and the requirements of the transaction, provincial security may be taken on them, if that is the best security that may be obtained or given in the circumstances.

### **Provincial Law**

The principal statute in British Columbia with respect to security on personal property, is the *PPSA*. Other provincial statutes may apply to specific kinds of personal property, such as mineral or mining rights.

### **What does the *PPSA* apply to?**

The *PPSA* applies to most types of security interests in tangible or intangible personal property, including consumer goods. Security interests are usually created by a security agreement. Whether a document is called a security agreement or not does not matter, as it is whether a document in substance creates a security interest which matters, not the name of the document. Therefore, it is important to be alert to documents which may contain security interests (for example, sometimes share purchase agreements contain the grant of a security interest over shares or assets, to secure holdback or other obligations), as the *PPSA* applies to these interests. Usually, a "General Security Agreement" refers to a document which creates a security interest in all of the debtor's (grantor)'s present and after acquired personal property, and a "Security Agreement" refers to a document which creates a security interest in specified personal property of the debtor. However, as these terms are often used interchangeably, it is always prudent to review the document itself to make this determination.

Section 3 of the *PPSA* states that the *PPSA* also applies to other transactions which do not traditionally create a security interest, for example:

- a commercial consignment; and
- a lease (of personal property) for a term of more than one year that does not secure payment or performance of an obligation.

The reason for these “deemed” security interests, is to impose on secured parties the obligation to perfect their security interests in circumstances in which third parties may not otherwise expect that a security interest exists.

Certain types of security interest are specifically excluded by the *PPSA*, including security interests created under the *Bank Act* and security interests in land.

### **What other legislation/law might I have to worry about?**

- Certain types of personal property are federally regulated, or regulated by other provincial legislation. Therefore, it is important to determine early in a transaction, what assets are proposed to be subject to the security, so appropriate due diligence is conducted, appropriate security documents are obtained, appropriate registrations (or other means of perfection, for example, delivery of share certificates) are made, and any priority issues as between secured creditors are resolved.
- Different types of liens may arise that may or may not be registered in the *PPSA*. For example, mechanics are protected under repairer liens legislation and can gain priority over existing *PPSA* security holders for work performed but not yet paid for.
- As previously noted, security registrations also exist under section 427 the *Bank Act* (please see above discussion). Both the *PPSA* and the *Bank Act* allow secured parties to take a security interest in assets such as inventory and receivables, thus difficulties can arise as neither the *PPSA* nor the *Bank Act* addresses priority issues between the security governed by the respective legislation. Therefore, it is usually prudent to search for security registrations under both statutes, even if security is only proposed under one, and to obtain a priority agreement if possible. If it is not possible to obtain a priority agreement, then the secured party must decide if the priority it will have over assets of the debtor, is acceptable for its requirements.
- Each province also has its own consumer protection legislation. In British Columbia the *Business Practices and Consumer Protection Act* (British Columbia), regulates consumer contracts, disclosure requirements, credit reporting, debt collections and other practices.
- Both the provincial government and federal government are able to gain super priority liens over secured and unsecured creditors in limited circumstances. These circumstances include instances of unremitted employee deductions or sales taxes.
- Upon a debtor declaring bankruptcy, certain priorities can change under the *Bankruptcy and Insolvency Act* (Canada) (“*BIA*”), thus impacting a creditor’s priority in certain circumstances.

### **Which *PPSA* applies?**

Which province’s legislation applies depends on a number of factors, including the location of the debtor, location of the collateral, where the loan transaction is made, and complex conflicts of laws rules. Once the appropriate legislation is determined,

then its conflicts of laws rules will apply (subject to certain exceptions) and will indicate where perfection (described below) must be made. The general rule is that perfection must be made in the jurisdiction in which the collateral is located at the time that the security interest attaches. “Attachment” occurs when value is given by or on behalf of a secured party. However, this general rule cannot always be relied upon. Some examples of exceptions are as follows:

- if the location of the goods moves to another jurisdiction, then re-registration may be necessary;
- if the security agreement specifies that the laws of a certain jurisdiction will govern the agreement, then a court may accept that as the appropriate jurisdiction;
- if the parties understand that at the time the security interest attaches, the goods will be located in another jurisdiction; and
- if the collateral consists of mobile goods and intangibles.

#### **How to secure priority under the *PPSA*?**

The *PPSA* is a ‘notice filing’ system, and the notice is filed in the province’s Personal Property Registry (“**PPR**”). Again, each jurisdiction which has a *PPSA* has its own PPR, and the perfection requirements may differ from jurisdiction to jurisdiction.

In British Columbia, and generally under other jurisdictions’ *PPSA* legislation, priority is secured by perfection. “Perfection” usually occurs by the proper filing of a financing statement (discussed more below) in the appropriate PPR. However, for certain types of personal property, such as investment property (eg. Shares and other securities), perfection can also occur by the secured party taking possession of this property. If a share, for example, is certificated (eg. A share certificate representing ownership of certain shares of a private company is issued), physical delivery of this share certificate would constitute possession. If a share, however, is uncertificated (eg. A share in certain large public corporations is recorded electronically, with no physical certificate being issued), then physical delivery is not possible, so possession occurs when the secured party obtains control over the uncertificated share. This process can be complicated and, as in all cases, appropriate documentation is needed to ensure the secured party obtains possession, ie. priority, under the applicable legislation.

Further, where perfection must occur is often a complicated question, depending on many factors. In general terms, however, a secured party should register a financing statement in the jurisdiction in which the collateral is located. In most cases, this will be the jurisdiction where the debtor is located. However, if the security interest covers intangibles (eg. Receivables) or mobile goods (eg. Cars, trucks), the location of which may be difficult to ascertain, then a financing statement must be registered in the jurisdiction of the debtor’s chief executive office (principal place of business and where the governing minds of the debtor are located). If a financing statement is properly registered, then in most instances, the secured party will have priority over later registrations.

Factors to consider when taking security include:

- is the collateral inventory;
- is the collateral comprised of serial numbered (mobile) goods or intangibles;
- is the collateral investment property;
- is the collateral consumer goods;
- is the collateral crops;
- is the collateral fixtures;
- where is the debtor located;
- what is the length of time perfection is required for (in terms of years for registrations);
- what is the nature of the security interest (eg. Is it created under a lease for a term longer than one year, in a security agreement over specific personal property, or in a general security agreement over all of the debtor's present and after acquired personal property);
- do searches indicate any prior registrations against the debtor in the relevant PPR(s) or under the *Bank Act* in the relevant office(s) of the Bank of Canada;
- have the funds been advanced/will the funds be advanced for the acquisition of specific personal property. If this is the case, then, if the required steps under the relevant *PPSA* are followed as and when required (as with most registration and priority matters, timing is critical), the secured party may be entitled to a Purchase Money Security Interest (a "**PMSI**"). If the proper steps are followed (usually BEFORE the debtor obtains possession of the subject personal property), then the secured party may be able to obtain priority for that financed personal property even over a party who has a prior perfected security interest in it.

As referred to above, registration under the *PPSA* is made by registration of a prescribed form called a financing statement. In British Columbia, registration is made electronically, and searches are conducted of the PPR in this manner as well. Once a financing statement is filed, it can be amended or renewed, or discharged by the secured party. A financing statement can be registered before a security agreement is even drafted, and one financing statement can be broad enough to cover multiple security agreements. Therefore, most secured parties register financing statements as soon as it is clear a transaction will be proceeding, to ensure their priority. One should consider how long one wishes to register the financing statement for; registrations can be as short as a year or can continue indefinitely (the cost of the registration increases with the length of registration required). It is the right of the debtor to require discharge of a financing statement that was registered erroneously (eg. If the anticipated financing did not proceed).

## Question 2

What generally is the priority of different types of security available for these types of assets?

The general rule under the *PPSA* is first in time, first in right as between registered financing statements; therefore the earliest perfected security instrument generally has priority over a later registered financing statement. The 'normal' priority rules are as follows:

1. perfected vs. perfected – first in time, first in right (ie. Priority);
2. perfected vs. unperfected – perfected has priority;
3. unperfected vs. unperfected – generally the security interest that attaches first will have priority; and
4. perfected under the *PPSA* vs. registered under the *Bank Act* – it is generally believed to be first in time, first in right; however there is still some uncertainty on this point.

However, there are exceptions to these general rules, some (but not all) of which are outlined below:

- if the security interest was never properly taken. This could be due to errors in the financing statement, registration in the wrong jurisdiction, an improperly drafted security agreement or a variety of other reasons;
- a PMSI may exist that has priority (see discussion of PMSIs in Question 1);
- there may be a priority agreement between the secured parties; or
- there may be an intervening lien or other federally regulated security interest.

## Question 3

What taxes, duties or other fees are payable on these securities?

There are no taxes or duties payable under the British Columbia *PPSA*, but there are registration costs.

Currently in British Columbia, the PPR charges \$5 for each year that a financing statement is registered, or \$500 for the infinity registration option. Additional fees will apply for searching the PPR and amending, renewing or partially discharging a registration. Other jurisdictions have their own fees.

## Question 4

What generally is the method of enforcement of these securities?

Secured parties have available to them the remedies provided for in the security agreement (provided that those remedies do not conflict with the *PPSA*), those provided in the *PPSA* and those provided by other applicable law (eg. In judicial decisions).

In order to enforce security, there must either be a default under the security agreement. These events of default are often broadly defined, and are sometimes supplemented by provisions in the PPSA, and should be carefully reviewed (and negotiated if possible) by the secured party and by the debtor both before the security agreement is finalized, and before the secured party commences enforcement proceedings.

If the *PPSA* applies to the transactions, then Part 5 of the British Columbia *PPSA* sets out a variety of rights and obligations of secured parties. The exercise of each of these rights must be performed in a commercially reasonable manner, and is subject to strict notice, care and disposal provisions. These remedies are:

- Seizure of the collateral: the secured party may hire a bailiff to seize the collateral. This can often be an effective remedy in and of itself as it may cause a debtor to take a greater interest in ensuring the secured party is paid.
- Disposition of collateral: after seizing the collateral the secured party may dispose of the collateral and use the proceeds to pay down the amount owed to it.
- Collection on payments: the secured party may collect any payments or debts owed to the debtor pursuant to the collateral. If the debtor has outstanding receivables, and these form part of the collateral, the secured party may provide the third parties owing monies to the debtor with notice that all payments are to be made to the secured party and not to the debtor.
- Foreclosure: the secured party may also elect to take the collateral in full satisfaction of the obligation secured by it.
- Receiver: the *PPSA* confirms that a security agreement may provide for the appointment of a receiver or a receiver manager subject to certain conditions. Generally, a receiver or receiver manager is appointed by the secured party to either manage the debtor's business as a going concern, to dispose of the debtor's assets, or both.

If the secured party has an interest in both land and personal property as collateral, the *PPSA* allows the secured party to elect to proceed against the personal property as if the personal property was land.

Special provisions apply to collateral that falls within the definition of consumer goods. These provisions limit the enforcement mechanisms described above. For instance, if the debtor has paid 2/3 of the obligation secured, the secured party cannot seize the consumer goods without a court order.

Secured parties must also be aware of the *BIA*, and how its provisions interact with the *PPSA*. If there is any chance that the debtor is an insolvent person, as defined in the *BIA*, then the provisions of the *BIA* must also be followed prior to taking any steps to enforce security.

## Question 5

What other issues should be considered when looking at securing such assets? (including, for example, any extra territorial recognition of the security or whether security becomes ineffective if the assets are moved outside of the jurisdiction)

There are many unique features to the PPSA which can surprise lawyers and business persons used to practising under a different regime. Some of these features are:

- As noted in Question 1, leases for a term greater than one year are deemed security interests. Therefore, if a lessor does not register its interest in the collateral leased, it can lose priority in its own collateral against a third party claiming a security interest in it. Therefore, to protect itself, the lessor should file a financing statement in the appropriate PPR whenever entering into a lease for a term greater than one year.
- Special rules apply when dealing with security interests in consumer goods. If dealing with an individual debtor it is often best to exclude consumer goods from the general security agreement in order to avoid consumer goods problems.
- The PPR does not provide secured parties with notice that their security interests are about to expire. Therefore, secured parties must diarize expiry dates of registrations and, if it will continue to require the registration, renew it well before its expiry date, to avoid losing priority.
- As a financing statement may be registered prior to a security agreement even being drafted, the practice in Canada is to register a financing statement as early as possible. If there are reasons for not making this registration early in the transaction (eg. Confidentiality reasons – perhaps the loan proceeds are to be used to pay out another secured creditor, but the debtor does not wish them to learn of this take out financing until it is sure it will be completed), these should be communicated to the secured party and its lawyers.



## Columbia

### Taking security over moveable/personal property/collateral in Colombia

#### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral)<sup>2</sup> both tangible and intangible in your jurisdiction?

**Overview.** In Colombia, security interests in personal property (both tangible and intangible) are governed by Law 1676 of 2013 (“Law 1676”). Law 1676 governs the creation, perfection and direct or special enforcement of security over moveable assets (*garantías mobiliarias*). Judicial enforcement is governed by the Code of Civil Procedure.<sup>3</sup>

The following assets are exempted from the application of Law 1676: aircraft and aircraft motors, helicopters, trains equipment, space elements, etc., securities, and title documents (meaning that the document gives the holder title to the goods specified in such document); etc., which have their own regulations.

**Key Concepts.** There are essential concepts relevant to security interests under Law 1676. Those concepts are assets that may serve as moveable guarantee, creation, registration, priority and enforcement.

**Types of Collateral.** The guarantees (security) over moveable assets are available to be granted over any type of goods, agreements, or rights subject to an economic valuation by the parties. This allows the lender to take security over tangible or intangible assets, cash available in bank accounts, contracts, receivables, inventory, future assets, among others.

**Creation.** The security is created by means of an agreement between guarantor and guaranteed creditor. The agreement must contain, at least, the following: (i) name, identification and signature of its parties, (ii) maximum guaranteed amount, (iii) description of the asset(s), (iv) description of the guaranteed obligations. This may be document by any tangible means or by an electronic communication which evidences consent of the parties according to Colombian law.

**Registration.** In order for a guarantee over moveable assets to be enforceable against third parties: (i) it must be registered in the Moveable Guarantees Registry (*Registro de Garantías Mobiliarias*, administered by the Confederation of Chambers of Commerce (*Confecámaras*)) or (ii) the creditor must be in possession of the asset. Priority under the guarantee will be given by the date of registration or of giving possession.

<sup>2</sup> Comment from C&C: we understand that by “personal property” you refer to moveable (either tangible or intangible property), as opposed to real or immoveable property. Our answers refer only to moveable property and not to real property.

<sup>3</sup> See answer to question 4 regarding direct, special and judicial enforcement.

Registration with the Moveable Guarantees Registry is made on-line by:

1. Creating a user account in the name of the creditor (i) uploading a certificate of good standing or any similar document that states that the creditor exists and is duly incorporated, notarized and legalized by Apostille or Consulate, if issued abroad, with official translation, if in a language other than Spanish, and (ii) indicating name, country, city and address of domicile, email (principal and alternate), phone number, etc. of the creditor and principal user of the account.
2. Uploading copy of the security agreement and filing an on-line form.

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

**Priorities.** Priority over the moveable asset will be given by the date of registration in the Moveable Guarantees Registry, or by giving possession of the asset to the creditor or by granting control in the case of account control agreements.

Law 1676 also incorporates the concept of the priority acquisition guarantee (*garantía prioritaria de adquisición*). This is a guarantee granted in favour of the creditor which financed the acquisition of a tangible asset by the debtor. Provided this guarantee has been made enforceable against third parties by registration in the Moveable Guarantees Registry indicating that it is a priority acquisition guarantee, it will have priority over any other guarantee, even over previously registered guarantees over the same asset.

## **Question 3**

*What taxes, duties or other fees are payable on these securities?*

**Taxes and Fees.** No stamp, registration or other taxes, duties, assessments or charges of whatsoever nature are imposed by or payable in Colombia upon or in connection with the execution of the security agreement. There is a registration fee payable to the Moveable Guarantees Registry of COP\$30,000 plus VAT of 16% (ie. COP\$34,800; approx. US\$18).

## **Question 4**

*What, generally, is the method of enforcement of these securities?*

**Enforcement.** The following are the possible foreclosure scenarios, depending on whether they have been agreed in the security agreement:

- **Direct Payment:** will be applicable only if creditor and debtor agree that in the case of an event of default, the creditor is paid directly with the asset. The value of the asset will be subject to an appraisal carried out by an expert. Such appraisal will be mandatory for the creditor and debtor.
- **Special Collection conducted before a Notary Public or a Chamber of Commerce:** It is performed in any of the following events: (i) by mutual agreement

between creditor and debtor contained in the security agreement; (ii) if the creditor is in possession of the asset; (iii) if the creditor is legally entitled to retain the moveable asset; (iv) if the equipment has a value of less than twenty (20) monthly minimum legal wages (approx. for 2014 US\$6,500); (v) if the asset is perishable.

- **Judicial Collection:** performed through a summary proceeding in which the creditor may request, if the debtor does not file any objections, the award of the asset in order to obtain complete or partial payment of the guaranteed obligation. The debtor may request, among other things, that before the award, the asset be submitted to auction. If no bidders are present, the asset will be awarded directly to the creditor. This possibility is applicable in case no direct payment or special collection procedure has been agreed upon in the security agreement.

### **Question 5**

*What other issues should be considered when looking at securing such assets?*

**Governing law.** Colombian law (Law 1676, as amended or modified) governs the creation, perfection and direct or special enforcement of security over moveable assets (*garantías mobiliarias*). Judicial enforcement is governed by the Colombian Code of Civil Procedure. Also, Colombian courts will have jurisdiction over the assets located in Colombia.

**Bankruptcy Remote.** Moveable assets given in guarantee may be, as of Law 1676, excluded from the liquidation proceeding of the debtor, provided such guarantee is duly registered.

## Costa Rica

### Taking security over moveable/personal property/collateral in Costa Rica

- **How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

In Costa Rica, no distinction is made between tangible and intangible moveables for purposes of securing collateral. Rather, our jurisdiction distinguishes between moveables that need to be and need not be registered at the Public Registry.

Moveables that can be registered are most often secured by using pledges. These pledges are also registered at the Public Registry and may be enforced once a competent judge finds that a default has occurred.

On the other hand, moveables that cannot be registered at the Public Registry will be able to serve as collateral in the near future, according to the Law on Security Interest over Moveable Assets (in Spanish, *Ley de Garantías Mobiliarias*) which was passed by the Costa Rican Congress in April 2014 and will come into effect in April 2015.

The purpose of the “Law on Security Interest over Moveable Assets” is to increase access to credit in Costa Rica by developing the appropriate legal and institutional framework to facilitate the use of moveable assets as collateral. The need for this law arose when previous Costa Rican legislation only allowed security interests to be created over certain individually-identifiable and tangible assets. This restricted the ability of potential borrowers to obtain credit using security interests over assets that cannot be easily individually identified due to the business cycle, like inventory, and certain intangible assets. The new Law expands the definition of collateral that can be secured, allowing security interests to be created over previously unsecurable collateral. We anticipate that the Law will drastically change the credit market in Costa Rica, and increase opportunities for both lenders and borrowers in the sector.

Moveable securities are enforced via the ruling of a competent judge, by a Notary Public proceeding, or by an arbitration award if the parties agree to it in the corresponding contract.

It is also possible to secure moveables in Costa Rica through Trust Agreements, according to the regulations established in the Costa Rican Commercial Code.

- **What, generally, is the priority of different types of security available for these types of assets?**

Pledges and registered securities in the Public Registry generally have priority over other types of collateral over moveable assets.

When moveables are transferred to a Trust as collateral, all registered pledges and securities must be accepted by the trustee. Registered pledges will also have priority if they are registered pursuant to a request by the trustee.

The “Law on Security Interests over Moveable Assets” establishes special rules of priority over different moveable collateral. Consequently, it would be necessary to study each individual case to determine the applicable priority.

- **What taxes, duties or other fees are payable on these securities?**

To register pledges at the Public Registry, it is necessary to pay Registry fees of 1% of the amount of the pledge, and other minor fees.

Transfer tax and registry fees are applicable to Trust Agreements when moveables that must be registered are transferred. Both expenses must be considered when the moveable is transferred to the Trustee and then when the trustee transfers the moveable to any other party of the agreement or to a third party.

Taxes and fees over moveable collateral have not yet been considered by the “Law on Security Interest over Moveable Assets.”

Stamp taxes to execute agreements in Costa Rica must also be taken into consideration by the parties. However, Trust Agreements are not subject to the payment of stamp taxes.

- **What, generally, is the method of enforcement of these securities?**

As explained above, pledges must be enforced by a competent judge. The judge’s decision will be executed by the Public Registry, which will transfer the corresponding moveable asset to the creditor.

On the other hand, moveable collateral will be enforced by competent judges, public notaries, arbitrators or special repossession proceeding established in the Law, once it takes effect in April 2015. However, to enforce collateral through public notaries or arbitrations, the parties must have reached an express agreement in the corresponding agreement constituting the collateral.

Likewise, collateral will be executed by filing a notice of execution to the Registry of Security Interests over Moveable Assets and delivering said notice to the debtor. Once the notice has been filed, the debtor has the right to terminate the enforcement proceeding by paying the full amount owed to the secured creditor, as well as reasonable enforcement costs, at any time prior to the sale of the asset(s) by the creditor. In the event these amounts are not paid, the execution may proceed according to the procedure chosen by the parties.

Trust Agreements must establish proceedings to transfer the assets to the creditors in the event of default. These proceedings must consider several formalities established in the Costa Rican Commercial Code.

- **What other issues should be considered when looking at securing such assets?**

As mentioned before, moveable collateral is a recent type of collateral established in Costa Rica. It will be possible to use this mechanism once the Law on Security Interest over Moveable Assets comes into effect in April 2015 and the corresponding regulations are issued. This type of security will open up the possibility to secure credit agreements using a wide variety of tangible and intangible assets.

The publication of regulations to the Moveable Securities Law is still pending approval. These regulations will be necessary to be able to grant this kind of collateral.

## Dominican Republic



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### SECURITY INTEREST<sup>1</sup>

- A. Can you describe any recording fees or charges (and how are fees or charges calculated) for perfecting the collateral? For example, describe mortgage recording, or any registration fees, in each case associated with the collateral perfection and filings.
1. The most relevant fees and expenses have to do with the perfection of mortgages over real estate, which entail the payment of a 2% of the secured amount in order to record the mortgage granted. The feekeeping is in addition of other fixed stamps and duties of a lesser value.
  2. Recordation of liens over registered local intellectual property entails a fixed recordation fee of around RD\$4,735 (approximately US\$120) for each trademark, commercial name, etc, affected.
  3. Chattel Mortgages over moveables assets related registration fees depend on the jurisdiction of recordation. This lien is perfected at the justice of peace of the jurisdiction where the assets are located and they charge an administrative fee pursuant to such recording. Justice of Peace in certain jurisdictions have tried to charge, in the past, up to 1% of the secured value, but this is not the norm.
  4. Pledge of Shares in a Dominican Company are usually recorded at the Mercantile Registry of the jurisdiction corresponding to the company and an administrative fee is charged.
- B. Can you describe any stamp duties, registration taxes, or other similar taxes required with respect to the liens in your jurisdiction?

In addition to what is established in item A) above, foreclosure procedures on liens granted over assets located in the Dominican Republic have to be undertaken under the specific procedures foreseen by DR Law with respect to such assets, depending on their nature. This is regardless of the choice of law of the relevant security document. Such foreclosure procedures entail litigation. Once the asset foreclosed is adjudicated (by irrevocable decision of the empowered court), the beneficiary shall pay the transfer tax applicable to such assets in order to obtain the corresponding deed in such beneficiary's name to be able to further dispose of the asset.

Most relevant transfer taxes are as follows:

1. Real Estate: 3%
2. Vehicles: 7%

<sup>1</sup> This document is not a substitute for legal advice or expert advice of attorneys. This document only contains just a summary of basic facts about the granting and perfection of Security Interests in the DR. For specific and in-depth advice on the subject matter you should consult a legal adviser licensed to practice in the Dominican Republic.



**C. What types of property is security interests typically granted in? In particular, is it difficult, unusual, and time consuming, or expensive for Lenders to take a security interest in accounts receivable, inventory, or intellectual property?**

1. **Real Estate:** mortgages are usually recorded by rank in the understanding that 1<sup>st</sup> priority (1<sup>st</sup> rank) is granted upon recordation provided there is no other lien recorded ("first recorded first in right" criteria) or the registered creditor authorizes a recordation superseding its own. However, there are "privileged creditors or credits" whose rights supersede those of previously recorded mortgagees. Privileged creditors are, among others: the local IRS' tax related credits; and employees with respect to their unpaid wages or rights. Recording a Mortgage might be of all possible liens related procedures the most time consuming (and onerous), but not necessarily complicated provided there is no prior recordings on the property, there is no recorded litigious matter affecting the property; there are no unpaid real estate related taxes, among other issues. The Mortgage is granted pursuant to a Mortgage Agreement setting forth the terms and conditions of the same, credit secured, authorization to record, restrictions, default provisions, etc. Upon recordation, the creditor is issued a Creditor's Certificate by the Deed Registrar Office of the relevant jurisdiction attesting to its creditor's rights over the referred property
2. **Stock Pledges:** the procedure to register the same is not a complicated one as it requires, at least for perfection, the least intervention or participation from governmental agencies or authorities; although, in certain cases, with respect to affected regulated entities authorization from the regulator might be required.
3. **Pledge over intellectual property:** the same is perfected upon recordation of the same at the National Office of Intellectual Property (ONAPI). Similarly to the Stock Pledges, it is granted pursuant to an agreement between the parties setting forth the terms and conditions of the pledge, authorization to record, restrictions, default provisions, etc. Upon recordation the creditor is issued a certificated (from ONAPI) attesting to the creditor's rights over the intellectual property.
4. **Chattel mortgages:** these are granted over movable assets (i.e. inventories, vehicles), entails a lien although possession of the assets remain on the debtor. The process to record should be a simple one (filing at the relevant justice of peace) although with respect to vehicles additional actions/precautions are taken such as filing oppositions to their transfer at the Motor Vehicle Department of the local IRS.
5. **Accounts Receivable:** it is possible to attach them with an assignment in guaranty (perfection subject to breach) and a notice to the debtor under the receivables of the assignment and the terms of the same. The issue with this is scheme is that if by the time the Creditor serves notices to the assigned debtor of the "breach" and to make payments directly to the Creditor in question, another





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creditor serves such assigned debtor with a garnishment or an opposition of payment against the assignor (creditor under the receivables in question), such assigned debtor might validly withhold payment until a court decides to whom such assigned creditor should pay. In order to avoid the foregoing it is possible to have an immediately enforceable assignment and serve notice of the same to the assigned debtor; which shall pay directly to the assignee from "day one". The issue with such scheme is that technically speaking is not really a security but an outright assignment of credit.

6. **Liens over Cash:** to our understanding this is not possible in our jurisdiction, in the sense that they do not provide for priority rights to the creditor vis a vis other creditors, unless the cash is represented by a CD or other Instrument or Deed which might be subject to a pledge. There have been mechanisms implemented in order to take control over a guarantor's bank account such as prior authorization to the bank holding the account to release the funds to the creditor when certain conditions are met; or even an assignment in guaranty of the funds, suspended until the occurrence of a default. However, those mechanisms are not necessarily exceptionable vis a vis third parties and even in a case where a creditor might take hold of debtor's cash through the same; they might be subject to claims from other creditors arguing that their rights (access to the debtors' patrimony to collect) have been violated.

- D. **How is the grant of security interest by the Obligors perfected (e.g., effecting a filing, possession of collateral, control of collateral)? How do you perfect a security interest in cash?**

Please see item C) herein above.

- E. **Can the obligors located in your jurisdiction legally provide an upstream guaranty, or a guaranty for the obligations of a sister company, to secure the Obligations? Is there "financial assistance" or similar issues in your jurisdiction that would result from such guaranty?**

A local entity may act as guarantor of other entities' obligations subject to the terms of the relevant credit agreements.

- F. **Are third party waivers, such as landlord waivers, customarily obtained when inventory collateral is located on a third party's premises?**

Not necessarily, unless the landlords have some rights of use over the assets or are required to authorize access to the premises in the event of embargoes, foreclosure, etc., of such assets. Usually, if the assets are located in a warehousing facility controlled by the Landlord or a third party, it is advisable to have the latter's authorization to enter the premises to seize the assets under certain conditions (foreclosure notice, embargo, garnishment, etc.).

## Mexico

### Taking security over moveable/personal property/collateral

(Mexico)

*Introduction.* Many types of security measures are available in Mexico for foreign or local lenders, and may be granted as either rights *in-rem* or rights *in-personam*. The most common types of guarantees are (i) mortgage; (ii) pledges; (iii) guaranty: bond (“*fianza*”) or unconditional guarantee (“*aval*”); (iv) security trust (*fideicomiso de garantía*); (v) credits for machinery and equipment or for raw materials that refer to personal property collateral devices (*crédito refaccionario* or *crédito de habilitación y avío*); and (vi) letters of credit.

In recent years, Mexico has enacted significant law reforms, related to secured transactions. On November 26, 2013, the Mexican Congress approved the financial reform, which includes amendments to 34 different statutes in banking and financial matters, being the main purpose of the reform, to boost credit and investments activities. A primary topic of the reforms related to collateral are: (x) pledges over cash may be perfected and also, used as an alternate extrajudicial payment source upon default of the secured obligation; (y) banks and brokers may act as both trustees and beneficiaries in security trusts securing obligations in which they act as secured parties; and (z) the pledge over securities (*prenda bursátil*) has been amended, in order to allow, in an event of default, the foreclosure of the pledged assets without necessity of a court order by the secured party.

Also, the Commerce Code (*Código de Comercio*) and the Organic Law of the Federal Judicial Branch (*Ley Orgánica del Poder Judicial de la Federación*) have been amended to reinforce precautionary measures to protect lenders, such as the restraining of debtors and/or the seizure of assets, including the seizure of cash when debts are due and payable, even when such debts are not documented in a credit instrument (i.e. promissory note).

#### **Question 1**

*How do you secure moveable (also known as persona property, moveable assets or collateral) both tangible and intangible in your jurisdiction?*

##### 1. Pledges.

There are three kinds of pledges under Mexican law: the commercial pledge, the non-possessory pledge, and the civil pledge. The General Law of Negotiable Instruments and Credit Transactions (*Ley General de Títulos y Operaciones de Crédito*) (“LGTOC”) defines and regulates the commercial pledge and the non-possessory pledge.

### *Commercial pledges.*

A commercial pledge is created by any of the following: (i) the delivery to the lender of the goods or negotiable instruments; (ii) in the case of nominative instruments, by endorsement of the negotiable instruments in favor of the lender, and in the case of instruments subject to registration, by endorsement and the corresponding notation in the registry; (iii) in the case of non-negotiable instruments, by delivery of the instrument or the document representing the credit to the lender, and by recording the lien in the applicable registry or by notification to the debtor; (iv) the deposit of the goods or bearer of instruments available to the lender, along with a third party designated by the parties; (v) the deposit of the goods available to the lender in places to which the lender has keys, even though such places are owned by or located within the establishment of the debtor; (vi) the delivery or endorsement of the instrument representing the goods that are the purpose of the contract, or by the issue or endorsement of a pledge bond relative thereto; (vii) the registration of the contract for the equipment or operating credit in the manner set forth in the LGTOC; and (viii) compliance with the requirements set forth in the LGTOC with respect to account receivables (book credits).

Pledges of fungible goods continue to be effective even when the original goods are substituted by goods of the same type. Although constructive delivery of pledged assets is not recognized for commercial pledges, there are a number of cases where the pledged assets may be placed with a third party or under the joint control of the debtor and the lender. These pledges produce effects against third parties upon registration of the corresponding pledge in the Sole Registry of Moveable Goods ("*Registro Unico de Garantías Mobiliarias*") ("RUG").

The lender may not become owner of the property given in the pledge without the express written consent of the debtor given after the creation of the pledge.

### *Non-Possessory pledge.*

The non-possessory pledge is an *in-rem* right concerning moveable property or rights that guarantee the fulfillment of an obligation while enabling the debtor to maintain the material possession of the pledged assets. This kind of *in-rem* right allows the debtor to use the assets for its commercial activities, even if they are pledged in favor of a lender. The pledged assets may be combined with other property, and even sold by the debtor within the ordinary course of its business. The agreement containing the non-possessory pledge of any moveable asset has to be ratified before a Public Notary if the value of the transaction is equal to or exceeds the equivalent amount, in Mexican Pesos, of two hundred fifty thousand Investment Units (approx. US \$100,000.00 Dollars). The pledge must be recorded in the RUG to produce effects against third parties. The rules of the commercial pledge are additionally applicable to the non-possessory pledge.

### *Civil pledges.*

The Civil Code defines a civil pledge as a property right over chattel for purposes of guaranteeing the performance of an obligation and its priority in payments. Nearly every chattel may be given in pledge, must be evidenced in a written agreement and

is perfected by actual or constructive delivery. In the latter case, the pledge must be recorded in the RUG.

In the event of default by the debtor, the lender may demand, and the judge shall order, the sale of the pledged collateral at a public auction. If the collateral cannot be sold at a public auction, it may be transferred to the lender for two-thirds of the legally required minimum bid. The debtor may agree after default that the lender may retain the collateral in satisfaction of all or a portion of the debt, or that the pledged item may be sold extra-judicially.

## 2. Trusts.

Trusts are widely used for many different purposes and in a wide variety of transactions (such as to manage assets, to transfer properties, to invest in shares and other securities and to create a business concern). Trusts may be used as a vehicle to guarantee debts when the security involves a substantial amount of property. A trust is created through an agreement between the grantor or grantors (*fideicomitentes*), and the trustee (*fiduciario*) must be a Mexican entity, such a bank or brokerage. A beneficiary or beneficiaries (*fideicomisarios*) are also named, and are entitled to the benefits of the trust agreement. Grantors may also be designated as beneficiaries. The trustee will perform its duties through its agents which may accomplish the purposes of the trust by instructions from a technical committee designated by the grantors. Property and rights of any type may be placed in trust. Those trusts affecting real property must be recorded at the Public Registry of Property of the location in which the real property is located. Trusts involving moveable property will be effective against third parties once the following requirements have been fulfilled: (i) if on non-negotiable credit or personal rights, from the date the obligor is notified of the trust; (ii) if on nominative instruments, from the date of endorsement of the instrument to the trustee and the recording of such endorsement in the registry of the issuer if applicable; (iii) if on tangible property, from applicable transfer of title to the trustee; and (iv) if on bearer instruments, from the moment of possession by the trustee.

### *Security Trust.*

In May 2000, the Mexican Congress established a new kind of trust specifically designed as an instrument to serve as guarantee for any sort of debt. The chapter regulating this kind of trust, is found within the LGTOC. Only Mexican credit institutions, insurance and bonding companies, brokerage, warehouses and special purpose financial entities, may be trustees of this new kind of trust. Security trusts may be used to guarantee several simultaneous or successive obligations, even if they are in favor of different lenders. The parties to the trust may agree that the grantor may use moveable assets affected by the trust, combine them with other goods, or instruct the trustee to sell them within the usual course of the activities of the grantor. When the security trust is equal or superior to the amount equivalent in Mexican Pesos of two hundred fifty thousand Investment Units (approx. US \$100,000.00 Dollars), parties shall ratify their signature before a Notary Public. Foreclosure may be achieved extra-judicially in a security trust by incorporating a conventional procedure in the trust agreement, or with the intervention of a court following the procedure applicable to conventional pledges for the sale of assets.

**Question 2**

*What, generally is the priority of different types of security available for these type of assets?*

All preferred and secured credits have to be paid before regular (unsecured) credits and preferred creditors are ranked based on the granting and filing, of the secured interest before the RUG. Credits secured by a pledge or mortgage have a preferred collection right, except for certain privileged rights, such as employee-related claims and tax debts --*generally in bankruptcy procedures*--. This preferential right for employees and taxes can be avoided with the security trust, since under Mexican law it is established that the assets transferred to a trust cease to form part of the debtor's patrimony.

**Question 3**

*What taxes, duties or other fees are payable on these securities?*

Taxes. There are no taxes or specific requirements for deducting or withholding any tax from the proceeds of a claim under a guarantee or the proceeds of enforcing security. The only tax that may be targeted is the one derived from any income or liquidated damages.

Fees. The fees for the creation and perfection of a security interest are basically, notary public fees and registration costs before the RUG. It is a common practice that all fees and expenses are paid by the borrower, but it is necessary to agree on this in the agreement. Cost may be incurred upon enforcement in an event of default.

**Question 4**

*What, generally, is the method of enforcement of these securities?*

The enforcement of a pledge or a security trust has to be claimed through a legal action. Obtaining a final judgment (enforcement and collection) may take approximately from 12 to 18 months. It is worth mentioning that there are no restrictions for foreign lenders, compared to those applicable to domestic lenders, related to filing suits or foreclosures on collateral security. Mexican courts recognize and enforce arbitral awards without re-examination of merits; however, Mexican courts will not enforce an arbitral award contrary to public law.

Security trust foreclosure, may be achieved extra-judicially. Please refer Question 2 above.

**Question 5**

*What other issues should be considered when looking at securing such assets?*

Before the creation of the security it is essential to verify that there are no prior liens created over the collateral, as well as performing a search at the RUG and at the Public Registry of Property and Commerce. Also, it is necessary to include in the agreement a declaration of the borrower that the assets are of its own and free of any kind of liens or limitation of ownership. Obtaining a certificate from a board member, in that regard, is also advisable.

## Panama

### Taking Security Interest in Panama

A preferred lien or security interest may be created by contract under Panama law either as a (i) mortgage or (ii) pledge. Mortgages may be either “real property mortgages” when they are created in respect of immovable property, or “chattel mortgages” when they are created in respect of moveable property or rights. Pledges may be created over tangible and intangible moveable property.

#### **(1) Real property mortgages**

**Overview.** The governing law of the real property mortgage in Panama is Title XIV of the Civil Code.

**Types of Collateral.** In addition to property that is traditionally considered “real estate”, the definition of real property in the Civil Code extends to certain moveables that by legal fiction have been declared to be an immovable. These include anything attached to the land permanently and objects placed in buildings by the owner which reflect an intention to permanently attach them, as well as machinery, equipment, etc. destined by the owner for the exploitation of an industry. Government concessions for the construction or exploitation of public works, such as electricity generation, as well as easements and other “in rem” (“*derechos reales*”) rights may also be mortgaged. Legislation has also extended the use of real property mortgages to certain moveables, such as ships.

**Creation.** In order to create a mortgage, the owner of record of the land must enter into a mortgage contract with the lender by means of a public deed executed before a notary public in Panama, which must then be filed and recorded at the Public Registry Office. Since recorded mortgages are satisfied in the order of filing at the Public Registry Office, this type of mortgage (known as a “hipoteca de máximo”) is a useful financial instrument. However, in order to preserve the preference afforded by the early filing date, upon disbursement of the principal, a supplementary deed indicating the amount of the indebtedness and date of repayment must be filed.

**Enforcement.** Enforcement of a mortgage is by way of an executory proceeding known as a “*proceso ejecutivo hipotecario*” whereby the court determines on the face of the instrument presented to it that there is in fact a debt that is past due and payable and, in the absence of proof that the debt has been paid, will order the judicial sale of the mortgaged property. The obligations secured must be clear and past due, the fact that a default has occurred should be readily ascertainable from the contract itself, and the amount owed must be determined or determinable.

#### **(2) Chattel Mortgage**

**Overview.** The governing law of the chattel mortgage in Panama is Law No. 129 of December 31, 2013.

**Types of Collateral.** A chattel mortgage can be created over the following types of collateral: current and future property rights; intellectual property rights; accounts receivables, letters of credit or similar rights; stocks, quotas or equity interest of any company, association, consortium or other organization; any licit forms of chattel; inventory or value fluctuating asset; and tangible or intangible, rights, contracts or stocks.

**Creation.** There are two essential legal requirements for the creation of a chattel mortgage: the execution of a written mortgage agreement and, in most cases, the filing of the same with the Public Registry. Notwithstanding the foregoing, registration is not required in certain limited cases for perfection. The mortgage agreement must meet certain requirements, such as a description of the parties, and the mortgaged collateral, its location, among others. The chattel mortgage does not require that possession of the encumbered property or asset to be delivered to the lender to mortgager.

**Perfection.** Perfection is achieved in most cases by filing the mortgage agreement with the Public Registry. If the amount secured by the mortgage exceeds of US\$20,000, the agreement must be executed in public deed form.

**Enforcement.** There are two types of enforcements: judicial enforcement which is done through the court system and extrajudicial enforcement which must follow the execution procedures established in Law 129.

### (3) Pledges

**Overview.** The governing law of the pledges in Panama is the Civil Code and the Code of Commerce.

**Types of Collateral.** Moveables that are located in the Republic of Panama and that are susceptible of being possessed and delivered may be pledged under Panama law by the owner as security for a principal obligation.

**Creation.** Delivery of the object of the pledge to the creditor or to a third person chosen by the parties to act as depositor is an essential condition. Delivery may be real (actual physical possession by the creditor or third-party custodian) or symbolical. If the pledge consists of bills of exchange or negotiable instruments ("*títulos a la orden*"), the pledge may be created by the endorsement of the corresponding negotiable instrument that includes language creating the security interest on the document. If the pledge consists of shares, obligations or other nominative titles ("*títulos nominativos*"), delivery may be accomplished by simply delivering the titles to the pledgee or to a third person acting as a depositary and the annotation of the lien in the relevant registry. A pledge must be created in writing either by executing a public deed, or by executing a private document.

**Perfection.** A pledge will not be enforceable against third parties unless its existence, and the date on which it came into effect, can be proven with certainty. Proof of the date of execution, or "date certain", is usually accomplished by executing a public deed or complying with the requirements for the recognition of a private document stipulated in the Code of Civil Procedure. An exception to this rule is with respect to pledges securing bank loans, which are deemed to be valid and affect third parties as of the date that the private document is created without further authentication.

**Enforcement.** Enforcement of a security interest created by way of a pledge is predicated on the principle that the pledge grants the creditors the right to be paid with the value of the pledged assets and with preference to other creditors. Accordingly, in order to realize the value, it is essential that, upon default, the pledged assets be sold to pay the pledgee. The Code of Commerce provides that the parties may contractually provide for a special extrajudicial sales mechanism and, if none is stipulated in the pledge agreement, the pledgee or depositor may dispose of the asset through a private sale, following an appraisal process. The parties may also establish in the pledge contract the method to be used to determine the value of the pledged item in the event of sale, or include a provision in the pledge

agreement allowing for appropriation of the pledged property following an appraisal. The Code of Civil Procedure also provides that the enforcement of the pledge can be done by way of a judicial auction ("*proceso ejecutivo prendario*") although this mechanism is seldom used.



Peru**Questionnaire – Answers under Peruvian law****Question 1****How do you secure moveables (also known as moveable property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

Under Peruvian law, the only guarantee that applies in respect of moveable goods is the pledge (*“garantía mobiliaria”*). The provisions regulating such guarantee are contained in Law No. 28677 “Law on the Guarantee over Moveable Assets” (*“LGM”*, for its acronym in Spanish). Article 3° of the LGM defines a “pledge” as the encumbrance of a moveable asset through a contract or a unilateral act to secure compliance with an obligation. In that sense, the pledge is the only legal mechanism established for this purpose.

A pledge, which may include any kind of moveable asset, both tangible and intangible, present or future, is established through an agreement between the moveable asset owner or future owner (debtor or not) and the creditor, or by a unilateral act granted by the moveable asset owner or future owner.

The pledge agreement or act must be in writing and needs to comply with certain specific and essential information such as the creditor’s identity, the amount of collateral, the secured obligation (which may be an existing obligation, a future obligation or even a contingent one), the moveable asset’s value determined by agreement with the creditor, the pledge’s term, the name of the third party authorized to sell the pledged property in the way indicated in the pledge agreement or pledge act (or even transfer it to the creditor, if so permitted), if the guaranteed obligations are not paid when due, or if any event of default occurs, among others. Unless otherwise indicated, the pledgor may retain the use and/or disposition rights over the secured assets, so the physical delivery of the same to the creditor or a third party on its behalf is not required for the validity of the pledge.

The pledge may be registered in the Pledge and Security Interests Registry (*“Registro Mobiliario de Contratos”*), if the pledged assets do not have an specific registry, (such as commodities, furniture, office supplies, etc.); or in the Registry of Goods and Assets (*“Registro Jurídico de Bienes”*) if the property can be identified and has an specific registry (aircrafts, vessels, automobiles, mining machinery, etc).

Pledges over securities and over warrants issued by Bonded warehouses representing goods in deposit, require to be made by endorsement and in certain specific instruments, such as shares, bonds and warrants, the pledge needs to be recorded in the corresponding ledger under control of the issuer or the warehouse as

applicable. Registration in the Public Registry under the LGM is also permitted and suggested.

Notwithstanding, registration in the Public Registry is not required for the perfection of the pledge (the pledge will be valid and enforceable from the date on which the collateral agreement is executed). However, if the pledge is not registered, the secured creditor may not enforce such pledge over third parties (buyers or other creditors having a registered right or security over the same property), which may acquire or foreclose (if acting in good faith) the moveable asset and subsequently argue preferential rights, based on the good faith protection granted by the Public Registry. Therefore, in order to avoid such a risk, the secured creditor should record its pledge before the Public Registry.

Where more than one security interest is recorded in the corresponding registry, unless otherwise agreed, preference will be according to the registration date. Secured obligations will thereof be following said preference with the product of the sale

Taking into consideration the aforementioned, the following scenarios may be present whenever a pledge right over moveable assets exists:

- (i) Pledge with physical delivery to the secured creditor or a third party named by it, but without any registration.
- (ii) Pledge with physical delivery, plus registration on a Registry of Goods and Assets.
- (iii) Pledge with physical delivery, plus registration on the Pledge and Security Interests Registry.
- (iv) Pledge without physical delivery, without any registration.
- (v) Pledge without physical delivery but with registration on a Registry of Goods and Assets.
- (vi) Pledge without physical delivery but with registration on the Pledge and Security Interests Registry.

The first three scenarios grant the secured creditor the possibility to enforce the pledge over the assets wherever they may be, even if property rights had been transferred to a third party or affected with a new encumbrance. This ability is based upon the physical possession exerted by the creditor and/or a designated third party, or in the protection granted by the Registry of Goods and Assets.

In scenarios (iv) and v), (and despite the registration in v), enforcement may be limited or delayed due to the lack of physical control over the assets; due to the fact that the Pledge and Security Interests Registry, does not allow a clear identification of the pledged assets, so a third party may challenge creditors right on actual possession and good faith. In the last scenario, actual enforcement may also be delayed, but if transferred to a third party by the pledgor, the creditor may still foreclose the assets. However, if any of the above referred situations is present, the law provides for criminal sanction against the owner that refuses to deliver the assets for sale upon request of the creditor, or if the same are being transferred despite the existence of the collateral.

## Question 2

### What generally is the priority of different types of security available for these types of assets?

As mentioned before, Peruvian law regulates only one type of security for moveable assets, i.e. the pledge ("*Garantía Mobiliaria*"). Therefore, the priority is not determined upon the type of security, but because of the date of creation of the encumbrance, or if registered, the date of its registration in the corresponding public registry. The secured creditor has a priority over any unsecured creditor regarding the pledged assets. Also, the secured creditor has a priority over any third party having a security right granted or obtained over the same assets, after the creation of the first collateral. However, if the second pledge is recorded and the first one is not, or if it is recorded after the latter, then the one recorded in first place will have preference.

It is important to mention out that the priority rights may be affected in situations in which the pledgor is put in liquidation because of insolvency or bankruptcy, as according to the insolvency law, certain credits such as labor dues and labor contributions are preferred rights.

If the same assets are affected by more than one pledge, any of the creditors may enforce its collateral. The enforcement shall be conducted by the common representative appointed upon the establishment of the first ranked pledge, under the rules and provisions of the corresponding pledge agreement. If the sale is not completed within 90 days, the sale process will be then transferred to the common representative appointed under the second ranked pledge agreement, and so on.

If the pledge agreements do not contemplate special provisions for the sale of the secured property, or if a judicial sale has been agreed with the party entitled to conduct the sale, then such judicial sale shall take place.

## Question 3

### What taxes, duties or other fees are payable on these securities?

There are no taxes levied on the granting or the registration of a pledge. However, it must be noted that if registration with the Public Registry is requested, then a registration fee, equivalent to a percentage of the amount of the pledge with a maximum of one UIT (currently equivalent to 3,800 PEN or 1,380 USD) will apply. It should also be noted, that, fees of the public notary that participates in the registration may also apply.

## Question 4

### What generally is the method of enforcement of these securities?

Enforcement of a pledge right over moveable assets can be carried out by: (i) extrajudicial enforcement (ii) judicial enforcement<sup>4</sup>.

<sup>4</sup> Nevertheless, enforcing a security interest by way of a judicial proceeding is often a costly and time consuming effort, even in short-form proceedings.

To allow for a extrajudicial enforcement, the following requirements shall be complied with:

- Both parties must have designated a third party as a common representative for purposes of the enforcement and sale of the property. The law prohibits that the secured creditor acts as common representative.
- The offer price must not be lower than 2/3 of the assets value. Otherwise the sale will be null.
- Prior to the enforcement, the secured creditor is required to notify the debtor, the pledgor and the common representative, via notarized letter, the amount due and payable. If after three days of the receipt of the notarized letter, such obligation is not duly complied with, then the common representative may initiate the process for the sale of the pledged assets.
- The common representative is required to abide to the rules in the pledge agreement or act, for the conduct of the sale. Any amount obtained from the sale shall be applied first to the sale expenses and fees and to the creditors, following their priority.
- If the agreement stipulates that the creditor may elect to receive the assets in payment of its credit, then the common representative is entitled to execute on behalf of the pledgor the documents necessary to transfer property rights to the creditor, up to the amount of its credit. If the agreed value for such a transfer is larger than the obligations secured by it, the creditor shall deliver to the common representative any balance within ten days after the communication of the amount due was received.

In order to take possession of the pledge assets for purposes of enforcement, the law provides for auxiliary measures if the pledgor does not comply with the delivery of the same to the common representative or other person named to that effect. In this sense, the law allows the creditor to directly take possession of the asset wherever it is possible (refraining from any act of violence). If this is not possible, the secured creditor may request from the judiciary the issuance of an incautación order.

Judicial enforcement requires the initiation of an enforcement proceeding with local courts, who will order the sale of the assets in a public auction or through the mechanism established in the security agreements. Under this procedure, the debtor whose property is attached may only challenge the enforcement mechanism claiming the formal nullity of the title deed from which the security originates non-demandability of the secured obligation or extinguishment of the secured obligation. In case the debtor is in no condition to prove any such formal defense, the court proceeding will be followed and shall conclude with the court sale of the attached goods.

Consequently, subject to verification of the aforesaid validity and demandability requirements of security interests, Peruvian courts will order the enforcement of the security and the auction sale of the collateral in order to pay the loan. Although the exact length of the court proceeding at all levels cannot be anticipated, it should be borne in mind that the enforcement proceeding of securities is designed to avoid intentional delays by the debtor whose property is attached.

The estimated time for the enforcement of a pledge under regular circumstances, is: (i) for a judicial enforcement: between 12-18 months; and (ii) for a non-judicial enforcement: 3-8 months. No governmental authorizations are required for this enforcement.

### **Question 5**

#### **What other issues should be considered when looking at securing such assets?**

Under Peruvian law, both the pledgor and the depositary – if any - have the duty to take good care of the pledged assets in their possession. They cannot take actions that may damage or affect the value of the asset. To assure that the pledged assets are been kept

in good care, it is recommended including periodical visits and or reports in the pledge agreement, to verify the status of the pledged assets. In an event of non compliance of the aforementioned obligations the secured creditor can choose between an early enforcement of the assets, their delivery to a third party, or their replacement with other assets with at least the same value.

As explained above registration of the pledge is strongly suggested even though it is not a condition for the effectiveness of security interests (the pledge will be valid and enforceable from the date on which the collateral agreement is executed), but rather for their binding nature towards third parties and for purposes of priority over other existing (but unregistered) security interests, or subsequently created over, the same assets and registered. Also, if the pledge is created over future assets, it is recommended that the pledgor grant powers of attorney to a third party designated by the creditor, so he can execute the necessary documents required for registration of the pledge upon existence or acquisition of said assets.

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## USA

### **Taking security over moveable/personal property/collateral in the U.S.**

#### **Question 1**

*How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?*

**Overview.** In the United States, security interests in personal property (both tangible and intangible) are the province of Article 9 of the Uniform Commercial Code (“UCC”). The UCC, which has been adopted in every State (with limited variations), governs the creation, validity and enforcement of security interests.

**Key Concepts.** There are three (3) essential concepts relevant to security interests under the UCC. Those concepts are creation, attachment and perfection.

**Creation.** Depending on the type of collateral, a security interest is created by delivery of possession or control of the collateral (e.g., in the case of a deposit account or letter of credit rights) or for most other types of tangible and intangible collateral via a written security agreement signed by the debtor. It is not necessary for the creditor to sign a security agreement. It however must contain an adequate description of the property. As a general rule, that description does not need to be overly specific but must only reasonably identify what is being described. It is important to note that the UCC does not define the term “default.” Hence, a secured party should always include in its security agreement a definition of “default” that eliminates a dispute over whether a certain act or failure to act does in fact constitute a default. Upon a default, a secured party will want an express right included in its security agreement to accelerate the debt.

**Attachment.** The security interest will attach when value is given by or on behalf of the secured party. Any consideration sufficient to support a simple contract constitutes value.

**Perfection.** Perfection occurs when the creditor establishes its priority in relation to other creditor’s interests in the same collateral. Perfection is generally achieved by public notice through the proper filing of an unsigned “financing statement” that provides the names of the debtor and secured party and an indication of the collateral that it covers in the appropriate public records. The security agreement itself may be filed instead provided that it contains the requisite information. A super-generic description (e.g., “all assets” or “all personal property”) is sufficient in a financing statement but it is inadequate in a security agreement. Although usually driven by the location of the debtor as described below, where one must file also can depend on the type of collateral involved. Hence, a clear understanding of the definitional classifications of different types of collateral under the UCC is essential. Moreover, the rights of parties who purchase collateral from the debtor are different depending on those various classifications of collateral and issues of priority between conflicting claimants as well as the secured party’s rights after default can also turn on the classification of the type of collateral. There also are a limited few types of security interests as to which no public notice step is required for perfection (e.g., purchase money security interests in consumer goods other than automobiles).

**Types of Collateral.** Article 9 of the UCC defines and applies to the following general types of collateral: goods, consumer goods, equipment, inventory, farm products, accounts, instruments, promissory notes, chattel paper, letter of credit rights, supporting obligations, healthcare insurance receivables, general intangibles, payment intangibles, software, deposit accounts, investment property and commercial tort claims. It is interesting to note that an item may constitute different types of collateral at different stages of its life cycle. For example, a dozen eggs may be “farm products” while on the farm, “inventory” while sitting on the supermarket shelf and become “consumer goods” after they have made their way to your kitchen. There are special rules under Article 9 relevant to after acquired property as well as purchase money security interests and with respect to the rights to proceeds of collateral. Similarly, there are special rules dealing with future advances.

**Place and Effect of Filing:** The location of the filing is determined generally by the debtor’s location regardless of the type of collateral. The rules regarding the debtor’s location are subject to a number of qualifications and can be quite complex. The location of an entity that itself is created by a filing with the state (e.g., corporations, limited liability companies, registered business trusts and limited partnerships) is the state where that filing is made. Other debtors (e.g., a general partnership) is the location of its place of business or, if it has multiple places of business, the location of its chief executive office. If the debtor is an individual, its location is the individual’s principal residence. In most states the office of that State’s Secretary of State is the proper filing office. Certain types of collateral however require local filing in the office where a mortgage on real estate would be filed (typically the office of the local county recorder) such as in the case of timber and fixture filings. Typically, filing is the only manner of perfection for accounts, general intangibles, fixtures and agricultural liens. As previously noted, certain types of collateral (e.g., deposit accounts and letter of credit rights) can only be perfected by physical control or possession.

Transactions for which a system of filing has been established under federal law (e.g., patents, trademarks, boats and aircraft) are exempted from State filing provisions. In addition transactions covered by State certificate of title statutes (e.g., automobiles) providing that security interest must be indicated on the certificate itself are exempted from filing requirements.

It should be noted that filings are typically only effective for five (5) years. Continuation statements may be filed to extend for an additional five (5) years. Once the secured obligations are extinguished, a secured party has an obligation upon demand to file a termination statement thereby giving public notice of the termination of its security interest.

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

**Priorities.** A perfected security interest has priority over a conflicting unperfected security interest. Any such unperfected security interests are subject and

subordinate to the rights of those parties holding perfected security interests under the Uniform Commercial Code. Where there are conflicting security interests, the basic rule of “first in time, first in right” will apply. Conflicting perfected security interests rank according to priority and time of filing or perfection assuming there has been no subsequent lapse in filing or perfection. The first security interest to attach or become effective has priority if conflicting security interests are both unperfected.

### **Question 3**

*What taxes, duties or other fees are payable on these securities?*

**Taxes and Fees.** Taxes (if any) and filing fees will vary from State to State. In Illinois for example, there is no tax but there are fairly nominal filing fees when filing a financing statement. Each state has its own scheme which must be consulted.

### **Question 4**

*What, generally, is the method of enforcement of these securities?*

**Enforcement.** Certain types of collateral may be repossessed peaceably upon a default or the secured party may resort to legal action to gain possession. Generally collateral is then disposed in full or partial satisfaction of the debtor’s obligation through a UCC sale. When a secured party intends to dispose of the collateral, the overriding concept that it must bear in mind is always one of “commercial reasonableness.” Every aspect of the maintenance and disposition of the collateral must be handled in a commercially reasonable fashion. These include preserving the collateral, giving appropriate notices of proposed dispositions of collateral, notice of public or private sale and the conduct of the sale itself. Sales proceeds derived from the sale are applied first to expenses relating to the repossession and preparation for sale (including attorney’s fees), then satisfaction of any senior secured debt and lastly the satisfaction of any subordinate liens. Debtors typically only have very limited rights of redemption. In some cases a secured party may accept collateral in discharge of indebtedness rather than conducting a public or private sale of the same.

### **Question 5**

*What other issues should be considered when looking at securing such assets?*

**Governing law.** There are certain variations to be found from state to state in their adopted versions of Article 9 of the UCC. Hence, governing law is a relevant consideration. The law of the debtor’s location generally governs the perfection, effect of perfection or non-perfection and priority of a security interest perfected by filing. However, if perfection is by possession, then the law of the state where the collateral is located typically governs perfection, the effect of perfection or non-perfection and the priority of such security interest. In addition with respect to tangible collateral perfected by filing, the law of the jurisdiction where the collateral is located governs the effect of perfection.



## Australia

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under Australian law

#### Terminology

**Attachment** – what occurs when a Security Interest is created over collateral to which the Grantor has transferable rights and the Secured Party has provided value or the Grantor has performed an act creating the interest (eg. entering into a Security Agreement or a declaration of trust).

**Collateral** – The personal property the subject of a Security Interest. Personal property is any property apart from real estate (land) and any fixtures attached to the land. Certain licences and liens are also excluded.

**Financing Statement** – the form which when completed and lodged on the PPSR effects the registration of the Security Interest.

**Grantor** – the person or entity who has transferable rights over the collateral and which grants the Security Interest.

**Perfection** – the act of establishing priority of a Security Interest.

**Secured Party** – The party who takes the Security Interest (and Secured Party Group has the same meaning but can include more than one Secured Party).

**Security Agreement** - an agreement in writing between the Secured Party and the Grantor which is signed or adopted by the Grantor and which grants the Security Interest.

**Security Interest** – an interest taken in personal property under a transaction that, in substance, secures payment or performance of an obligation. There are deemed security interests under the PPSA which include PPSA Leases, being leases of personal property for over 1 year or for an indefinite period, retention of title arrangements and commercial consignments.

**Verification Statement** – the notice of registration which is issued by the registrar to the Secured Party confirming the registration of a Security Interest.

#### QUESTION 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

## Overview

In Australia, the principal legislation governing all securities over personal property, both tangible and intangible, is the *Personal Property Securities Act 2009* (Cth) ("**PPSA**").

A Security Interest over personal property will generally be secured and enforceable against a third party if the interest is attached to the collateral, as by the "attachment rule" set out in s 19(2), and if the conditions in s 20 are also met.

The "attachment rule" provides that the Grantor must have rights in, or the power to transfer rights in, the collateral, and either value must be given or the Grantor must perform an act by which the interest arises.

The conditions in s 20 can be briefly summarised as the party needing to either possess the Collateral, have perfected the security interest by control over that collateral, or there must be a security agreement which is in writing, signed or adopted by the Grantor and contains a description of the Collateral. The Collateral can be described specifically, as "the grantor's all present and after-acquired property", or as "the grantor's all present and after-acquired property" with specific exceptions.

In Australia, a Security Interest that is perfected has priority over a Security Interest that is not perfected. Further, unperfected security interests will lose title to most purchasers, and their whole interests on liquidation or bankruptcy.

A Security Interest may be perfected by:

- registration on the Personal Property Securities Register ("**PPSR**");
- physical possession (of tangible assets);
- control (over controllable property); or
- force of the PPSA (temporary perfection under some provision of the PPSA).

It is important to note that perfection can occur without registration on the PPSR. This means that the PPSR will not necessarily be a complete record of all Security Interests over personal property.

The PPSA commenced operation on 30 January 2012, and established the PPSR as a single national register for Security Interests in Australia.

As a result of the PPSA, it does not matter what personal property is being secured as this no longer dictates the type of security. All that is needed is a general security agreement or a specific security agreement which covers that property.

## Perfection

Perfection is the mechanism by which a Security Interest may be protected from competing Security Interests and third party interests.

In order to be perfected by registration, possession or control a Security Interest must have first attached to the collateral and be enforceable against third parties.

## Perfection by registration

In order for a Security Interest to be perfected by registration on the PPSR, the registration must be effective with respect to the collateral. That is the Security Interest must have attached to the collateral and the correct information describing the collateral, the interest and the parties must be entered into the register.

PPSR registrations can be made online on the PPSR website [<http://www.ppsr.gov.au/>].

Once a Financing Statement is completed and lodged, the PPSR will send an email with a Verification Statement and a Registration Token to the Secured Party.

For consumer transactions, a notice of the Verification Statement must be served on the grantor as soon as practicable after the registration.

For amendments and discharges, the Registration Number from the Verification Statement, Registration Token and Secured Party Group numbers as well as the Secured Party Group Access code will be needed.

## Perfection by physical possession

Where the collateral is tangible personal property, physical possession by the secured party can be sufficient to perfect the Security Interest.

Intangibles, such as an investment instrument (including shares and debentures) that is not evidenced by a certificate or an intermediated security cannot be perfected by possession. Where the collateral is an investment instrument which is contained in a physical record, then possession must be actual possession of that certificate or instrument.

## Perfection by control

Perfection of the Security Interest by control only applies to "controllable property".

Only Security Interests in the following kinds of collateral may be perfected by control:

- an authorised deposit-taking institution ("**ADI**") account in relation to which the ADI is the secured party;
- an intermediated security;
- an investment instrument;
- a right evidenced by a letter of credit that states that the letter of credit must be presented on claiming payment or requiring the performance of an obligation; and
- certain negotiable instruments which are not evidenced by a certificate.

For example, a secured party has control in the case of an ADI account, where it is the ADI, or can direct the disposition of funds from the account without reference to

the grantor (eg a POA, or charge over deposit) or becomes an assignee of the account with the ADI.

Control may be established notwithstanding concurrent rights of the grantor remaining with regards to dealing with the collateral.

### **Perfection by force of PPSA**

The PPSA provides for temporary perfection or perfection of Security Interests to be obtained in relation to certain types of collateral such as:

- collateral moved to Australia;
- proceeds not included in the registered description of collateral or arising from the collateral being perfected other than by registration;
- transferred collateral (over which a secured party has a perfected Security Interest);
- goods or documents of title returned to the grantor for dealing;
- negotiable and investment instruments returned to the grantor for dealing; or
- goods in transit when a bailee takes possession of the goods and issues a negotiable instrument of title.

### **QUESTION 2**

*What, generally, is the priority of different types of security available for these types of assets?*

In Australia, a Security Interest that is perfected has priority over a Security Interest that is not perfected.

### **Priority time**

Section 55(4) introduces the concept of “priority time” for determining when a Security Interest in collateral will be deemed to have commenced. A priority time will usually, although not necessarily, be the earliest time that the Security Interest is perfected.

The time of perfection will only be a priority time if the collateral has been continuously perfected from that time. If there is a break in perfection, the priority time will change from the earliest time of perfection to the later time from which the Security Interest was continuously perfected.

Generally, the priority time for a Security Interest in collateral is:

- a) Perfection by registration – the registration time;
- b) Perfection by physical possession – the time that the secured party takes physical possession of the collateral; and
- c) Perfection by force of the PPSA – the time when perfection is deemed to occur.

### **Default priority rules**

To determine priority, the PPSA has default priority rules and a number of more specific rules. The default rules are:

- a) where there are no specific priority rules for a situation, the PPSA applies the default priority rules which are set out in Section 55 of the PPSA;
- b) the priority between unperfected Security Interests in the same collateral is to be determined according to the order of attachment of the Security Interest;
- c) perfected Security Interests have priority over unperfected Security Interest; and
- d) priority between two or more perfected Security Interests in collateral is to be determined by the priority time for each Security Interest occurs.

### **Other rules**

The PPSA sets out specific priority rules for a variety of situations such as where:

- a) a party has control of collateral;
- b) a party has a purchase money Security Interest (PMSI) in collateral;
- c) a party takes a non-PMSI interest in accounts;
- d) Security Interest taken in crops or livestock;
- e) collateral is transferred in such a way so that there are two Security Interests given by two different grantors in the same collateral; or
- f) there is a competition between a Security Interest and a statutory interest.

### **QUESTION 3**

*What taxes, duties or other fees are payable on these securities?*

#### **Mortgage duty**

In Australia, the only state in which duty is payable on an amount secured by a mortgage is New South Wales. The amount secured by a mortgage is the amount of any advance made under an agreement, understanding or arrangement for which the mortgage is security.

Mortgage duty must be paid within 3 months after the date of the first signing the document or the date of an advance.

The rates of mortgage duty can be found on the website of the Office of State Revenue of NSW [<http://www.osr.nsw.gov.au/>].

#### **PPSR registration fees**

A fee will apply to the creation of a registration on the PPSR depending on the duration of the registration, and whether you include any attachments:

- register financing statement for an undefined duration: \$140
- register financing statement where duration is 7 years or less: \$8
- register financing statement where duration is more than 7 years but less than 25 years: \$40
- attach a document to a financing statement: \$4

Fees also apply for certain amendments to a financing statement.

Discharges of a Security Interest are free.

#### **Question 4**

*What, generally, is the method of enforcement of these securities?*

Chapter 4 of the PPSA includes enforcement provisions dealing with seizure, disposal and retention of collateral.

The provisions under the PPSA are supplementary to and not exclusive of the rights and obligations that parties may have under the security agreements or other legislation.

Any secured party, irrespective of its priority, can commence enforcement proceedings

A secured party may seize collateral by any method permitted by law where the grantor is in default under a security agreement. Where collateral cannot be physically removed, "apparent possession" may apply by signage being placed or other notifications.

Once collateral has been disposed of or proceeds seized, the distribution rules apply in the following order:

- Amounts owed to those with interests in collateral with higher priority to secured party;
- Reasonable expenses (if covered by Security Interests);
- Higher ranking Security Interests to the secured party;
- Secured party;
- Lower priority holders; and
- Grantor.

The enforcement provisions apply differently to consumer property than to commercial property. If the personal property is used predominately for personal, domestic or household purposes, then certain remedies are not available to the secured party, including:

- Disposal of property by lease or licence
- Collection and application of liquid property
- Disposal by sale where property acquired by enforcing party
- Retention of property by enforcing secured party

#### **Question 5**

*What other issues should be considered when looking at securing such assets?*

- The PPSA does not preclude secured parties making their own arrangements regarding priorities. As in some other jurisdictions it is possible to take security over assets which are already the subject of other security interests and enter into a priority agreement with other secured parties.

- Identifying the Grantor and ensuring the correct data is entered into the PPSR is very important. The regulations specify the identifiers to be used for registrations, for example when the Grantor is a company the security interest should be registered against the company's Australian Registered Body Number ("ARBN") or if the company does not have one, then the company's Australian Company Number ("ACN"). In the case of serial numbered goods ( motor vehicles, planes, ships) the registration must be made against the serial number of those goods, being the vehicle identification number ("VIN") or Chassis number if a VIN is not available and so on. If the correct identifier is not used the security will be invalid.
- Due to some transition issues in migrating data from the old registers to the PPSR there are some errors which have not been able to be rectified. Some charges which were in the Australian Securities & Investments Commission's register were not transferred, some were transferred as All present and after acquired property securities when in fact they were only fixed charges and should have been transferred as specific securities over specific collateral only. There were also some issues with those charges having been registered against the Australian Business Number ("ABN") for a company instead of the ACN so a search of both ABN and ACN should be made when checking on whether any securities exist against a company.

## China

### Taking security over moveable/personal property/collateral in China

#### Question 1

How do you secure moveable (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

Under PRC laws and regulations, the property right which technically does not fall into the scope of moveable assets, is still the main kind of intangible property, therefore in this Memo, for the intangible assets, our analysis will mainly focus on the property rights, i.e., the share equity, receivables.

In practice, mortgage and pledge are commonly used for the security of tangible moveables and pledge is used for the security of property rights.

#### I. Mortgage

A. Mortgage refers to an obligor or a third party mortgages his properties to the obligee, without transferring the possession of such properties, in order to ensure the payment obligation of the obligor.

Most tangible moveables could be mortgaged, i.e., production equipment, raw and semi-finished materials, semi-finished products and finished products, automobiles, vessels and aircraft under construction, means of transportation. The mortgage established over tangible moveables will become effective when the mortgage contract comes into effect. Notwithstanding if the mortgage interest is not registered with the regulatory department, the mortgage shall not be used against a bona fide third party.

B. There are mainly three kinds of mortgage in practice.

- General mortgage: the mortgage is established over specific property or over a specific type or types of property for certain amount of indebtedness;
- Maximum amount of mortgage: a mortgagor and a mortgagee agree to use the mortgaged property as security for a series of indebtedness over a certain period of time up to a maximum amount;
- Floating mortgage: enterprises, self-employed industrial and commercial households, agricultural producers and distributors may mortgage their all (existing and anticipated) production equipment, raw and semi-finished materials, semi-finished products and finished products. If the debtor defaults or the conditions for enforcement of the interest, as agreed upon by the parties concerned, arise, the creditor shall have priority in having his claim paid with the moveables which the mortgagor have at the time of enforcement. The subject of the mortgage is not fixed, i.e., assets will fall out of charge when disposed of and will come into charge when acquired.



## II. Pledge

Pledge refers to where a debtor or a third party pledges moveables or property rights to the creditor by transferring the possession of such properties to the creditor to ensure the payment of debts. Generally, moveables and most property rights i.e., a bill of exchange, cheque, promissory note, certificate of deposit, bond, receivables, equity share, could be pledged.

For tangible moveables, the interest of a pledge is established upon delivery of the pledged property by the pledgor. For property rights, (i) where a bill of exchange, cheque, promissory note, bond, certificate of deposit is pledged, the interest to the pledge will be created at the time when the certificate of right is delivered to the pledgee; if there is no such certificate, the interest will be created at the time when the pledge is registered with the relevant authority; and (ii) where portions of funds or the shares that are registered with the securities registration and the settlement authority are pledged, the interest to the pledge will be established at the time when the pledge is registered with the securities registration and the settlement authority. Where other kinds of shares are pledged, the interest to the pledge will be established at the time when the pledge is registered with the administration department for industry and commerce.

### **Question 2**

What, generally, is the priority of different types of security available for these types of assets?

The priority could be a complex issue. There may be securities of different types on one property or several securities of same type on one property.

I. Different types of security: (i) where a mortgage is legally registered first and then a pledge is established, the mortgage shall prevail; but if the mortgage is not legally registered, then the pledge shall prevail; (ii) where a pledge is set on the property first, then the mortgage is established, in this case, the pledge shall prevail.

II. Same type of security: For moveables or property rights, (i) where more than one mortgage coexist on the same property, then the first legally registered one should prevail; (ii) where a pledge is already set on the property, then the pledgor transfers the property to a third party and sets another pledge (whether the former pledgor consents or not), the lateral pledge shall prevail.

### **Question 3**

What taxes, duties or other fees are payable on these securities?

I. Tax: Under PRC law, mortgage or pledge is free of stamp duty or other documentary taxes.

II. Other fees: Different security registration departments charge differently:

Subject matter of registration	Charging department	Charging Standards
Stocks (For stock corporation only)	China Security Depository and Clearing Corporation Limited	For stocks less than 5 million (included) shares, 1‰ of the face value shall be collected; and for those exceeding 5 million shares, 0.1‰ of the face value of the exceeding part shall be collected with the minimum of no less than 100 Yuan.
Funds (For public offering of fund only)		For funds less than 5 million (included) shares, 0.5‰ of the face value shall be collected; and for those exceeding 5 million shares, 0.05‰ of the face value of the exceeding part shall be collected with the minimum of no less than 100 Yuan.
Bonds		For bonds less than 5 million (included) shares, 0.5‰ of the face value shall be collected; and for those exceeding 5 million shares, 0.05‰ of the face value of the exceeding part shall be collected with the minimum of no less than 100 Yuan.
Equities of limited corporation and stock corporation	The Administration of Industry and Commerce (hereinafter referred to as "AIC")	Free <i>*the equities should exclude those pledged already in the China Security Depository and Clearing Corporation Limited</i>
Motor vehicle	The vehicle administrative office	RMB 70 yuan for each vehicle
Receivables	The Credit Reference Center of People's Bank of China	Free
Patent	State Intellectual Property Office	Free
Copyright	Copyright Protection Center of China	Free
Exclusive right of registered trademark	Trademark Office of State AIC	Free

\* Please note that the table above does not list the charging standards for all kinds of properties.

**Question 4**

What, generally, is the method of enforcement of these securities?

The enforcement of mortgage and pledge are different.

**I. Mortgage**

Where the debtor defaults or the conditions for enforcement of the mortgage interest thereof, as agreed upon by the parties concerned, arise, the mortgagee may enter into an agreement with the mortgagor that he be given the priority in being paid with the money into which the mortgaged property is converted or the proceeds obtained from auction or sale of the property.

If the mortgagee and mortgagor fail to reach an agreement on the means of enforcing the mortgage interest, the mortgagee may apply to the people's court for auction or sale of the mortgaged property.

**II. Pledge**

If the debtor defaults or the conditions for enforcement of the interest, as agreed upon by the parties concerned, arise, the pledgee may conclude an agreement with the pledgor that the pledged property be converted into money, or he may enjoy the priority in having his claim paid with the proceeds obtained from auction or sale of the pledged property.

The pledgor may request the pledgee to enforce his interest to the pledge in a timely manner at the maturity of the debts. Where the pledgee fails to do so, the pledgor may request the people's court to have the pledged property auctioned or sold.

**Question 5**

What other issues should be considered when looking at securing such assets?

The relevant laws and regulations *per se* are silent as to whether security becomes ineffective if the assets are moved outside of the jurisdiction.

Generally, in China, as long as the security right has been established, then no matter where the property has been moved into, the security right should remain effective in China. According to the reply of the registration authority (including the notary office, the vehicle administrative office and AIC), they all hold the position that once the mortgage right has been established, the movement of moveable will not invalidate the right.

In addition, it is also necessary to check whether there are securities already established over the property to make sure that the creditor's right could be fulfilled.

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## India

### Taking security over moveable/personal property/collateral

#### Questionnaire Answers under Indian law

The responses to the questionnaire have been provided primarily from the perspective of creation of charge over moveable assets of a company incorporated under the Companies Act, 2013. There may be other requirements for Limited Liability Partnerships, registered/unregistered partnerships, co-operative societies, individuals and other entities.

**1. How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

The form of security created over moveable assets depends on the type of moveable asset. The most common forms of security created over moveable assets are as follows:

- **Hypothecation:** A charge by way of hypothecation may be created on moveable assets, both tangible and intangible. A charge by way of hypothecation does not require delivery of the assets. The hypothecation may be created by way of a fixed charge or a floating charge. A fixed charge is a charge created on specific moveable assets such as plant and machinery, while a floating charge is a charge created generally on all moveable assets of an entity (e.g. current assets and stock-in-trade). When the charge is fixed in nature, a debtor who has created the charge, can only deal with the moveable assets subject to the charge, whereas when the charge is floating, the debtor may, in the ordinary course of business, deal with the moveable assets in any manner until the charge crystallizes. A fixed charge has priority over a floating charge unless the fixed charge is created after the floating charge crystallizes.
- **Pledge:** A pledge of moveable assets may be created, by actual or constructive delivery of the moveable assets. Typically, security over assets such as shares, debentures and other securities are created by way of a pledge.
- **Assignment by way of security:** Moveable assets such as intellectual property and choses in action (receivables, debts and rights under contracts) may be assigned, by way of security, by the debtor to the creditor.

We have briefly highlighted certain aspects of each of these forms of security below.

**Hypothecation** – Hypothecation was not recognized as a concept in statutes till as late as 2002 when, for the first time, the term ‘hypothecation’ was defined in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the “**SARFAESI Act**”). Under the SARFAESI Act, the term ‘hypothecation’ has been defined as “a charge in or upon any moveable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the moveable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on moveable property”. There is no transfer of ownership interest or property in the moveable assets by the hypothecator to the hypothecatee.

For a hypothecation, a deed of hypothecation needs to be executed in writing. Usually, a deed of hypothecation is executed to create a charge on any moveable assets, which are not required to be delivered, irrespective of whether the charge is a fixed charge or a floating charge. A floating charge crystallizes into a fixed charge upon the occurrence of certain events, including an event of default, which are spelled out in the hypothecation deed. It may be noted that although a hypothecation deed may provide that a charge over a specific moveable asset is a fixed charge, in the event the hypothecator continues to deal with such moveable asset in an unrestricted manner while carrying on its business, such charge may be classified as a floating charge, since credence is given to the substance of the transaction.

**Pledge** – A pledge is a special kind of bailment where goods are delivered (actually or constructively) to the pledgee for securing the payment of a debt or performance of a promise. In practice, a pledge is generally created over moveable assets like shares, debentures and other securities. Usually, a pledge agreement is executed to record the terms of the pledge.

However, the pledge agreement merely records the terms of the pledge and the actual pledge is created by the actual or constructive delivery of the assets to the pledgee. In the case of a pledge of securities in physical form, the certificates evidencing the securities being pledged are delivered along with blank transfer forms. Pledges of dematerialised securities must be in accordance with the rules of the relevant depository (National Securities Depository Limited/ Central Depository Services Limited) for the depositing / delivering of the securities.

**Assignment by way of security** – Intellectual property and choses in action (receivables, debts and rights under contracts) can be assigned, by way of security, to the secured creditor. Such assignment by way of security must be in writing.

There are certain perfection requirements in respect of charges created by way of (i) hypothecation, (ii) pledge, and (iii) assignment by way of security. The perfection requirements depend on the nature of the moveable asset being charged. For instance, charges created on most forms of moveable assets are required to be registered with the Registrar of Companies within the prescribed time period. It is also advisable to obtain a certificate of “no-

objection” from the Income Tax Department prior to creating any charge, unless such certificate is not required under the provisions of the Income Tax Act, 1961. In respect of security created over a ship or vessel registered under the Merchant Shipping Act, 1958, a filing has to be made with the registrar of the port of registry. Similarly, in respect of a charge created on an aircraft registered with the Directorate General of Civil Aviation in India (“**DGCA**”), a filing has to be made with the DGCA. It is also advisable to execute a de-registration power of attorney and register the same with the DGCA in respect of a charge created on an aircraft. The Trade Marks Act, 1999 requires the assignee to apply to the Registrar (Trademark Registry) in the prescribed format for the assignment to be registered. Similarly, under the Patents Act, 1970, when a person becomes entitled as an assignee of a patent or to any share in the patent or as a mortgagee, such person is required to apply in writing in the prescribed form to the Controller of Patents for registration of the interest of such person in the patent.

## 2. **What generally is the priority of different types of security available for these types of assets?**

The rule of priority expressed in the equitable maxim *qui prior est tempore potior est jure* (‘he who is first in time is better in law’) is recognised in India. Generally, the security interest created earlier in time takes priority over the security interest created at a later date.

However, the creditors of a company may also contractually agree on the *inter-se* ranking and priority of the charges created in their favour by such company.

The priority of a charge may also be affected due to failure to comply with perfection requirements. For instance, as mentioned above, charges created on most forms of moveable assets are required to be registered with the Registrar of Companies. This is to be completed within 30) days from the date of creation of the charge (extendable to 300 days). In the event the charge created on moveable assets has not been registered with the Registrar of Companies, such charge is void against any other creditor or any liquidator which may be appointed. Similarly, in the event a no-objection is not obtained from the Income Tax Department prior to creating any charge, the charge may, under certain circumstances, be void as against any claim in respect of any tax or any other sum payable to the income tax authorities.

Assuming that the charge has been validly created and perfected, the order in which creditors would be paid in case of a winding up of a company, is broadly as follows:

- (i) **Workmen's Dues and Secured Creditors** – The security of every secured creditor is deemed to be subject to a *pari passu* charge in favour of workmen of the company.

- (ii) **Costs, Charges and Expenses of Winding Up** – These include *inter alia* administrative costs of the liquidator, administrative costs of a receiver and costs awarded in litigation.
- (iii) **Preferential Payments** – These include, *inter alia*:
  - Government and statutory dues, taxes, cesses and rates due and payable for the 12-month period before the date of the winding up order or the date of appointment of the provisional liquidator or the date of passing the resolution for voluntary winding up (the “**Relevant Date**”); and
  - Wages and salaries of employees for a period of no more than 4 months during the 12-month period before the Relevant Date, up to limit (as prescribed by the Central Government from time to time).
- (iv) **Floating Charge Holder** – Claims of debenture holders under a floating charge created by the company which have not crystallised at the time of winding up.
- (v) **Unsecured Creditors**
- (vi) **Preference and Equity Shareholders**

It may be noted that in certain scenarios, government claims (such as state sales tax dues) may have priority over secured creditors. Further, the priority mentioned above, may undergo a change under the Companies Act, 2013. The rules under the Companies Act, 2013 relating to provisions of winding up are still awaited. For further details on certain relevant aspects of the Companies Act, 2013, please see below in the section titled “Did You Know”.

### 3. **What taxes, duties or other fees are payable on these securities?**

Documents executed in or brought into India attract stamp duty (fixed, *ad valorem* and/or subject to a limit) at applicable rates. Stamp duty is usually payable on or prior to execution of the documents, if executed in India. In the event any document is executed outside India, such document would have to be stamped within 3 months from the date such document (or any counterpart or copy thereof) is first brought into India. The rates of stamp duty differ from state to state. For instance, payment of stamp duty on an unattested deed of hypothecation is exempted in Delhi while the stamp duty payable on a deed of hypothecation in Maharashtra is 0.2% of the secured amount. Hence, if, after stamping of any document, such document (or its counterpart or copy) is brought into any other state and such document relates to any property situated or to any matter or thing to be done in the state, then additional stamp duty may have to be paid on such document (or its counterpart or copy thereof). If appropriate stamp duty is not paid, the document creating security interest is inadmissible as evidence and can be impounded by (i) any person having, by law or consent of parties, authority to receive evidence; and (ii) every person in charge of a public office (except an officer of police). However this defect can be cured for most documents by paying the deficient stamp

duty, together with a penalty which may be up to ten times the deficient stamp duty payable.

Notarization of security documents (creating charge on moveable assets) is not mandatory but desirable for evidence purposes, particularly for power of attorneys. Charges for notarizing documents are nominal.

Fees may also be payable for registering the charge with the relevant authorities such as the Registrar of Companies, the Registrar (Trademark Registry) or the Controller of Patents.

Any enforcement proceedings (including with respect to the enforcement of a foreign judgment) in Indian courts are subject to court fees. The amount of the court fees depends on the value of the claim and may be substantial in some cases.

#### **4. What generally is the method of enforcement of these securities?**

The remedies available to creditors with respect to enforcement of security are contained in legislation of general applicability such as Transfer of Property Act, 1882 and Indian Contract Act, 1872, read in conjunction with Code of Civil Procedure, 1908.

To overcome the delay in recovering loans by banks and financial institutions, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (“**DRT Act**”) was enacted. The DRT Act establishes special tribunals (known as Debt Recovery Tribunals) for recovery of debts due to banks and financial institutions.

Further, the SARFAESI Act has been enacted to empower certain category of secured creditors to recover their non-performing assets without the intervention of the court. The non-performing assets should be backed by securities charged to the creditors by way of hypothecation, assignment, etc. The creditors can *inter alia* take possession of the secured asset without requiring the court’s intervention.

However, foreign banks or financial institutions that do not conduct banking in India cannot rely on the DRT Act or the SARFAESI Act unless they have been specifically notified by the Central Government for the purposes of the DRT Act or the SARFAESI Act. Hence, a foreign bank or financial institution not notified by the Central Government for the purposes of the DRT Act or the SARFAESI Act may seek to enforce the security by initiating civil proceedings before the district courts or the high courts, depending on *inter alia* the value of the claim.

- With respect to a pledge, a pledgee may, on default by the pledgor, exercise the following remedies:
  - (a) initiate court proceedings against the pledgor to recover the debt and to retain the pledged goods as security; or



- (b) sell the pledged goods, either by a private sale or public auction, after providing a reasonable notice of the intended sale to the pledgor, without any reference to a court process.

With respect to a (i) hypothecation; and (ii) assignment by way of security, in addition to the laws of general applicability, the rights of the charge holder are primarily governed by the terms of the contract. Hence, in the event the contract provides a right to the charge-holder to enforce the security without court intervention, the charge holder may enforce the security without approaching the court, unless contested by the counter party.

Further, where a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding can be commenced, or if pending at the date of winding up order, can be proceeded with against the company, except by leave of the court of competent jurisdiction and subject to such terms as the court may impose.

The Sick Industrial Companies (Special Provisions) Act, 1985 (“**SICA**”) has been enacted to provide a framework for the revival and rehabilitation of certain companies, which have been classified as “sick industrial companies”, under the supervision of the Board of Industrial and Financial Reconstruction (“**BIFR**”). Under the provisions of SICA, if a company is classified as a “sick industrial company”, then no proceedings for execution, distress or the like against any assets of such company and no suit for recovery of money or enforcement of security may be initiated against such company without the consent of the BIFR.

It may be noted that repatriation and realisation of proceeds outside India, pursuant to an enforcement action by a non-resident creditor, may require the prior approval of the Reserve Bank of India (“**RBI**”) under the provisions of the Foreign Exchange Management Act, 1999 (“**FEMA**”) and the rules and regulations framed thereunder.

**5. What other issues should be considered when looking at securing such assets? (Including for example any extra territorial recognition of the security or whether security becomes ineffective if the assets are moved outside of the jurisdiction)?**

***Issues in the PPP Model*** – In project financing transactions involving PPP models, concessions from government bodies typically regulate creation of security over essential assets or rights, including project contracts and receivables. Creation of security over such assets or rights is usually not permitted, except as expressly provided in the agreements. Regulation of security over such assets or rights can include the following:

- (a) prior government approval to create security: (i) when a governmental authority has a charge over receivables; and (ii) to assign rights of the concessionaire under the project contracts;
- (b) security may have to be created in a specific way. For example, in the case of telecommunications, national highways and international

airports, there are restrictions on security creation over certain project assets. In such cases, typically, a direct agreement recognizing the rights of the lenders is executed *inter alia* between the lenders, the concessionaire and the concerned governmental authority. The Model Concession Agreement for national highways provides a standard form of such an agreement (a substitution agreement) which allows the lenders to substitute the concessionaire with another entity, on the occurrence of certain events.

**Foreign Exchange Regulations** – Under FEMA and the rules and regulations framed thereunder, the creation of a charge on moveable assets by a resident in India in favour of, or for the benefit of, a non-resident may require the prior approval of the RBI or, in certain cases, a “no-objection” from an AD Category I Bank. An AD Category I Bank is a bank which has been authorised by the RBI to deal in foreign exchange and to which the RBI has delegated certain of its powers under FEMA and the rules and regulations framed thereunder.

## Did You Know

### **Companies Act, 2013**

The Companies Act, 1956 has been recently replaced by the Companies Act, 2013, which seeks to amend and consolidate company law in India. The Companies Act, 2013 received the assent of the President of India on August 29, 2013. The Companies Act, 2013 marks a significant departure from the regulatory framework provided under the Companies Act, 1956. The Companies Act, 2013 is being notified in a phased manner and out of the total of 470 sections, 98 sections were notified with effect from September 12, 2013 and another 183 sections were notified *vide* notifications dated March 26, 2014 and June 6, 2014. Further, the Companies Act, 2013 is to be read with the Rules framed thereunder which are also being notified in a phased manner. The Companies Act, 2013 has introduced some crucial changes pertaining to security creation on moveable assets in India which are as follows:

1. Under the Companies Act, 1956, pledge of moveable assets of the company was exempted from registration with the Registrar of Companies. However, the requirement of registering a pledge of moveable assets is unclear under the Companies Act, 2013 and a clarification from the Ministry of Corporate Affairs is awaited in this regard.
2. Under the Companies Act, 1956, a shareholders’ resolution passed by a simple majority, at a general meeting, was required in the event the whole or substantially the whole of the undertaking was being disposed of (including by way of creation of a security interest). The requirement of such resolution was for public companies or private companies which were subsidiaries of public companies. However, the Companies Act, 2013 mandates the requirement of passing such a resolution for all private and public companies by way of a special resolution. The Companies Act,

2013 has also specifically defined what constitutes an 'undertaking' or 'substantially the whole of the undertaking' which was not the case in the Companies Act, 1956.

## Japan

### Taking security over moveable/personal property/collateral in Japan

#### Question 1

How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?

**Overview.** In Japan, there are two types of security interests which can be created on personal property: (i) pledge and (ii) security interest by title transfer (“SITT”). The creation and perfection of such security interests are governed by the Civil Code with certain modifications by the Commercial Code. The requirements for creation and perfection are different dependent on whether the personal property is (a) tangible personal property, such as goods, equipment, inventory and so on, or (b) monetary claims, such as accounts receivable, loans, and so on. Special rules for perfection of SITT are provided both for tangible personal property and monetary claims by the Special Law Concerning Perfection of Transfer of Tangible Personal Properties and Monetary Claims (“Special Law”). Please note that the description below does not include certain types of tangible personal property which requires registration of title, such as automobiles, ships, etc.

**Key Concepts.** There are two essential concepts relevant to security interests under the Civil Code. Those concepts are creation and perfection.

#### Pledge.

##### (a) Tangible personal properties

- (i) Creation and Perfection. A pledge is created and perfected on tangible personal properties by an agreement between pledger and pledgee and physical delivery of the properties to pledgee.
- (ii) Continuation of Effect of Perfection. The pledgee is required to retain physical possession of the properties in order to maintain the effect of perfection.

##### (b) Monetary claims

- (i) Creation. A pledge is created on monetary claims by an agreement between pledger and pledgee.
- (ii) Perfection. Perfection against obligor of the claims is made through a notice by pledger to obligor or through acknowledgement by obligor. Perfection against third parties is made through such notice or acknowledgment with date certification. Such date certification can be obtained through content-certified mail or certification by a notary public.

#### Security Interest by Title Transfer (SITT).

##### (a) Tangible personal properties

- (i) Creation. A security interest is created on tangible personal properties through title transfer of such properties for the purpose of creating security interest therein. Such title transfer is made by an agreement between transferor and transferee.
- (ii) Perfection. Perfection of SITT is made by delivery of the properties, including physical delivery and constructive delivery.
- (iii) Special rules for perfection under the Special Law. Under this law, when a registration of title transfer of the properties is made at the relevant legal affairs

bureau, then the delivery for the purpose of perfection is deemed to be completed.

(iv) Future inventory. It is possible to create and perfect SITT on current and future inventories as a whole which are placed, or will be placed in the future, in certain specified places, such as specific warehouses, factories, etc.

(b) Monetary claims

(i) Creation. A security interest is created on monetary claims though transfer of such claims for the purpose of creating a security interest therein. Such transfer is made by an agreement between transferor and transferee.

(ii) Perfection. Perfection against obligor of the claims is made through a notice by transferor to obligor or through acknowledgement by obligor. Perfection against third parties is made through such notice or acknowledgment with date certification.

(iii) Special rules for perfection under the Special Law. Under this law, when a registration of transfer of claims is made at the relevant legal affairs bureau, the perfection against third parties is deemed to be completed. In addition, when either transferor or transferee sends notice of certification of the registration to obligor or when obligor acknowledges such registration, the perfection against obligor is deemed to be completed.

(iv) Future accounts receivable. It is possible to create and perfect SITT on the accounts receivables which the pledger currently has or will have in the future arising from certain specified types of transactions as a whole.

## **Question 2**

*What, generally, is the priority of different types of security?*

When more than one security interest is created, the priority is determined based upon the perfection against third parties. Between a perfected security interest and unperfected security interest, that which is perfected has priority. Between perfected security interests, the one perfected first prevails.

## **Question 3**

*What taxes, duties or other fees are payable on these securities?*

A small registration tax is incurred for the registration of title under the Special Law mentioned above. There is no registration tax in other cases mentioned above. A small fee will be incurred if the date certification mentioned above is obtained at a notary public office.

## **Question 4**

*What, generally, is the method of enforcement of these securities?*

**Pledge on tangible personal properties.** Under the Civil Code, the pledgee needs to commence a court enforcement procedure for public foreclosure or for acquiring title of the properties at the price determined by an appraiser. However, under the Commercial Code, with respect to the pledge created to secure debts arising from commercial transactions, the pledgee can enforce the pledge without using a court enforcement procedure by private sale or by acquisition of the property at fair value in accordance with the agreement.

**Pledge on monetary claims.** The pledgee can enforce the pledge by collecting the monetary claims from the obligor thereof. It is not necessary to use a court enforcement procedure.

**SITT on tangible personal property.** The holder of the security interest can enforce it by private sale or by acquisition of the property at fair value in accordance with the agreement. It is not necessary to use a court enforcement procedure.

**SITT on monetary claims.** The holder of the security interest can enforce it by collecting the monetary claims from the obligor thereof. It is not necessary to use a court enforcement procedure.

## **Malaysia**

### **Taking security over moveable/personal property/collateral**

#### **Questionnaire Answers under Malaysian law**

##### **Question 1**

*How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?*

***The law on taking security in Malaysia is very similar to that of English Law, in which Malaysia's legal system is based.***

To start with, some definitions:-

"Fixed Charge" refers to a specified charge which attaches to a specific property or over a specific type of property. A property which is the subject of a fixed charge must be definite or capable of being ascertained in the instrument creating the charge so that there is no doubt that the property is caught in the charge. Once perfected, a fixed charge gives the greatest available priority to the security holder over other creditors.

"Floating Charge" refers to a charge which is not a specific charge on the assets of the company. A floating charge is a security which may be over all or some of the assets for the time being of a company. The owner of the assets constituting a floating charge can continue to deal with them with little restriction (including disposing them) until the charge "crystalises." In the meantime, some assets will cease to be subject to the floating charge when disposed of while new ones may come into the charge through acquisition. The security holder in the case of a floating charge has lesser priority over another creditor who holds a fixed charge over the same assets. See the answers to Question 2 below.

"Pledge" refers to the transfer of the possession but not the ownership of a chattel, which includes stocks, shares and cheques of a company to its creditor as security for the payment of a debt or performance of an obligation; in default of which the chattel may be sold.

"Tangible Assets" refers to assets which have physical existence, including land, equipment, machinery and inventory.

"Intangible Assets" will be a reference to anything which are not physical in nature including patents, trademarks, copyright, goodwill and debts and receivables.

## 1.1 Tangible Assets:

### **Fixed and Floating Charges**

- Under Malaysian law a fixed and/or floating charge can be created over the tangible assets of the borrower or a third party (providing security in consideration of a loan to the borrower).
- Inventory (which are considered tangible assets) are usually subject to a floating charge only as their very nature means that they are constantly sold and replaced in the ordinary course of business.

### **Pledges**

- Under Malaysia law, tangible assets of the borrower or a third party (providing security in consideration of a loan to the borrower) can also be secured by way of pledge by giving actual possession of the tangible assets to the creditor.

## 1.2 Intangible Assets:

### **Fixed and Floating Charges**

- It is possible under Malaysian law to have a fixed and/or floating charge over intangible assets of the borrower or a third party (providing security in consideration of a loan to the borrower). The most common intangibles used as security in any corporate borrowing are debts and receivables.
- The fixed and/or floating charge can extend to both present and future debts/receivables.
- The fixed and/or floating charge is effected by taking an assignment over all, or perhaps only the specified categories of, debts/receivables.
- For an assignment to be effective, the assignment must be in writing. Express notice in writing must be given to the debtor of the assignment. It is advised that the form of acknowledgement should provide for the debtor to confirm the amount of the debt, whether or not he has any right of set-off or counterclaim against the assignor and whether he has received notice of prior assignments.

### **Pledges**

- Under Malaysia law, intangible assets of the borrower or a third party (providing security in consideration of a loan to the borrower) can also be secured by way of pledge by giving constructive possession of the intangible assets to the creditor. For example, shares can be pledged in which case the security holder will take constructive possession by having the actual possession of the share certificates.



### 1.3 Methodology

- Assignments, pledges, fixed charges and floating charges can all be taken as separate documents depending on what the creditor requires to have secured;
- In practice though, in many cases, particularly where banks are the lenders, the security will take the form of a single document called a debenture or sometimes a fixed and floating charge. This document will combine all the foregoing forms of fixed security and, also, a floating charge over, probably, all the assets of the borrower which are not otherwise effectively charged by way of fixed charges under the document.
- Under Malaysian law, only corporations can create a debenture. "Corporations" are the companies incorporated under the Companies Act 1965.

#### **Question 2**

What, generally, is the priority of different types of security available for these types of assets?

Fixed charges:

- a valid fixed charge once perfected takes priority over all floating charges and all other fixed charges subsequently created.
- the fixed charges rank according to their order of creation.
- registration of fixed charges protects the creditor's priority over later, registrable fixed charges. A fixed charge that is registered earlier than the another fixed charge will have priority over it, even if the second mentioned fixed charge was created before it.

Floating charges:

- registration of floating charges protects the creditor's priority over later, registrable floating charges. A floating charge that is registered earlier than the another floating charge will have priority over it, even if the second mentioned floating charge was created before it.
- a fixed charge will rank above a floating charge, assuming that both were registered even though the floating charge was registered earlier.
- a floating charge has no priority over a fixed charge unless the floating charge was created earlier than the fixed charge and the floating charge has a clause prohibiting the creation of subsequent charges without the holder of floating charge's consent and the fixed chargee having knowledge of the clause.
- floating charges have a more restricted priority and it is therefore important for creditors to ensure that if they have a fixed security, it does not rank behind another creditor's (or, indeed, that creditor's own) floating charge.
- the priority of a floating charge is postponed to:-
  - certain preferential debts set out in statute. Examples of preferred debts are all wages and salaries up to RM1,500 or such other amounts as may be prescribed from time to time; all amounts due in respect of

workers' compensation; and all remuneration payable in respect of vacation leave.

- payment under an insurance policy against liability to third parties.

### Question 3

What taxes, duties or other fees are payable on these securities?

In Malaysian law, all securities are subjected to the payment of stamp duty. The assessment and collection of stamp duties in Malaysia is governed by the Stamp Act 1949. However, exemption of stamp duty is given on certain instruments and documents.

If the security instrument is the principal instrument, it will be subjected to ad valorem stamp duty and if the security instrument is a subsidiary or collateral instrument, it will be subjected to nominal stamp duty in the amount of RM10.

Any security taken from a company, however, must, to be valid, be registered with the Companies Commission of Malaysia within 30 days of its creation. Such registration with the Companies Commission of Malaysia would cost RM300.00.

### Question 4

What, generally, is the method of enforcement of these securities?

#### 4.1 Tangible Assets:

##### **Fixed Charges**

- A fixed charge will usually be enforced by way of an application to the courts under a foreclosure or charge action.
- The instrument of charge or the court order may appoint a receiver.
- There are no statutory provisions in the Companies Act 1965 in relation to general powers of receivers. In view of the lacunae, common law principles may be referred to. Accordingly, the powers of receivers include:
  - Power to commence legal proceedings;
  - Power to dispose of property subject to a charge; and
  - Power to take possession.

##### **Floating Charges**

- For a floating charge, upon crystallisation, it becomes a fixed charge and the receiver will be appointed.
- Sale proceeds and other funds recovered by the receiver are disbursed according to a predetermined priority of payment.

##### **Pledges**

- A pledge is enforced by selling the deposited security by the creditor.

## 4.2 Intangible Assets

### **Fixed and Floating Charges**

- Assignments of debts/receivables may similarly be enforced by the appointment of a receiver, again with the powers of enforcement provided for in the assignment itself.
- However, this will probably not be necessary as, simply by giving notice to the debtors of the assignment, the creditor can ensure that the debtors in the receivables are legally obliged to pay the proceeds of the receivables to the creditor direct without the requirement for the appointment of any third party.

### **Pledges**

- A pledge is enforced by selling the deposited security by the creditor.

## **Question 5**

*What other issues should be considered when looking at securing such assets?*

- The common practice is to do a search on the company in the records of the Companies Commission of Malaysia. Known as a “company search,” it checks what other creditors hold securities from the company. This enables the lender or prospective lender to find out if the assets of the company have been given as security to third parties.

## New Zealand

### **NZ law – security over personal property/moveable collateral**

## **2 HOW DO YOU SECURE MOVABLES (ALSO KNOWN AS PERSONAL PROPERTY, MOVABLE ASSETS OR COLLATERAL) BOTH TANGIBLE AND INTANGIBLE IN YOUR JURISDICTION?**

### 2.1 Introduction

The law of personal property securities in New Zealand is the creation of statute – the Personal Property Securities Act 1999 ("the Act") – and is not easily comparable to common law concepts.

The Act has replaced the concept of "title" based security interests with concepts of apparent title by virtue of possession and the creation of a security interest by "attachment" and "perfection".

### 2.2 Essentials of having a security interest under the Act

A security interest creates a proprietary interest in the property, and must secure payment or performance of an obligation. The Act focuses on the substance as opposed to form and who has apparent title to the property.

A security interest can only be created by agreement and can be in relation to particular property, or it can be over all present and after acquired property. There is no distinction in the Act between fixed security interests or floating security interests.

### 2.3 Creation of security interests

To be able to enforce a security interest against a debtor and third parties, a security interest should ideally both "attach" to the personal property and be "perfected".

#### (a) Attachment

The most basic attachment of a security interest to personal property is when value is given by the secured party and when the debtor has rights in the personal property ("Level 1 attachment"). The security interest will be enforceable between the secured party and the debtor.

The next stage of attachment is to enter into a written security agreement or take possession of the property ("Level 2 attachment"). It is preferable and far more common to enter into a written security agreement. At Level 2 attachment, the security interest will be enforceable between the debtor, the secured party, as well as third parties.

(b) Perfection

Perfection governs the priority of the secured party and third parties who also have security interests in the property. A security interest is perfected when there is Level 2 attachment and either the secured party has possession of the property, or the security interest is registered on the "Electronic Noticeboard" – the Personal Property Securities Register. It is far preferable and almost universal to perfect a security interest by registration on the Electronic Noticeboard.

2.4 Electronic Noticeboard

The Electronic Noticeboard is a unified register of security interests with a default provision that the first secured party to register their security interest has priority. It does not contain particulars of security documents however it does provide notice to third parties of the secured party's interest in the property.

Notice is registered against the debtor, as opposed to particular items of personal property (with some exceptions such as motor vehicles where the interest is registered against the motor vehicle's serial number).

**3 WHAT GENERALLY IS THE PRIORITY OF DIFFERENT TYPES OF SECURITY AVAILABLE FOR THESE TYPES OF ASSETS?**

3.1 Varying levels of priority

There are 5 levels of priority within the Act which generally rank in the following order, from first priority to last priority:

- (a) A purchase money security interest. This includes a security interest that secures the debtor's obligation to pay the purchase price, and a security interest securing a loan made for the purposes of the debtor acquiring rights in the particular collateral being secured.
- (b) Perfected security interest.
- (c) Unperfected security interest with Level 2 attachment.
- (d) Unperfected security interest with Level 1 attachment
- (e) Unsecured creditors.

3.2 Priority within levels

In general, if two parties with perfected security interests are competing for the same personal property, the first to take the perfecting step has priority. If two parties with Level 2 attachment only are competing for the same personal property, the first to attach has priority.

### 3.3 Contractual subrogation

Secured parties may between themselves enter into contractual arrangements varying their priority in secured property as between those parties.

## 4 **WHAT TAXES, DUTIES OR OTHER FEES ARE PAYABLE ON THESE SECURITIES?**

4.1 There are no taxes or duties payable as such. Fees are minimal.

## 5 **WHAT GENERALLY IS THE METHOD OF ENFORCEMENT OF THESE SECURITIES?**

5.1 Because enforcement of one secured party's rights affects the rights of competing secured parties, enforcement provisions are codified in the Act.

5.2 If a debtor defaults or if the secured assets are at risk, the secured party with priority may apply their debt obligations in satisfaction of the security interest, may take possession of the collateral, and may retain or sell the collateral in due course. Subordinate secured parties are deprived from exercising their contractual rights in the property.

5.3 Enforcement can be difficult as it can be difficult to immediately ascertain who has priority in particular collateral. Priority may be altered by private contractual documents not recorded on the Electronic Noticeboard. Consumer goods to which the Credit (Repossession) Act 1997 applies have their own enforcement provisions.

## 6 **WHAT OTHER ISSUES SHOULD BE CONSIDERED WHEN LOOKING AT SECURING SUCH ASSETS?**

**(INCLUDING FOR EXAMPLE ANY EXTRA TERRITORIAL RECOGNITION OF THE SECURITY OR WHETHER SECURITY BECOMES INEFFECTIVE IF THE ASSETS ARE MOVED OUTSIDE OF THE JURISDICTION)**

### 6.1 Relocation

If a debtor relocates to another jurisdiction, an already perfected security interest will continue to be perfected in New Zealand if it is also perfected in the other country within a specified timeframe.

If the security interest relates to an intangible, the security interest is governed by the jurisdiction where the debtor is located when the security interest attaches.

### 6.2 Exceptions to the Act

(a) Cargo in international transit. There are complex rules as to whether the Act applies or whether overseas legislation applies to cargo in international transit.

- (b) Aircraft. Aircraft are subject to their particular rules as the Act is subject to the application of Cape Town Convention and Aircraft Protocol and to the Civil Aviation Act 1990.
- (c) Ships. The Act does not apply to any ships over 24m in length. Instead, the Ship Registration Act 1992 shall apply. Ships smaller than 24m may elect for the Ship Registration Act 1992 Act to apply instead of the Act.

## **Singapore**

### **Taking security over moveable/personal property/collateral**

#### **Questionnaire Answers under Singapore Law**

##### **Question 1**

*How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?*

#### **Introduction to personal property and security in Singapore**

Moveable and Immoveable property are terms defined in section 2(1) of the Interpretation Act. Immoveable property includes land, benefits that arise from land and things attached to the earth or permanently fastened to anything attached to the earth. Moveable property is any property that is not immoveable property.

Personal property refers to things such as cars, jewellery, rights to sue under a contract for debt owed or for insurance proceeds under a contract of insurance, and is commonly further sub-classified as chattels or choses-in-possession (tangible property like cars and jewellery) and choses-in-action (intangible property like trade debts, accounts receivables, rights to sue under a contract, stocks and shares, bank deposits, rights under insurance policies and copyright).

Chattels or choses-in-possession on land may be considered part of the land ("fixtures"), accordingly, a security interest granted over the immoveable property would extend to the fixtures. Singapore courts determine if a chattel has become a fixture by applying the common law two pronged test of (i) degree: a chattel physically annexed to the building raises the rebuttable presumption that it has become a fixture. A chattel that simply rests on the ground by its own weight would raise the presumption that it is not a fixture; and (ii) purpose of annexation: a chattel attached to the building may not become a fixture if the purpose of the attachment is temporary and intended for the better enjoyment of the chattel. A chattel resting on its own weight may become a fixture if it was intended for the permanent and substantial improvement of the land.

#### **Creating security over personal property**

##### **1. Mortgage**

A mortgage is a transfer of ownership of personal property by way of security with an express or implied obligation to re-transfer ownership on the discharge of the mortgagor's obligations. A mortgage can either be created as a legal mortgage or an equitable mortgage.

Legal: A legal mortgage is the most secure and comprehensive form of security interest. It transfers the legal title to the mortgage and prevents the



mortgagors from dealing with the securities while they are subject to the mortgage (unless the mortgagee gives the mortgagor the option to remove the securities from time to time and substitute other equivalent securities in their place). In the case of registered securities, a legal mortgage is created by transferring the securities into the name of the mortgagee or a nominee who will be registered as the holder of the securities and will receive a new certificate of title in its name. An agreement between the mortgagor and mortgagee will set out in detail their respective rights and obligations. Since a legal mortgage can only be taken in respect of existing property, a mortgage agreement which purports to create a mortgage over future dividends or interest in respect of the mortgaged securities would be more likely to be equitable than legal.

**Equitable:** An equitable mortgage only transfers beneficial interests in the securities to the mortgagee while the legal title remains with the mortgagor. Generally, an equitable mortgage will arise where (i) the formalities necessary to create a legal mortgage have not been completed; (ii) the mortgagor's interest in the asset being mortgaged is itself an equitable interest; or (iii) the parties have merely entered into an agreement to create a legal mortgage in the future over the asset in question.

## 2. Charge

A charge may be created over personal property either as a fixed charge or a floating charge. A charge is an agreement whereby a debtor (or other third party) agrees to make property available towards the satisfaction of a debt so that in the event of default, the creditor is entitled to take possession of the property. Unlike a mortgage, a charge does not transfer the legal and equitable interest in the asset to the chargee; it merely creates an encumbrance in favour of the chargee. Whether a security takes effect technically as a mortgage or a charge depends upon the intention of the parties.

**Fixed charge:** A fixed charge is one that attaches to existing personal property or property which may be acquired in the future and is usually created over tangible property such as office equipment, machinery and vehicles. The fixed charge immediately attaches to the specific assets, either at the creation of the charge or on a future acquisition. If the chargor disposed of the charged asset to a third party, the chargor would be in breach of the charge, and the third party would not obtain a good title to the asset (unless the third party provided value for the purchase without notice of the fixed charge).

**Floating charge:** A floating charge does not specifically attach to any assets of the chargor as the charge "floats" over the assets in question until a specified act occurs to cause the charge to attach to the assets causing the floating charge to become a fixed charge. The instrument of charge contractually providing for the charge would typically set out the circumstances in which a floating charge would attach to an asset taking effect as a fixed charge. A floating charge may also be created over tangible personal property as it would enable the goods to be dealt with in the ordinary course of the

chargor's business as though it is unencumbered by the charge, which would be appropriate for goods used to generate income, like the inventory of a business.

### 3. Assignment

In relation to contracts, insurances and the proceeds payable ("accounts receivables") the chargee may require an assignment of the accounts receivables, provided the terms of contract or insurance do not prohibit an assignment. An assignment has the advantage of allowing the secured creditor to sue for recovery of the debt in its own name and allows the secured creditor to take the security free of rights of set-off arising between the debtor and the assignor (except where such rights arise in the contract or insurance giving right to the receivable). The assignment should be in writing and executed by the chargor unconditionally and in relation to the whole amount receivable. If the assignment is intended to be perfected as a legal assignment, a notice of the assignment should be given in writing to the relevant party (i.e. the counterparty in the contract and insurer). Acknowledgement may be required as evidence of the notice being received and so as to confirm there is no prior interest.

### 4. Pledge

A pledge is created when a debtor ("pledger") transfers possession of goods owned by him to the creditor ("pledgee") with the intention of using these goods as security for the loan. A pledge can be distinguished from other security in that it requires a transfer of possession of goods which could involve physical delivery of personal property or a constructive delivery (for example, by delivering a warehouse receipt, which is a document that provides proof of ownership of commodities that are stored in a warehouse). The pledgee has the right to retain possession of the pledged goods and use them until the debt is repaid.

## **Question 2**

*What, generally, is the priority of different types of security available for these types of assets?*

Singapore courts generally follow common law priority rules such as the rules governing legal and equitable interests and questions of constructive notice of an interest. A legal mortgage taken in good faith and for value will rank ahead of previously created equitable securities, provided that the mortgagee had no actual or constructive notice of such interest at the time of creation of the legal mortgage. Generally, registered security interests have the following priority:

- A fixed charge, mortgage or pledge will have priority over an uncrystallised floating charge even if subsequently created.

- A fixed charge and mortgage ranks according to the date of creation or, in the case of intangibles, such as debts or receivables, according to the date of the first to give notice to the relevant debtor where such notice is given.
- A floating charge ranks according to the date of creation - the priority of a floating charge is postponed to certain preferential debts set out in statute.

Creditors may also enter into subordination arrangements in order to contractually modify the priority position that the law confers on them.

### **Question 3**

What taxes, duties or other fees are payable on these securities?

No taxes are payable to perfect a security interest. Security over personal property which attracts a stamp duty (e.g. shares) is chargeable at 0.4% (for a mortgage other than an equitable mortgage) or 0.2% (for an equitable mortgage) on the amount of the facilities granted on the mortgage (however the total stamp duty chargeable is a maximum of S\$500).

A registrable charge created by a company has to be registered under section 131 of the Companies Act with the Accounting and Corporate Regulatory Authority (ACRA) of Singapore within 30 days from the date the instrument of charge was created. It costs S\$60 to register a charge with ACRA.

Security created over intellectual property will need to be registered with the Intellectual Property Office of Singapore. For security over trademarks, it costs S\$50 per trademark number, patent application number or design number to register the grant of security.

### **Question 4**

What, generally, is the method of enforcement of these securities?

**Fixed charge:** The lender may choose to exercise its power to sell the property, which is usually provided for in the security document. If the lender wants to protect the security and collect profits yielded by the property to discharge the debt, a receiver may be appointed pursuant to either the provisions of the security document, statute or a court order. In exercising the power of sale, the lender has a duty to take reasonable steps to obtain a proper price. The lender must inform itself of the value and the price obtainable for the security before it agrees to sell it to the buyer. When that is established, the lender should then determine whether the price actually obtained is reasonable in the circumstances. The lender has the onus to prove the security was properly sold.

**Floating charge:** A floating charge is enforced through the appointment of a receiver or manager. The receiver or manager is appointed by the security holder, pursuant to the private power of appointment in the terms of the security agreement, to be agent of the chargor company for the purposes of realising the security. The duty of the receiver or manager is to realise the security for the benefit of the security holder,

with limited duties to the company and other creditors of the company. The receiver or manager has the advantage of disregarding the rights of any unsecured creditors against the company and are able to enforce the company's rights as an agent of the company.

### **Question 5**

*What other issues should be considered when looking at securing such assets?*

1. A registrable charge that is not registered within 30 days of its creation with ACRA is void against the liquidator and other creditors. Notwithstanding the failure to register with ACRA, the underlying debt between the chargor company and the chargee is generally not affected by the avoidance of the charge against the liquidator and creditors of the company.
2. In Singapore, other steps involved in perfecting security include taking possession of property or giving actual notice to and obtaining acknowledgement from the applicable third party (depending on the nature of the asset and the security). Failure of perfection could render the security interest invalid against subsequent parties who are granted perfected security interests over the same property, an outright purchaser of the property or an execution creditor.
3. An assignment of debts and choses in action must comply with the form and procedure for perfection prescribed by the Civil Law Act, i.e. express notice in writing of the assignment must be given to the debtor. A failure to comply with this procedure may render the assignment effective only as an equitable assignment and also cause the assignee to lose priority to other competing legal claims.

## Vietnam

### Taking security over personal /moveable property – Vietnamese Laws

#### Overview:

In Vietnam, secured transactions are governed by the Civil Code No.33/2005/QH11 approved by the National Assembly on 14 June 2005 (“**Civil Code**”). It is further guided by other legal instruments such as decrees of the Government and decisions, circulars of relevant ministries, including Decree 163/2006/ND-CP dated 29 December 2006 on Secured transactions and its amended Decree No. 11/2011/ND-CP dated 22 February 2012 (“**Decree 163**”), and Decree 83/2010/ND-CP dated 23 July 2010 on Registration of secured transactions (“**Decree 83**”).

#### Key concepts:

“**Immoveable property**” means land; houses and structures attached to land, including the property attached to those houses and structures; other property attached to land; other property as provided by law;

“**Moveable property**” is property which is not immoveable property;

“**Tangible property**” and “**Intangible property**” are not legal concepts, but there are similar definitions used in accounting:

- *Tangible fixed assets* means working assets which are in material form, satisfy the criteria for tangible asset, and are involved in business cycles but still retain their original material form. Examples include houses, buildings, machinery, equipment, and means of transportation;
- *Intangible fixed assets* means assets which are in a non-material form, express a fixed sum of investment, which satisfies the criteria for intangible fixed assets, and are involved in business cycles. Examples include expenses directly relating to land use, and expenses for publishing rights, patents, or copyright.

“**Mortgage**” means the use by one party of its property (mortgagor) as security for the performance of a civil obligation without transferring such property to the mortgagee.

“**Pledge**” means the delivery by one party of its property to another party as security for the performance of a civil obligation.

“**Deposit**” means a sum of money, precious metals, gemstones or other valuable objects delivered by one party to another party as security for the entering into or performance of a civil contract.

“**Secured deposit**” means a sum of money, precious metals, gemstones or other valuable objects delivered by a lessee of moveable property to the lessor as security for the return of the leased property.

**“Escrow deposit”** means a sum of money, precious metals, gemstones or other valuable objects deposited by an obligor into an escrow account at a bank as security for the performance of an obligation.

**1. How do you secure moveables (also known as personal property, moveable assets or collateral) both tangible and intangible in your jurisdiction?**

### **Types of security over moveable property**

The Civil Code stipulates five types of security over property including *mortgage, pledge, deposit, secured deposit* and *escrow deposit*.

Since *deposit, secured deposit* and *escrow deposit* are three types of security designed specifically for money, precious metals and gemstones, these three types are not commonly used for taking security over other kinds of moveable property. The most common types of security over moveable property are mortgage and pledge.

### **Deposit, Secured Deposit and Escrow Deposit**

Only applies to money, precious metals and gemstones.

In a deposit transaction, the recipient of the deposited property must return the deposited property and pay an amount equivalent to the value of the deposited property to the party which delivered the deposited property if the recipient refuses to enter into or perform the civil contract.

A secured deposit is used to secure the return of leased property.

If using an escrow deposit, an escrow account is required to open account at bank.

### **Mortgage and Pledge**

The main difference between mortgage and pledge is that under a pledge, the physical possession of the property is delivered from the pledgor to the pledgee, while in a mortgage, the mortgagor is not required to deliver the possession of the property to the mortgagee. In a pledge, the pledgee, after receipt of the property from the pledgor, may authorise a third party to keep the property, but such a third party is only accountable to the pledgee, while the pledgee is accountable to the pledgor in respect of the pledged property. In a mortgage, parties may agree on appointing a third party to hold the mortgaged property and such a third party shall be accountable to both parties subject to terms and conditions of the security agreement.

On the above basis, “intangible” property cannot be used for pledge because the physical possession of such property cannot be delivered. Security over intangible moveable property can only be in the form of a mortgage. Security over tangible moveable property can be in the form of either a pledge or a mortgage.

## Creation and registration of pledge and mortgage

- It is required that a mortgage or pledge of property must be made in writing, either in a separate document or in a principal contract.
- A pledge takes effect from the time of delivery of the property. A mortgage will take effect subject to agreement of the parties. If no such agreement is made, a mortgage agreement will become effective from the time of signing by the parties.
- There is no concept of floating charge in Vietnam, but mortgage over all or any of the assets of the mortgagor, whether present or future, is not prohibited. Nevertheless, the secured property should be identified as with as much detail as possible for the purpose of registration and realisation of the mortgage. Similarly, a mortgage over inventory is permissible under Vietnamese laws. The mortgage agreement will set out whether the mortgagor is entitled to dispose of the secured property. Normally, disposal of mortgaged inventory by the mortgagor does not require prior approval of the mortgagee.
- It is not mandatory for a mortgage over contractual rights, including right to reclaim a debt, to be agreed on by the obligor. However, a notice of the mortgage must be delivered to the obligor if he requests so. Otherwise he is entitled to refuse making payment directly to the mortgagee. Mortgage over both present and future contractual rights (including debts/ receivables) is permissible.
- Mortgage or pledge of most moveable property may be registered with the National Registration Agency for Security Transactions (“NRAST”), established under the Ministry of Justice, but mortgage over some specific types of property with their own central register of ownership may have their own registration requirements (e.g. registration of mortgages of ships with the Vietnam National Maritime Bureau and registration of pledges or mortgages of aircrafts with the Civil Aviation Authority). For certain types of property, e.g. security over aircraft or ship, or in the case a certain property is secured for multiple secured parties, registration is necessary for the security to be legally binding and effective. Other types of security do not need to be registered in order to be effective between the security provider and the secured party but may be registered in order to be legally binding vis-à-vis third parties and in order to confer priority.

### **2. What generally is the priority of different types of security available for these types of assets?**

There is no priority between types of security, however, a registered security takes priority over an unregistered security. A secured transaction which is registered in accordance with law is legally effective from the time of registration. This means that where there are conflicting security interests over certain property, the basic rule of “first in time, first in right” will apply.

### **3. What taxes, duties or other fees are payable on these securities?**

In Vietnamese law, all secured transactions over moveables are free from taxes. However, there is a small registration fee payable to the registrar for registration of secured transactions (about US\$4 per registration with NRAST).

### **4. What generally is the method of enforcement of these securities?**

- Generally, the method of enforcement of any security is subject to agreement of the parties in the security document or in a separate document. If no such an agreement is reached, the property must be sold by auction (except for some types of moveables of which market price is easily determined, e.g. listed securities). Auction is conducted strictly in conformity with the laws on action of property.
- Widely used methods of security enforcement include the sale of the secured property to third party or to securing party itself, or receiving money directly from related third parties in case of debts/ receivables. Vietnamese laws do not limit the methods of security enforcement so long as such methods have been agreed upon by the parties in a security agreement or a separate document.
- The enforcement may be conducted by the secured party or through a person designated by the secured party (“realisor”). The realisor may realise the secured property in accordance with the terms and conditions of the security agreement without a separate authorisation from the securing party. The laws do not provide for details of rights and duties of the realisor and leave this issue to be agreed between the parties in the security agreement.
- Sale of the secured property (not by auction) is to be conducted in accordance with the Civil Code. The selling price of the secured property must be agreed between the parties or determined by property evaluation organisation. However, it is not clear under the laws if a provision of security agreement that enables the secured party to determine price of secured property at its own will is deemed as prior agreement of the parties on selling price for the purpose of enforcement of the security. For some types of moveables of which market price may be clearly determined (e.g. listed securities), the realisor is permitted to sell the property at the market price without conducting procedures for sale by auction, and at the same time must notify the securing party and the jointly secured parties (if any).
- For debts/ receivables or other contractual rights, the secured party may enforce the security by demanding the third-party obligors to make payment to the secured party.
- Realisation of security property being bonds, shares, promissory notes, other valuable papers and savings deposit cards is implemented in accordance with the law on bonds, shares, promissory notes, other valuable papers and savings deposit cards.



**5. What other issues should be considered when looking at securing such assets? (including for example any extra territorial recognition of the security or whether security becomes ineffective if the assets are moved outside of the jurisdiction).**

- Secured transactions and its registration are effective within the territory of Vietnam. As a general rule of Vietnamese conflict of laws, rights to a property shall be defined in accordance with law of the place where the property is situated. This means if the property is moved outside Vietnam, the right holder is unable to rely on Vietnamese law to claim its rights over the property. With respect to moveable property in transit (e.g. goods in transit out of Vietnam), rights to the moveable property shall be determined in accordance with the law of the country of destination, unless otherwise agreed by the parties in sale and purchase agreement or other agreement.
- Under the current security registration system in Vietnam, except for transportation vehicles, it is not possible to check whether certain moveables are subject to any security, however, it is possible to check if the securing party holds any registered secured transactions. These checks should always be done by creditors to determine its priority right over the secured property.
- Vietnam has a developing legal system which in some respects, lacks the certainty of more developed legal jurisdictions. Although the laws provide creditors with all necessary rights to realise the secured property, the enforcement of such rights in practice would be affected by other factors such as, the misinterpretation of the dispute settlement bodies which may make a simple realisation case become a dispute that requires a court's judgment for enforcement which can be a lengthy process. Such risk could be avoided if the security package is structured in a way that enables the creditors to control the secured property. In a typical security transaction, in addition to the security agreement, creditors are granted a power of attorney (although this is not required by laws) so the creditor may deal directly with state authorities or relevant third parties during the realisation of the secured property.

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## CONTACT

1900 Avenue of the Stars  
Suite 700  
Los Angeles, California  
90067  
[secretariat@interlaw.org](mailto:secretariat@interlaw.org)

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