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Private Credit in Asia Pacific

Australia | China | Hong Kong | India | Indonesia | Japan | Malaysia | New Zealand | Philippines | Singapore | South Korea | Taiwan | Thailand | Vietnam

Introduction

Welcome to the first edition of our guide to Private Credit in Asia Pacific.

Our Guide focuses on key issues for consideration in Private Credit transactions across 14 Asia Pacific jurisdictions providing both a high level overview and a more detailed jurisdiction-by-jurisdiction analysis.

The Private Credit market in Asia Pacific has grown significantly over recent years, providing significant opportunity for regional and global investors. Higher funding costs and increased regulatory scrutiny on banks have created a financing gap which is being increasingly filled by Private Credit providers and other sources of institutional capital such as international pension funds and insurers.

It is also expected that Private Credit will play a key role in the recovery of the Asia Pacific economy following COVID-19 and will be an increasingly important source of liquidity for borrowers in the Asia Pacific region.

If you would like to discuss any of the points raised in this Guide in more detail, please do get in touch.

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Level of materiality

High Medium Low

Issue / Question	Australia	China	Hong Kong	India	Indonesia	Japan	Malaysia	New Zealand	Philippines	Singapore	South Korea	Taiwan	Thailand	Vietnam
Can a fund make a new loan to a borrower incorporated in this jurisdiction without a banking license?	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the RJ?	No	Yes	No	Yes	No	No	No	No	Yes	No	Yes	No	Yes	No
Can interest, fees and remuneration be agreed freely between a lender and a borrower in this jurisdiction?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Can a fund hold directly all security granted by a security provider incorporated in this jurisdiction?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Can a company incorporated in this jurisdiction provide credit support for the acquisition of its or its holding companies' shares?	Yes (subject to a whitewash)	Yes (other than listed companies)	Yes (subject to a whitewash)	Yes (other than listed companies)	Yes	Yes	Yes (other than listed companies)	Yes	Yes	Yes (subject to a whitewash)	Yes	Yes (other than listed companies)	Yes (with restriction for listed companies)	Yes
How strong in relative terms is credit support given by a company in this jurisdiction likely to be?	Strong	Moderate	Strong	Moderate	Strong	Strong	Strong	Strong	Moderate	Strong	Moderate	Strong	Moderate	Moderate
Is the enforcement regime in this jurisdiction relatively lender friendly?	Yes	Moderate	Yes	No	No	Moderate	Moderate	Yes	No	Yes	Yes	Moderate	No	No

Australia

The Private Credit market continues to grow in Australia. While lending markets in Australia were historically dominated by the big four Australian banks and bank-led financings, higher funding costs and increased regulatory scrutiny following the 2008 global financial crisis and more recently in the wake of a Banking Royal Commission has led to a decline in bank lending. This bank lending decline created a financing gap, which is being increasingly filled by Private Credit providers and it is expected that Private Credit will play a key role in the recovery of the Australian economy following COVID-19 as Australian borrowers find it harder to access bank-led financings, the equity capital markets or the debt capital markets. While the Australian secondary loan market remains relatively illiquid, a significant mitigant to that lack of liquidity is Australia's creditor friendly enforcement regime.

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Can a fund make a new loan to a borrower incorporated in Australia without a banking license?

- Generally yes. While Australia has a licensing system for financial service providers who carry on a financial services business in Australia (a person who is "carrying on a business of providing financial services" in Australia is required to hold an Australian Financial Services License (**AFSL**), unless an exemption applies), generally the making of loans does not require an AFSL license or any other form of banking license. More caution is needed where the fund will also be providing derivatives, debt securities or other structured products.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Australia?

- Generally no. Australia levies withholding tax on interest, at the rate of 10%, subject to certain reliefs/exemptions. The most common exemption relied on by an offshore fund providing private credit to an Australian borrower is the public offer exemption as set out in section 128F of the Income Tax Assessment Act 1936. The public offer exemption applies to two principal categories of loans, being debentures/loan notes (which will be the preferred route if the loan amount is under AUD 100 million at first drawdown and there may only be one lender) and syndicated loan facilities (which will be the preferred route if the loan amount is at least AUD 100 million at first drawdown and there will be at least two lenders). For the exemption to apply to the debenture/loan notes or syndicated loan facility, the parties must satisfy one of five public offer tests, which is a relatively straightforward procedure with the most common being offers made:
  - to at least 10 unrelated lenders; or
  - publicly in an electronic form (such as a listing on a Bloomberg or Reuters screen).

  While it is not necessary that all lenders accept the public offer, the offer must be genuine in order to meet the public offer exemption. It is essential that tax advice is sought when seeking to rely on the public offer exemption.

  No state or territory in Australia charges ad valorem stamp duty on loan and security documents. Sale of secured property following enforcement can give rise to a liability for the security holder to pay Goods and Services Tax (GST) on the sale, at the rate of 10%. Stamp duty may also apply on enforcement of security over shares or real property.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in Australia?

- In principle, there are no restrictions of this type in the case of corporate borrowers (in contrast with individuals, who are protected by statutory usury provisions, and individuals and small businesses, who may be protected by unfair contract terms legislation). The interest or default interest is governed by the contractual arrangements between the parties and by common law. However, there may be circumstances in which the default interest and ancillary fees may be considered to be an unenforceable penalty.

Can a fund hold directly all security granted by a security provider incorporated in Australia?

- Yes, although security is commonly granted in favour of a security agent or trustee to facilitate future transfers and enforcement

Can a company incorporated in Australia provide credit support for the acquisition of its or its holding companies' shares?

- There are restrictions on a company giving financial assistance to a third party to acquire its shares or its holding company's shares. These restrictions apply except where the giving of the financial assistance does not materially prejudice the interests of the company or its shareholders, the company's ability to pay its creditors, or where the assistance is approved by the shareholders under what is called a "whitewash" procedure, or the assistance is exempted.

  Under the "whitewash" procedure, financial assistance cannot be given until at least 14 days after the lodgment with the Australian Securities and Investments Commission (**ASIC**) of the notice informing it of the intention to give financial assistance. This means that financial assistance typically can only be given after an acquisition is completed.

How strong in relative terms is credit support given by a company in Australia likely to be?

- Strong. The company directors will need to satisfy themselves as to the corporate benefit of the transaction and to abide by maintenance of capital rules. While this requires a case-by-case analysis, in practice solvent Australian companies with positive net assets often satisfy these requirements and can provide full guarantees and security. In addition, the articles of association will need to permit the giving of a guarantee/security and can usually be amended to include this if they do not already do so.

Is the enforcement regime in Australia relatively lender friendly?

- Yes. Enforcement can usually be achieved by a secured creditor out of court and relatively expeditiously, typically through the appointment of a receiver.

  The enforcement regime is well-established and flexible, with various options for stakeholders in protecting value in a distressed business. The market is also transparent, sophisticated, and well served by a bench of professional advisors and an accommodating (and expert) Court system.

  In principle, a lender can exercise rights of acceleration and security enforcement after any event of default if the documents provide for this (although in practice a technical default would rarely be used to accelerate debt or enforce security).

  Hardening periods, though in principle relevant for up to two years after a suspect transaction by a company, rarely present an issue in practice if credit support has been provided for a new loan by a solvent company.

China*

Private Credit market has become increasingly active in the PRC in recent years, providing significant opportunities for offshore funds. We expect this trend to continue due to the following key factors:

- further opening up of the PRC financial markets and the Chinese government's continuing commitment to create a friendly business environment to attract foreign investment;
- the continuing deregulation on foreign debt control with a view to facilitating PRC companies in obtaining credit from international lenders;
- an ongoing crack down on shadow banking and the capital constraints on domestic banks (especially in sectors such as property development) which has created a financing gap and opportunities for Private Credit investors to meet the financing needs of PRC companies; and
- international investors becoming increasingly comfortable with the efficiency and predictability of the PRC legal system.

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Can a fund make a new loan to a borrower incorporated in the PRC without a banking license?

Generally yes. Whilst a person who is carrying on a lending business in the PRC is generally required to have an establishment in the PRC and hold a PRC financial license issued by the China Banking and Insurance Regulatory Commission (**CBIRC**, formerly known as the China Banking Regulatory Commission), the making of cross-border loans to a PRC borrower by an offshore fund qualified to operate lending business under the laws of the jurisdiction of its incorporation (**Offshore Fund**) does not require a PRC financial license, so long as its marketing activities in relation to such loans shall be made on a one-on-one and close-door basis and mass and material deal-related marketing in the PRC is avoided.

Note however that the PRC onshore borrower itself must comply with regulatory requirements on foreign debt administration issued by the State Administration of Foreign Exchange (**SAFE**), the People's Bank of China (**PBOC**) and (if the term of the loan exceeds 1 year) the National Development and Reform Commission (**NDRC**). Among other things, the offshore borrowing headroom for a PRC company which is not a bank or financial institution is limited to 2.5 times (which has recently been lifted from 2 times) of its audited net assets whereas qualified PRC companies (including foreign-invested financial leasing companies, foreign-invested investment companies and small, medium and micro high-tech enterprises in pilot areas) can enjoy larger foreign debt quota. Nonetheless, the borrowing of cross-border loans by real estate companies and government financing vehicles is still restricted.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the PRC?

Yes. Generally the interest income under a cross-border loan made available to a PRC borrower by an Offshore Fund will be subject to withholding tax for PRC enterprise income tax (at the rate of 10%) and PRC value added tax plus related surcharges (at a consolidated rate of approximately 6.72%) subject however to exemption or deductions under any applicable double tax treaty between the PRC and the jurisdiction of the incorporation of the lender. PRC stamp duty will also apply to the loan agreements in relation to such cross-border loan (but not to the guarantees/security documents) if such loan agreements are executed or used in the PRC.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the PRC?

Generally yes for cross-border loans made available to a PRC borrower by an Offshore Fund, unless such an amount is so unreasonably excessive that, in the case of dispute between the parties, it may not be upheld by the PRC court. There is no hard-and-fast rule on what amount of such interest, fees and remuneration will be deemed by PRC courts to be unreasonably excessive, but we believe that the judicial interpretation issued by the Supreme People's Court of the PRC and effective on September 1, 2015 on permitted intercompany loans made by an unlicensed PRC lender to a PRC borrower (subject to certain conditions being met, Private Lending) (the Judicial Interpretation on Private Lending) may, to some extent, reflect positions of the PRC courts on this issue, where interest rates exceeding 24% per annum (including fees and other remuneration in the nature of interest) are subject to limitations by the PRC courts and interest rates exceeding 36% per annum are void.

Can a fund hold directly all security granted by a security provider incorporated in the PRC?

Generally yes, provided that in the case of a mortgage over PRC onshore immovable properties such as lands and buildings, it is advisable to check with the local registration authorities as to whether the registration of the mortgage in favor of an Offshore Fund is possible as this need to be considered on a case by case basis and in practice the operational guidelines of the local registration authorities may vary from place to place. If the registration is not possible, a security agent arrangement could be considered. No registration of the guarantee and security for such cross-border loan with SAFE is required (note however that registration of the cross-border debt under the cross-border loan with SAFE and (if the term of the loan exceed 1 year) NDRC before drawdown is required).

Can a company incorporated in the PRC provide credit support for the acquisition of its or its holding companies' shares?

Generally yes, except in the context of listed companies. Under the relevant rules and regulations promulgated by the China Securities Regulatory Commission (**CSRC**), a company listed on the PRC stock exchanges, a PRC company seeking to be listed offshore and their respective subsidiaries shall not provide any form of financial assistance to persons who purchase or propose to purchase the shares of the listed company.

For unlisted companies, there is no explicit restriction on the giving of financial assistance under PRC law subject however to the provisions of its constitutional documents and other restrictions imposed under contractual or other arrangements to which the company is subject. Please also refer to our comments on credit support below.

How strong in relative terms is credit support given by a company in the PRC likely to be?

Medium. There is no concept of "corporate benefit" under PRC law, and therefore, under PRC law, a PRC company is generally allowed to grant upstream, cross stream and downstream security and guarantees. This remains subject to the provisions of its constitutional documents and other restrictions imposed under contractual or other arrangements to which the company is subject.

However (i) where a PRC company (whether listed or unlisted) provides a guarantee or security to guarantee or secure the indebtedness of its shareholders or de facto controllers (which we understand is at the time of the provision of such guarantee or security), the provision of the guarantee or security must be approved by the shareholders, and the shareholders whose indebtedness are being guaranteed or secured are not entitled to vote; and (ii) providing guarantee or security for third party indebtedness by listed companies is strictly regulated.

Is the enforcement regime in the PRC relatively lender friendly?

Medium. In principle, a lender can exercise rights of acceleration and security and/or guarantees enforcement after any event of default if the documentation provides for this (although in practice a technical default would rarely be used to accelerate debt or enforce security and/or guarantees). Enforcement of duly perfected security and/or guarantees can usually be achieved by a secured or guaranteed creditor out of court with the cooperation of the debtor or the providers of security and/or guarantees. Note however that, for mortgages over PRC onshore immovable properties and pledges over shares in PRC companies, the lender usually needs to go to the court for an auction procedure for security enforcement unless the security provider agrees to sell the security assets at agreed price.

The enforcement proceeds under a cross-border loan made available to a PRC borrower by an Offshore Fund and/or the guarantees or security in connection therewith could generally be remitted out of the PRC without approvals of or registrations with PRC governmental agencies subject however to (i) the completion of the due registration of the cross-border debt under the cross-border loan with SAFE and (if the term of the loan exceed 1 year) NDRC as mentioned above and (ii) the clearance of the KYC procedures of, and/or the review and examination by, the PRC onshore bank dealing with such cross-border remittance.

The bankruptcy administrator of a PRC borrower and/or credit provider may also challenge (during hardening periods of up to a year) the provision of guarantees or security over assets, or early prepayment of debts. The risk of challenge should be assessed on a case-by-case basis, particularly if lending to distressed credits.

**For the purpose of this Guide, "PRC" or "China" refers to the People's Republic of China and excludes the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau and Taiwan.*

Hong Kong

There is significant growth in the Hong Kong private credit market, with a number of credit funds (including credit funds set up by private equity firms) and asset management companies increasing the size of their portfolio in recent years.

Some investment banks have, through a separate division, deployed their own capital to engage in special situations financings and bespoke acquisition and real estate financings.

A number of credit funds have their credit investment teams based in Hong Kong covering deals involving Asian owners, with a particular focus on PRC based sponsors and parent companies.

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Can a fund make a new loan to a borrower incorporated in the Hong Kong without a banking license?

- Yes. If a fund (not being an authorized institution (**AI**) authorized by the Hong Kong Monetary Authority (**HKMA**) under the Banking Ordinance (Chapter 155 of the laws of Hong Kong) (BO)) intends to lend to a borrower incorporated in Hong Kong, then it must comply with the Money Lenders Ordinance (Chapter 163 of the laws of Hong Kong) (**MLO**). The MLO imposes licensing and other compliance requirements. The MLO requires any lender (other than an AI) that is in the business of making loans in Hong Kong (or who holds himself out as doing so) to obtain a money lenders' license and to comply with various requirements relating to the making of loans.

  Without applying for a money lenders' license, a fund can seek to rely on a list of exemptions if the fund is an "exempted person" or if the loan is an "exempted loan" as specified in Schedule 1 of the MLO. Exempted loans include, among other things, loans made to any of the following persons:

  - a company where the loan in question is secured by a mortgage, charge, lien or other encumbrance that is registered under the Companies Ordinance (Chapter 622 of the laws of Hong Kong) (**CO**);
  - a company that has a paid up share capital of not less than HKD 1 million (or an equivalent amount in any other approved currency which is freely convertible into Hong Kong dollars); and
  - a company the shares or debentures of which are listed on a recognized stock market (or any subsidiary of that company).

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Hong Kong?

- No. In Hong Kong, no stamp duty is payable on the granting of a loan, and generally, not on the taking of security or guarantee (although in the case of a legal mortgage over shares, a nominal fixed stamp duty of HKD 5 would be payable on the instrument of transfer transferring the **legal** title to the mortgagee or third party purchaser). Any transfer of the beneficial interest in shares or real property at the time of enforcement will attract ad volarem stamp duty. Also, there is no requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender.

Remuneration: Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Hong Kong?

- Generally yes. However, Hong Kong law restricts default interest to the extent they could constitute a penalty (which would render them unenforceable on the grounds that they do not represent a genuine pre-estimate of the loss of the aggrieved party, or are out of all proportion to the legitimate interests of the innocent party). The MLO also regulates the charging of excessive rates of interest by any person (other than an AI), except where the borrower's paid up share capital is not less than HKD 1 million (or an equivalent amount in any other approved currency which is freely convertible into Hong Kong dollars). Under the MLO, an effective annual interest rate in excess of 60% is illegal, whilst an effective annual interest rate that exceeds 48% but does not exceed 60% is presumed to be extortionate and allows the court to reopen the underlying transaction.

Can a fund hold directly all security granted by a security provider incorporated in the Hong Kong?

- Yes, except that any mortgagee of a construction loan secured by a building mortgage should be an AI as per the requirement of the relevant government land grant. Generally, it does not matter whether or not the beneficiaries of a security or the security agent is located in Hong Kong.

Can a company incorporated in the Hong Kong provide credit support for the acquisition of its or its holding companies' shares?

- Under the CO, a Hong Kong company, whether public or private, cannot directly or indirectly provide financial assistance (i) for acquisition of shares in itself or its Hong Kong incorporated parent company; or (ii) for the purpose of reducing or discharging the liability of any person incurred for such acquisition. The term "financial assistance" includes financial assistance given by way of gift, guarantee, security, indemnity, release, waiver, loan, transfer of rights in respect of loans or other financial assistance if the net assets of the company are reduced to a material extent by the giving of the assistance or if the company has no net assets. There are a number of exceptions to this prohibition including the so-called "whitewash" procedure, which allows assistance to be given by a company provided that, among other things, its directors were able to make certain solvency-related statements in specified forms.

  Breach of the financial assistance prohibition will render the company liable to a fine and every director in default will also be liable to a fine and imprisonment on summary conviction, but the CO provides that the validity of the financial assistance transaction is not affected by contravention of the financial assistance prohibition.

  Providing financial assistance by a Hong Kong incorporated company for the purpose of acquiring shares in its holding company is not prohibited under the CO if that holding company is incorporated outside of Hong Kong.

How strong in relative terms is credit support given by a company in the Hong Kong likely to be?

- Strong. Hong Kong companies can provide credit support by granting guarantees or securities.

  The company directors will need to satisfy themselves as to the corporate benefit of the provision of the guarantee or security. While this requires a case-by-case analysis, in practice, where a Hong Kong company provides a guarantee or security to secure the obligations of a third party, lenders are advised to obtain the unanimous approval of the company's shareholders to the provision of the guarantee or security and a statement from the company's directors that the company will not be unable to pay its debts as a result of providing the guarantee or security. Taking these steps serves to protect the guarantee or security from being subsequently challenged. Lastly, a Hong Kong company has powers as a natural person which is wide enough in granting security.

Is the enforcement regime in the Hong Kong relatively lender friendly?

- Yes. Enforcement regime in Hong Kong is similar to those in the United Kingdom, and depending on the terms of the finance documents, enforcement can usually be achieved by a secured creditor out of court. In principle, a lender can exercise rights of acceleration and security enforcement after an event of default if the documents provide for this. Also, there is generally no requirement to obtain a court order in order to enforce security. However, in respect of a mortgage over real property, a lender may bring a "mortgagee action" to obtain a court order for payment of moneys secured by the mortgage and for possession of the mortgaged property, among other things. Alternatively, a lender can enforce a mortgage by virtue of express or implied powers under the mortgage, or powers implied into the mortgage by the Conveyancing and Property Ordinance (Chapter 219 of the laws of Hong Kong).

India

Private credit has grown in India over recent years, providing a significant opportunity for investors. Historically, banks and non-banking financial companies (NBFCs) have been the primary providers of debt to Indian borrowers. However, due to higher delinquencies faced by banks and the liquidity crunch being faced by NBFCs, providers of private credit have gained prominence.

Assets under management for debt mutual funds have reduced due to increasing defaults coupled with the illiquidity in the secondary markets. This has provided a large opportunity for alternate investment funds providing structured credit.

The uncertainty and weakening of credit quality due to COVID-19 is likely to increase the demand for private credit in India as Indian borrowers may find it harder to access loans from banks and NBFCs or raise funds through equity capital markets.

The secondary loan market has not evolved in India and is fairly illiquid.

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Can a fund make a new loan to a borrower incorporated in the India without a banking license?

- A fund incorporated in India cannot offer loans to borrowers in India without a banking license. For an entity to provide loans as its primary business in India, it needs to be registered as a "banking company" under the Banking Regulation Act, 1934 or a "non-banking financial company" under the Reserve Bank of India Act, 1934. However, funds that are registered in India as mutual funds or alternative investment funds with the Securities and Exchange Board of India (**SEBI**), may subscribe to non-convertible debentures issued by an Indian company.

  A fund incorporated outside India may provide a loan in the form of an external commercial borrowing to an Indian company if such private fund is a resident of Financial Action Task Force or International Organization of Securities Commission's compliant country. Such a fund would not need to be licensed, and is qualified or otherwise entitled to carry on business in India for providing such loan.

  Additionally, a fund incorporated outside India may subscribe to non-convertible debentures issued by an Indian company upon obtaining a registration as a foreign portfolio investor with the SEBI under the SEBI (Foreign Portfolio Investors) Regulations 2014.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the India?

- Currently, the applicable rate of withholding tax on interest (**WHT**) payable by an Indian company to a non-resident lender (situated outside India) on external commercial borrowings and Indian rupee (**INR**) denominated bonds is 5% (plus applicable surcharge and cess), subject to satisfaction of certain conditions and provision of prescribed documents. This tax is withheld from the interest payable to the lender and deposited on the lender's behalf with the government. It is a borrower's obligation to withhold the tax and issue a certificate evidencing it. The lender can take the credit of the tax withheld on interest to meet its tax liabilities in India as well as in the country of residence. Further, in India stamp duty is required to be paid on documents on or prior to execution. The stamp duty payable depends on the subject matter of the document and the place of execution.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the India?

- Interest, fees and remuneration in relation to non-convertible debentures may be agreed freely between the investors and the issuer, subject to the same being reasonable and not extortionate. However, if a fund established outside India provides a loan to a company in India in the form of external commercial borrowings, under the guidelines issued by the Reserve Bank of India, a ceiling has been prescribed for the all-in cost. The all-in cost ceilings include rate of interest, other fees, expenses, charges, guarantee fees, export credit agency charges, whether paid in foreign currency or INR, but excludes commitment fees and WHT payable in INR. The all-in-cost ceilings allowed for an external commercial borrowing in foreign currency is 6 Month LIBOR (or equivalent benchmark for the other currency) plus 450 basis points. The all-in-cost ceilings allowed for an external commercial borrowing in Indian currency is prevailing yield of the Government of India securities of corresponding maturity plus 450 basis points.

Can a fund hold directly all security granted by a security provider incorporated in the India?

- If the fund is a registered foreign portfolio investor, the security in relation to the non-convertible debentures must be created in favor of a trustee. Further, in case of investments by mutual funds and alternative investment funds as well, the security will be created in favor of a trustee. If the fund has advanced an external commercial borrowing, the security may be held directly or through a security agent.

  However, depending on the nature of the security created to secure the loan, a fund would need to have a digital signature in order to file certain forms with the Registrar of Companies or have a dematerialized account with a depository in India. If it does not have either of these, then it may be necessary to appoint a security trustee in India.

Can a company incorporated in the India provide credit support for the acquisition of its or its holding companies' shares?

- As per the Companies Act 2013 of India, a public company (whether listed or not) is prohibited from providing any direct or indirect financial assistance to any person for subscription to, or for purchase of its own shares or the shares of its holding company. The term "financial assistance" is broad and includes assistance in the form of loans, guarantees and the provision of security. This restriction does not apply to a private company.

  In view of the above, a target company that is a public company cannot create security or provide guarantees in relation to acquisition finance availed for acquisition of its shares.

How strong in relative terms is credit support given by a company in the India likely to be?

- Moderate. It is generally accepted that an Indian company is permitted to provide credit support, to the extent that it can show that corporate benefit, to the company giving credit support, results from this action. If, in insolvency proceedings, the creditor cannot show that sufficient corporate benefit accrued to the company, the court may rescind the relevant credit support, if such credit support having been provided within the hardening periods prescribed under the Insolvency and Bankruptcy Code 2016.

Is the enforcement regime in the India relatively lender friendly?

- No. Enforcement of security in India is governed by the terms and conditions of the security documents. Generally, a lender may enforce its security on the occurrence of an event of default. Except in the case of an equitable mortgage, a court order is generally not required for the enforcement of security. However, if the security provider objects to, or disputes, the enforcement and makes an application to the court, then the dispute must be resolved through a court process, which may take several years to obtain a final judgment. The timeline depends on the facts and the relief sought, as well as the backlog of cases at the time of enforcement. However, it may be possible to obtain interim relief in a shorter time frame.

  If a fund subscribes to listed non-convertible debentures issued by an Indian company, such fund will be entitled to enforce its rights under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002, which provides for the realization of any security interest (other than pledge) in favour of any secured creditor "without the intervention" of the court or tribunals.

  Any proceeding in court for the enforcement of security must be brought within the relevant limitation period. For example, a suit ordering the sale of the mortgaged property must be brought within 12 years from the date on which the money sued for becomes due, and a suit ordering a sale of charged or pledged property must be brought within three years from the date that the cause of action arises.

Indonesia

Indonesia has traditionally had a long and well established credit market dominated by the large commercial banks. After the Asian Financial Crisis (1998) and the resultant banking crisis and recapitalization of the banking sector in Indonesia, the Indonesian credit market was severely restricted. This has led to a shallow overall financial market in Indonesia.

Today, the largest of the commercial banks in Indonesia (categorized as Buku IV and Buku III) control most of all commercial loans outstanding as at December 2019. The major commercial banks primarily focus their lending activity on top tier corporates in Indonesia and loan products are generally very basic – usually being collateral based loan products.

The absence of a developed loan market has created a financing gap which has led to non-bank financial institutions in Indonesia and offshore regional banks and global banks stepping in to fill the gap in private credit.

In periods of liquidity crisis in Indonesia private credit has and will likely continue to step in to support the credit markets in Indonesia.

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Can a fund make a new loan to a borrower incorporated in the Indonesia without a banking license?

- Yes, it can. A fund is not required to be licensed, qualified or entitled to do business in Indonesia for the purpose of only entering into a loan facility agreement, Indonesian law security documents and other documents related to the facility agreement with a borrower established in Indonesia.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Indonesia?

- There are certain requirements under Indonesian law on taxes and similar charges in relation to financing; however, generally taxes or similar charges do not present a material issue in entering into a loan agreement in Indonesia.

  Under Indonesian law, the borrower is required to withhold tax at a rate of up to 20% from any payment of interest and any other payment of a similar nature in relation to loan documents to an offshore party, subject to any applicable tax treaty agreement. Under most of the Indonesian tax treaties, the withholding tax rate on interest payments (**WHT**) is reduced to 15%, 10% or 5%, depending on the applicable tax treaty. In certain conditions, the WHT rate can be zero.

  Other charges in relation to loan documents are fees and charges for the preparation and registration of security under the loan agreement and a stamp duty of IDR 6,000 that is payable on each of the loan and security documents when executed in Indonesia. In relation to the preparation fees, we would like to note that from all of the securities, the most substantial fee would be in relation to land mortgage *(Hak Tanggungan)* registration, which could be up to 1% of the transaction value subject to negotiation.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Indonesia?

- Yes. A lender and borrower in this jurisdiction may agree on a rate of interest or default interest that may be charged in an agreement. However, there was a case whereby the court decided to modify the agreed interest rate. The court mentioned that the interest rate needed to be in accordance with the interest rate applicable to state-owned banks. As Indonesia is a civil law jurisdiction, court decisions do not create precedent and only bind the parties to the case.

Can a fund hold directly all security granted by a security provider incorporated in the Indonesia?

- From a regulatory perspective, there are no restrictions to provide security or guarantees to offshore parties including private credit funds. However, from a logistical and administrative perspective, it is better to use an onshore security agent to: (i) attend to the signing of security documents (as some security needs to be signed in front of a notary in Indonesia whilst a POA signed abroad needs to be legalized in the nearest embassy or consulate which takes some time), (ii) liaise with the notary for the registration, (iii) liaise with the security provider for the update of the list of security from time to time, (iv) monitor the security, as well as (v) enforce the security.

Can a company incorporated in the Indonesia provide credit support for the acquisition of its or its holding companies' shares?

- Subject to the corporate benefit principle, in which the board of directors would need to act in the best interest of the company, there is no statutory prohibition on a company established in Indonesia from providing financial assistance in connection with the acquisition of its own shares or those of its parent company (either direct or ultimate). However, there are protection provisions for minority shareholders under the Indonesian Company Law and Capital Market Law.

  Under the Indonesian Company Law, any shareholder has the right to file a lawsuit against a company at the District Court whose jurisdiction covers the domicile of the company if the shareholder considers it has been harmed by the actions of the company unfairly and without reasonable grounds as a result of a general meeting of shareholders, board of directors meeting or board of commissioner meetings resolutions. Shareholders can use this right if they feel that the granting of any financial assistance will cause them harm.

  There are also some limitations in relation to the purchase by a company of its own shares or shares of an affiliated company.

How strong in relative terms is credit support given by a company in the Indonesia likely to be?

- Strong. The company directors will need to satisfy themselves as to the corporate benefit of the transaction to ensure they are not violating their duty of care to the company, but in practice, most companies can provide full guarantees and security.

Is the enforcement regime in the Indonesia relatively lender friendly?

- No. Enforcement in Indonesia is typically a lengthy process, which is often the subject of challenge by the borrower/obligor seeking to invalidate the debt, guarantee or security and/or to frustrate the enforcement process.

  Further, the enforceability of an obligation in Indonesian law governed documents may be affected or limited by:

  - the general defences available to obligors under Indonesian law in respect of the validity and enforceability of loan and security documents; and/or
  - the provisions of any applicable current or future bankruptcy, insolvency, fraudulent conveyance *(actio pauliana)*, reorganisation, moratorium/suspension of payment and other laws of general application relating to or affecting the enforcement or protection of lenders' rights.

Japan

- Private Credit remains limited in the Japan market due to the strict regulation of banking and corporate lending activities and the ready availability of senior debt at low cost from Japanese banks.
- Japan still largely operates on a relationship banking basis, with the largest banks dominating the credit markets.
- Notwithstanding this, some alternative lenders do provide mezzanine tranches in special situations financings, such as bespoke acquisition or real estate financings.
- The secondary loan market in Japan is not as active as in other jurisdictions, which can be a problem for alternative lenders that require liquidity.

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Can a fund make a new loan to a borrower incorporated in the Japan without a banking license?

In Japan, lending in the ordinary course of business requires a license either under the Banking Act (Act No. 59 of 1981, as amended) or under the Money Lending Business Act (Act No. 32 of 1983, as amended).

If the loan is a one-off, it could be argued that the lender is not acting in the course of its business. However, where a foreign bank or fund that provides loans as part of its business makes the loan, even if the loan were its first in Japan, that argument would be unlikely to succeed.

The arrangement of a syndicated loan by a bank (including a foreign bank) is recognized and permitted as part of a licensed bank's "incidental business" (*Fuzui Gyomu*), as set out in the Banking Act. For non-banks, the arrangement of loans requires a license under the Money Lending Business Act.

Similarly, because a facility agent or security agent only undertakes administrative functions, it is not required to obtain a Bank Agent license (although in practice the facility agent or security agent role is always taken by licensed banks). If a security trust scheme is used in Japan, the security trustee must be a company which has obtained a Trust Company license pursuant to the Trust Business Act (Act No. 154 of 2004, as amended). Security trust schemes are rare in Japan however, as it can take time to agree on the arrangements with the security trustee and additional fees must be paid to the security trustee.

Apart from the licensing requirements referred to above, there is no license or qualification that is required for a lender, arranger, facility agent or security agent in Japan.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Japan?

Not ordinarily. However, (i) interest paid to a foreign lender providing loans to borrowers in Japan is subject to interest withholding tax (**WHT**) of 20.42%, which may be reduced or exempted under tax treaties between the relevant lender's country of tax residence and Japan; and (ii) to the extent credit support is provided in the form of security, the perfection of mortgages in Japan may attract material registration taxes (which are based on the amount of the secured claim to be registered).

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Japan?

The Interest Rate Restriction Act (Act No. 100 of 1954, as amended) sets the following interest rate ceilings:

- 20% per annum for loans with a principal amount under JPY 100,000;
- 18% per annum for loans with a principal of between JPY 100,000 and JPY 1 million; and
- 15% per annum for loans with a principal amount of JPY 1 million or more.

Interest rates that are higher than these rates are void.

In addition, any loan with an annual interest rate above 20% may trigger criminal sanctions under the Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates (Act No. 195 of 1954, as amended).

If a borrower meets certain criteria (for example, stock companies with more than JPY 3 billion in capital) set forth in the Act on Specified Commitment Line Contracts (Act No. 4 of 1999, as amended), the commitment fee is not subject to restriction under the Interest Rate Restriction Act (Act No. 100 of 1954, as amended) or the Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates (Act No. 195 of 1954, as amended). Lenders therefore often require the borrower to satisfy such criteria if a revolving facility or other facility involving a commitment fee is provided to avoid technical violations of such restrictions.

Can a fund hold directly all security granted by a security provider incorporated in the Japan?

Yes.

Can a company incorporated in the Japan provide credit support for the acquisition of its or its holding companies' shares?

Yes. In Japan, there is no concept of "financial assistance" as is typically seen in some western countries. However, the giving of credit support by a company may, in the event the company derives no benefit from the transaction, be considered to be a violation of the duty of care or duty of loyalty owed to the company by its directors pursuant to the Civil Code (Act No. 89 of 1896, as amended) or the Companies Act (Act No. 86 of 2005, as amended. Where a company is not wholly owned/acquired, obtaining the consent of the minority shareholders for such credit support is generally required to ensure the directors do not violate this duty of care.

How strong in relative terms is credit support given by a company in the Japan likely to be?

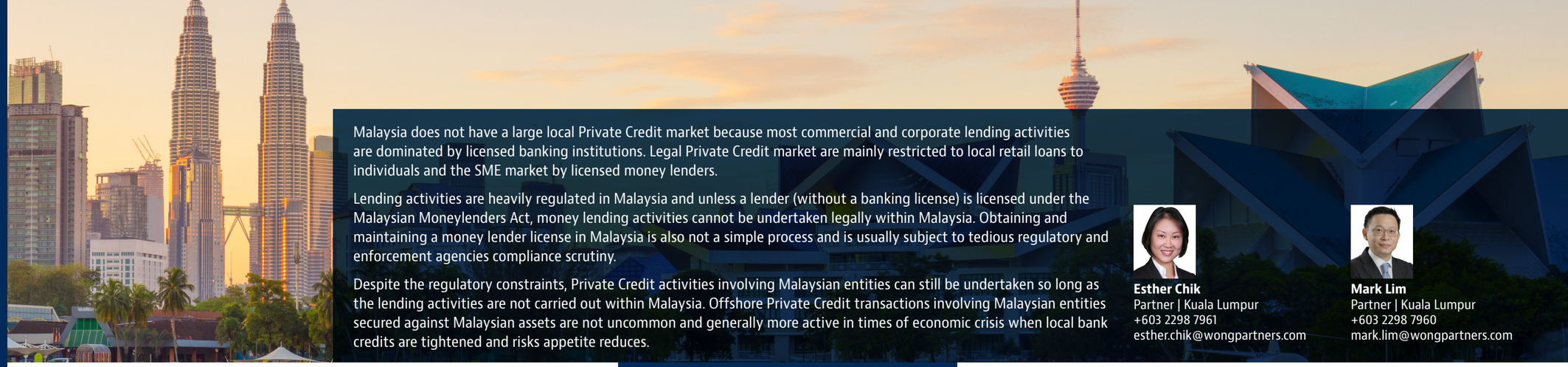
Strong. The company directors will need to satisfy themselves as to the corporate benefit of the transaction to ensure they are not violating their duty of care to the company, but in practice most companies can provide full guarantees and security in support of the transactions of its affiliates within a 100% ownership group.

For example, in the context of leveraged buyout financings in Japan, the target company (and its wholly owned subsidiaries) is typically required to provide credit support (i.e., full guarantees and security) to secure the acquisition facilities provided to the purchaser once all of the target's shares have been acquired by the purchaser.

Is the enforcement regime in the Japan relatively lender friendly?

Moderate. Enforcement can usually be achieved by a secured creditor out of court and relatively expeditiously if so provided in the relevant security document — unless challenged by a debtor, in which case a court administered public auction may be necessary to dispose of secured assets which can make the process considerably longer and tends to result in far lower realization value.

It is possible to contractually set the threshold for enforcement of security, but in practice enforcement of security generally only occurs after a payment default (and consequent acceleration).



Malaysia

Malaysia does not have a large local Private Credit market because most commercial and corporate lending activities are dominated by licensed banking institutions. Legal Private Credit market are mainly restricted to local retail loans to individuals and the SME market by licensed money lenders.

Lending activities are heavily regulated in Malaysia and unless a lender (without a banking license) is licensed under the Malaysian Moneylenders Act, money lending activities cannot be undertaken legally within Malaysia. Obtaining and maintaining a money lender license in Malaysia is also not a simple process and is usually subject to tedious regulatory and enforcement agencies compliance scrutiny.

Despite the regulatory constraints, Private Credit activities involving Malaysian entities can still be undertaken so long as the lending activities are not carried out within Malaysia. Offshore Private Credit transactions involving Malaysian entities secured against Malaysian assets are not uncommon and generally more active in times of economic crisis when local bank credits are tightened and risks appetite reduces.

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Can a fund make a new loan to a borrower incorporated in the Malaysia without a banking license?

Yes, a fund can make loans to borrowers incorporated under Malaysian law without having a banking license issued by the Central Bank of Malaysia provided that such fund does not carry on any business, operation or activity which involves (i) accepting deposits of any kind; and/or (ii) paying or collecting cheques. However, where such lending activity is being carried out in Malaysia as a form of business in moneylending, it will attract licensing requirement under the Malaysian Moneylenders Act whereby such fund must possess a moneylender's license issued by the Malaysia Ministry of Urban Wellbeing, Housing and Local Government and comply with the requirements specified in the Malaysian Moneylenders Act. In addition, depending on the loan currency, loan sum and security or collateral involved, the borrowing and provision of security may be subject to the relevant foreign exchange administration rules and requirements issued by the Central Bank of Malaysia, which requirements could include the prior written approval of the Central Bank of Malaysia if certain prudential thresholds are breached.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Malaysia?

Generally, no. Malaysia levies withholding tax on interest and fees (**WHT**) for services rendered, subject to certain reliefs/exemptions or reduction (by virtue of the applicable double taxation treaties). All instruments and agreements in respect of a loan are subject to stamp duty being (i) in the case of a Ringgit-denominated loan, a duty at the rate of 0.5% on the loan sum and (ii) in the case of a non-Ringgit-denominated loan, a maximum duty of MYR 2,000 (approximately USD 458) on the principal instrument, each payable on the first copy of the principal instrument of the loan. There is additional stamp duty of MYR 10 (approximately USD 2.50) for each subsequent copy of the principal instrument and each copy of the secondary instruments (e.g., security documents).

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Malaysia?

If the fund is a lender licensed under the Malaysian Moneylenders Act to make loans to a borrower, then:

- interest for a secured loan shall not exceed 12% per annum;
- interest for an unsecured loan shall not exceed 18% per annum;
- default interest (charged on a simple interest basis) at the rate of not exceeding 8% per annum on daily basis;
- the payment of compound interest is illegal; and
- any increase in the rate or amount of interest by reason of any default in the payment of sums due under the loan is illegal.

Other than as specified above, fees and other remuneration can be agreed freely between a lender and a borrower. However, Malaysian courts may treat any provisions relating to additional interest, damages for late payment or compensation payments under a finance document as a penalty and may award only such damages or compensation as they deem reasonable in lieu thereof.

If the fund falls outside the ambit of the Malaysian Moneylenders Act, then interest, fees and remuneration can be agreed freely between a lender and a borrower.

Can a fund hold directly all security granted by a security provider incorporated in the Malaysia?

Yes. However, depending on the loan sum and security or collateral involved, the provision of security or guarantee may be subject to the relevant foreign exchange administration rules and requirements issued by the Central Bank of Malaysia.

Can a company incorporated in the Malaysia provide credit support for the acquisition of its or its holding companies' shares?

A private company incorporated under Malaysian law may give financial assistance if a "whitewash process" is undertaken, i.e., all of the following conditions are fulfilled:

- if the financial assistance is approved by special resolutions of the shareholders of such Malaysian company;
- if the financial assistance is approved by a majority of the directors of such Malaysian company;
- each director of such Malaysian company who voted in favour of the financial assistance makes a "solvency statement"
- the aggregate amount of the financial assistance and any other financial assistance given by such Malaysian company that has not been repaid does not exceed 10% of the current shareholders' funds of such Malaysian company;
- such Malaysian company receives fair value in connection with giving of the financial assistance; and
- the financial assistance is given not more than 12 months after the day the solvency statement was made.

Other than as specified above, fees and other remuneration can be agreed freely between a lender and a borrower. However, Malaysian courts may treat any provisions relating to additional interest, damages for late payment or compensation payments under a finance document as a penalty and may award only such damages or compensation as they deem reasonable in lieu thereof.

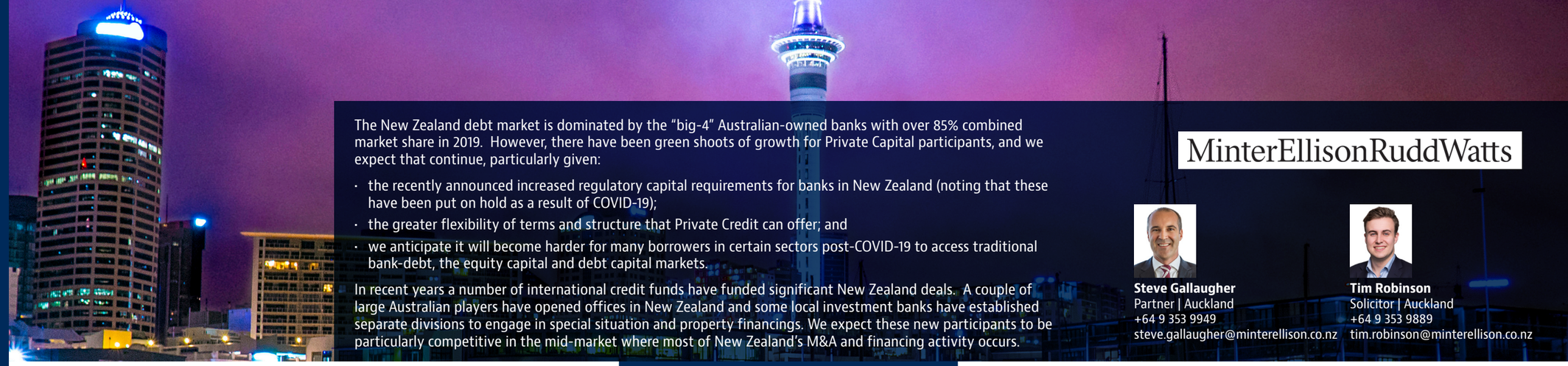
If the fund falls outside the ambit of the Malaysian Moneylenders Act, then interest, fees and remuneration can be agreed freely between a lender and a borrower.

How strong in relative terms is credit support given by a company in the Malaysia likely to be?

Strong. The Malaysian company and its directors must be satisfied that the Malaysian company can derive or receive corporate benefits by providing the guarantee or security. It is not uncommon for a Malaysian company to obtain approvals from its shareholders if the corporate benefit to such Malaysian company is not clear so to avoid any risk of any creditor or shareholder challenging the provision of such guarantee or security. In addition, the constitution of such Malaysian company must permit the giving of security or guarantee.

Is the enforcement regime in the Malaysia relatively lender friendly?

Moderate. Enforcement can usually be achieved by a secured lender out of court as long as the finance documents provide that the lender can exercise rights of acceleration and security enforcement after the occurrence of an event of default. However, in the case of an enforcement of security over real property in Malaysia, an application to the court for an order of sale (which is a lengthy and highly administrative procedure) is required.



New Zealand

The New Zealand debt market is dominated by the "big-4" Australian-owned banks with over 85% combined market share in 2019. However, there have been green shoots of growth for Private Capital participants, and we expect that continue, particularly given:

- the recently announced increased regulatory capital requirements for banks in New Zealand (noting that these have been put on hold as a result of COVID-19);
- the greater flexibility of terms and structure that Private Credit can offer; and
- we anticipate it will become harder for many borrowers in certain sectors post-COVID-19 to access traditional bank-debt, the equity capital and debt capital markets.

In recent years a number of international credit funds have funded significant New Zealand deals. A couple of large Australian players have opened offices in New Zealand and some local investment banks have established separate divisions to engage in special situation and property financings. We expect these new participants to be particularly competitive in the mid-market where most of New Zealand's M&A and financing activity occurs.

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Can a fund make a new loan to a borrower incorporated in the New Zealand without a banking license?

- Yes, noting the specific rules below which may apply in some cases. For example:
  - The *Reserve Bank of New Zealand Act 1989* (NZ) requires any foreign entity which carries on any activity directly or indirectly in New Zealand (whether through an agent or otherwise) to be registered (and regulated) as a bank if it has the word "bank" (or any derivative or variant of the same) in its name. Certain exemptions or authorisations may apply or be available for overseas banks which primarily deal with wholesale customers in New Zealand.
  - Certain entities are required to register on the financial service providers register under the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ) if they are in the business of providing credit. This will, however, generally only apply where the entity has a place of business in New Zealand (or, when changes are introduced in 2021, where it has retail customers in New Zealand), or is otherwise required to hold certain types of license (including being a registered bank, as discussed above).
  - A fund which is structured as a company or a limited partnership may need to be registered with the New Zealand Companies Office under the *Companies Act 1993* (NZ) or *Limited Partnerships Act 2008* (NZ) as an overseas company/limited partnership if it carries on business in New Zealand.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the New Zealand?

- Generally no, but New Zealand has some unique tax rules.

  Withholding tax: New Zealand imposes withholding tax obligations on New Zealand resident borrowers and guarantors (together the **payer**) that make interest payments to non-resident lenders under the non-resident withholding tax (**NRWT**) rules. A New Zealand payer will be required to apply the NRWT rules where the non-resident lender (each a **NRWT Lender**):
  - does not have a fixed establishment (i.e., branch) in New Zealand; or
  - is not a registered bank and has a fixed establishment in New Zealand, but the lending is not for the purposes of a business they carry on in New Zealand through that fixed establishment,

  AIL regime: It is standard commercial practice for NRWT Lenders to require a New Zealand payer to "gross-up" their interest payments for NRWT. This practice means that the NRWT cost is not borne by the NRWT Lender as intended (and is instead an additional cost that the payer must bear in order to obtain funding). To address this issue, New Zealand enacted the "AIL regime" under which a payer may:
  - register with Inland Revenue as an "approved issuer" and register the relevant loan as a "registered security"; and
  - make a payment equal to 2% of each interest payment to Inland Revenue (being the **AIL**).

  Where the AIL regime is used, the applicable NRWT deduction rate for payments made to the NRWT Lender will be 0%. From a payer's perspective, paying AIL is usually more cost effective than grossing a NRWT Lender up for the NRWT that would otherwise be payable.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the New Zealand?

- In principle, interest, fees and remuneration can be agreed freely between a lender and a corporate borrower, with terms governed by the contractual arrangements between the parties and common law. However, we note that:
  - *Penalties:* There may be circumstances in which default interest or fees may be considered to be an unenforceable penalty.
  - *Oppression:* The terms of a credit contract may be unenforceable to the extent that (a) the terms are oppressive (including the interest rate), (b) the exercise by a party of any of its rights and powers is oppressive, or (c) a party has been induced to enter into the transaction by oppressive means.

Can a fund hold directly all security granted by a security provider incorporated in the New Zealand?

- Yes, although security is commonly granted in favour of a security trustee to facilitate administration and future transfers and enforcement.

Can a company incorporated in the New Zealand provide credit support for the acquisition of its or its holding companies' shares?

- Yes. *The Companies Act 1993* (NZ) permits a company to provide financial assistance in connection with the purchase of a share issued or to be issued by a company or its holding company provided that certain requirements are met.

  The most common means of approving financial assistance requires the board of the company providing the assistance to obtain a written entitled person agreement signed by all "entitled persons" of a company (in most cases these will be the shareholders). The directors of the company providing the financial assistance must be satisfied on reasonable grounds that the company will, immediately after the giving of the financial assistance, satisfy a solvency test.

How strong in relative terms is credit support given by a company in the New Zealand likely to be?

- Strong. It is common in New Zealand for companies within wholly-owned groups to provide security over all of their present and future assets and give unlimited cross guarantees in support of their debt obligations. The company directors will need to satisfy themselves as to the corporate benefit of the transaction (which can be for the benefit of its holding company if its constitution expressly provides) and the company's solvency at the time the credit support is provided. It is accepted market practice for these, and various other, matters to be certified to financiers at the time of providing credit support.

Is the enforcement regime in the New Zealand relatively lender friendly?

- Yes, the enforcement regime in New Zealand is considered to be "lender friendly", and a lender can usually achieve enforcement out of court and expeditiously. Hardening periods can apply for up to two years after security has been granted, but rarely present an issue where the underlying security document secures money advanced at the time of, or at any time after, the granting of the security and provided that the company was able to pay its due debts at the time of granting such security.

  The most common means for a lender to take enforcement action is to appoint a receiver over the debtor or its assets under contractual rights conferred under the relevant security document(s), and then for the receiver to exercise a power of sale. Where a receiver is not appointed, there are other statutory regimes available for a secured party to take possession of and sell the secured property to realize debt.

Philippines

The Philippines is still a developing market in terms of Private Credit transactions. Lending activities are highly regulated by the Philippine Securities and Exchange Commission (Philippine SEC). Offshore lenders not registered or authorized to do business in the Philippines are generally subject to regulatory constraints under the prevailing "doing business" rules and regulations except for certain activities that may fall under permissible exemptions. In addition to obtaining a license to do business in the Philippines, entities that engage in lending transactions with Philippine entities are also required to further a license from the Philippine SEC.

Notwithstanding the prevailing regulatory restrictions, security is capable of being created over assets located in the Philippines. The recent passing of the Philippine Personal Property Security Act (PPSA), has paved the way for a more robust legal framework for secured transactions in the Philippines with the establishment of a centralized registry and improved enforcement of security interests in personal property in the Philippines.

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Can a fund make a new loan to a borrower incorporated in the Philippines without a banking license?

A fund can make a new loan to a borrower incorporated in the Philippines without a banking license, provided that the loan transaction can be considered as an isolated transaction and is not part of other lending transactions to other borrowers located or based in the Philippines.

Note, however, that if the lending transaction is not an isolated transaction or is part of other lending transactions to other borrowers located or based in the Philippines:

- the fund, if an offshore fund, may be considered to be doing business in the Philippines. Under prevailing regulations, foreign corporations and other juridical persons doing business in the Philippines are required to secure a license to do business from the Philippine Securities and Exchange Commission (**Philippine SEC**).
- the fund, whether an offshore or onshore fund, may be considered to be engaged in the lending business. Under prevailing regulations, persons or entities engaged in lending business are required to secure a license to engage in lending business from the Philippine SEC.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Philippines?

Interest payments to offshore lenders who are non-resident foreign corporations are subject to withholding tax. As a general rule, interest payments to non-resident foreign corporations are subject to a final withholding tax rate of 20% on gross interest received in relation to loans granted to Philippine residents. However, the 20% final withholding tax on gross interest may be further reduced under provisions of applicable tax treaties.

Under prevailing regulations, loans or other forms of debt instruments are subject to the payment of documentary stamp taxes (**DST**) at the effective rate of 0.75% of the face value or principal amount of the loan. On the other hand, credit support in the form of pledges, mortgages or similar security instruments (but excluding guarantees) are each separately subject to the payment of DST at the effective rate of 0.4% of the amount secured by the credit support instrument.

Finally, if credit support involves a real estate mortgage, the perfection of such real estate mortgage (to create a lien binding on third persons) requires, in addition to payment of DST, the payment of registration fees at an effective rate of 0.45% of the amount secured by the real estate mortgage.

There are several options available under Philippine law to structure a secured lending transaction to substantially mitigate the effects of these taxes or charges.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Philippines?

Interest, fees and remuneration can be freely agreed between a lender and a borrower under Philippine law. As a rule, such agreements (on interest, fees and remuneration) must be expressly made in writing.

Note, however, that Philippine courts reserve the power to invalidate an obligation to pay interest if the rate thereof is found by the courts to be excessive or unconscionable. What would constitute "excessive" or "unconscionable" would depend on the circumstances specific to the transaction, the status of the parties, or such other factors that a Philippine court adjudicating on the issue may find relevant or equitable.

Can a fund hold directly all security granted by a security provider incorporated in the Philippines?

A fund can hold directly all security granted by a security provider incorporated in the Philippines.

Note, however, that for certain legal and practical reasons (including administrative obligations typically handled by the holder of security), the market practice in the Philippines is for offshore secured creditors to appoint onshore security agents or trustees for security granted by a security provider that (i) requires registration before applicable security registers in the Philippines; and/or (ii) requires delivery of the collateral by the security provider to the secured creditor.

Can a company incorporated in the Philippines provide credit support for the acquisition of its or its holding companies' shares?

A company incorporated in the Philippines can provide credit support (e.g., guarantees, security over its assets, etc.) for the acquisition of its or its holding companies' shares.

However, for any such credit support to be valid and enforceable under Philippine law, the following requisites must be present:

- The company's articles of incorporation expressly authorize the company to provide credit support in respect of obligations of third persons, including its subsidiaries and/or affiliates.
- The credit support can be reasonably shown to be for the benefit of and in furtherance of the company's primary purposes.
- The credit support must be authorized by requisite corporate approvals, including, in certain instances, approval by shareholders of the company.

How strong in relative terms is credit support given by a company in the Philippines likely to be?

Moderate. The company directors will need to satisfy themselves as to the corporate benefit of the transaction to ensure they are not violating their duty of care to the company, but in practice, most companies can provide guarantees and security.

Enforcement: Is the enforcement regime in the Philippines relatively lender friendly?

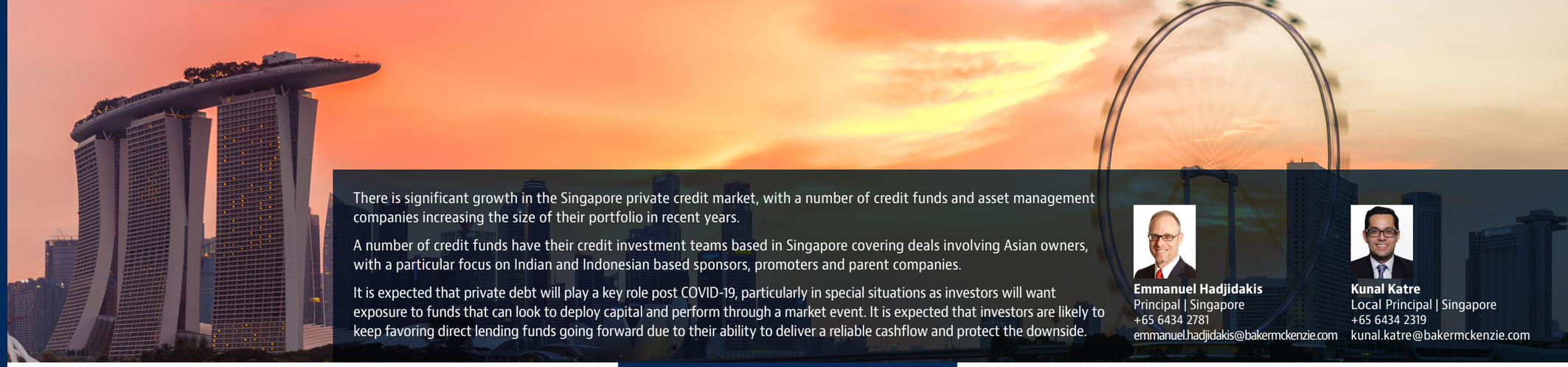
No.

If the collateral involves movable or personal properties (such as shares of stock, accounts, receivables, contract rights) and the security interest over such properties has been constituted via a security agreement under the Philippines' Personal Property Security Act, lenders may enforce on the security extra-judicially and via a public or private auction process (or where applicable, acquire the collateral in satisfaction or partial satisfaction of the secured obligation).

However, if the collateral involves real property or the security interest over the collateral has been constituted via legacy legislation, enforcement of security will require a public or private auction process and a lender will not be permitted to take ownership or title to the collateral until two failed auction sales of the collateral have taken place.

Finally, another practical consideration for lenders intending to engage in financing and security transactions in the Philippines is that enforcement in the Philippines is generally a lengthy process. Security interests that are sought to be enforced through court proceedings for foreclosure are often not immediately enforced. As a result, most lenders typically prefer (or provide in the relevant agreements the ability to conduct) extra-judicial foreclosure proceedings.

Singapore



There is significant growth in the Singapore private credit market, with a number of credit funds and asset management companies increasing the size of their portfolio in recent years.

A number of credit funds have their credit investment teams based in Singapore covering deals involving Asian owners, with a particular focus on Indian and Indonesian based sponsors, promoters and parent companies.

It is expected that private debt will play a key role post COVID-19, particularly in special situations as investors will want exposure to funds that can look to deploy capital and perform through a market event. It is expected that investors are likely to keep favoring direct lending funds going forward due to their ability to deliver a reliable cashflow and protect the downside.

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Can a fund make a new loan to a borrower incorporated in the Singapore without a banking license?

Yes, a fund can make a loan to a Singapore incorporated company without the requirement for the fund to be licensed as a bank under the Banking Act (Cap. 19). However, the fund must be a licensed moneylender under the Moneylenders Act in Singapore, unless it fits into one of the exclusions and/or exemptions in that statute.

In particular, a fund may come within the "excluded moneylender" exception if it lends money in Singapore solely to any one or more of the following:

- Corporations;
- Limited liability partnerships;
- Trustees or trustee-managers, as the case may be, of business trusts for the purposes of the business trusts; or
- Trustees of real estate investment trusts for the purposes of the real estate investment trusts.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Singapore?

Generally, no. Singapore levies withholding tax on any interest (**WHT**), commission, fee or any other payment in connection with any loan or indebtedness that is sourced or deemed sourced in Singapore and paid to a non-Singapore tax resident. The applicable WHT rate is generally 15%, but this may be lowered by the relevant double tax treaty. In addition, such WHT will not apply to the following (subject to the fulfilment of certain conditions):

- interest payments made by any person to a Singapore branch of a non-Singapore tax resident company;
- payments made by banks, finance companies, and certain approved entities;
- interests derived from any qualifying debt securities; and
- interests derived from any qualifying project debt securities.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Singapore?

In principle, there are no restrictions of this type in the case of corporate borrowers. The interest or default interest is governed by the contractual arrangements between the parties and by common law. However, there may be circumstances in which the default interest and ancillary fees may be considered to be an unenforceable penalty.

Can a fund hold directly all security granted by a security provider incorporated in the Singapore?

Yes, although security is commonly granted in favor of a security trustee to facilitate future transfers and enforcement.

Can a company incorporated in the Singapore provide credit support for the acquisition of its or its holding companies' shares?

Under the Companies Act in Singapore, there is a general restriction on a public company (or a company whose holding company or ultimate holding company is a public company) from providing financial assistance, whether directly or indirectly, to any person in the acquisition or proposed acquisition of shares in that company or the holding company or ultimate holding company of that company.

Under the Companies Act, it is possible to "whitewash" financial assistance. There are a number of way of doing so, which may include obtaining a combination of requisite shareholders' approvals, board approvals, solvency statements of directors' and compliance with certain statutory procedures under the Companies Act, such as the filing of certain prescribed forms with the Accounting and Corporate Regulatory Authority of Singapore (**ACRA**), publishing of notices to give financial assistance and/or allowing objections to be made by shareholders, debenture-holders and ACRA.

How strong in relative terms is credit support given by a company in the Singapore likely to be?

Strong. The company directors will need to satisfy themselves as to the corporate benefit of the transaction and to abide by maintenance of capital rules. While this requires a case-by-case analysis, in practice solvent Singapore companies with positive net assets often satisfy these requirements and can provide full guarantees and security. Under Singapore law, there are no limitations relating to the amount of debt which can be guaranteed, apart from any restriction that exists within a company's constitutional documents. In this respect, the articles of association will need to permit the giving of a guarantee/security.

Enforcement: Is the enforcement regime in the Singapore relatively lender friendly?

Yes. Enforcement can usually be achieved by a secured creditor out of court and relatively expeditiously. Depending on the type of security interests created, a secured creditor's remedies could include possession, statutory powers of sale and/or appointment of receivers. The remedies are cumulative and not mutually exclusive.

In principle, a lender can exercise rights of acceleration and security enforcement by giving notice to the borrower after any event of default if the documents provide for this (although in practice a technical default would rarely be used to accelerate debt or enforce security).

Hardening periods, though in principle relevant for anywhere between six months to five years after a suspect transaction (e.g., transactions at an undervalue, or unfair preference) by a company, rarely present an issue in practice if credit support has been provided for a new loan by a solvent company.

There are currently no exchange controls in effect in Singapore that restrict payments to a foreign lender under a security document, guarantee or loan agreement.

South Korea

Private Credit has been steady in Korea over recent years, providing significant opportunity for foreign investors.

The South Korean market appears to be generally resilient the COVID-19 crisis. Due to falling interest rates, there is still enough market appetite for refinancing existing financing deals. New transactions that were in the pipeline prior to the COVID-19 pandemic do not appear to have been affected and are being carried out, although we do not see as many "new transactions" originating given the current economic situation. Major Korean commercial banks are still playing a big role in the market. One major reversal in trend we noticed is that securities firms which were becoming major players as lenders in the finance market are not as active as before because of low liquidity caused by the COVID-19 pandemic. At the same time, there seems to be more projects in the market attracting Private Credit.

In particular, following the Korean Government's energy policies (i.e., 20% or more renewable power in energy mix by 2030), there is increased interest in renewable energy projects such as wind/solar power projects, which are attracting investments from overseas (including Private Credit). This trend is expected to continue according to the recent election results in Korea. While it is too early to anticipate what specific energy policies will come through, it is notable that the powerful ruling party favorably views the renewable energy sector.

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Can a fund make a new loan to a borrower incorporated in the South Korea without a banking license?

- Yes, assuming that the Exemption Requirement (as defined below) has been satisfied. In order to carry out a lending business (e.g., committing to advance funds and advancing funds) in Korea, a license, authorisation or registration is required under the relevant Korean laws (including the Act on Registration of Credit Business, etc. and Protection of Finance Users (the "**Credit Business Act**"), the Bank Act or other similar financial laws). However, there is an informal exemption to the above licensing requirement in case of cross-border lending to Korean residents from an offshore lender, provided that the cross-border lending occurs either (i) on a reverse inquiry basis; or (ii) with institutional investors on a low profile basis (the "**Exemption Requirement**"). In practice, the Korean regulators have not regulated cross-border lending so long as the Exemption Requirement is satisfied, but please note that Korean regulatory authorities have not yet provided any specific guideline on the Exemption Requirement. Thus, there is some ambiguity as to how the Exemption Requirement can be satisfied.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the South Korea?

- Generally yes. Withholding tax (**WHT**) generally applies to interest payments made by Korean resident borrowers. The rate of WHT on interest income is 22% or a reduced double taxation treaty (**DTT**) rate under any applicable tax treaty between Korea and the jurisdiction where the lender as beneficial owner is a tax resident.

  No stamp duties apply on provisions or transfers of loans unless a lender or borrower is a Korean licensed financial institution.

  Loans secured by real estate situated in Korea or stocks of a Korean company may trigger Korean transaction taxes if such collateral is transferred as a result of certain events such as an event of default.

  Korean borrowers are generally entitled to deduct interest expenses and other borrowing costs, subject to certain limitations which include: transfer pricing rules, thin capitalisation rules, 30% EBITDA rules, and anti-hybrid rules.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the South Korea?

- Yes, unless such an amount (which includes fees, interests and remuneration) violates the Interest Limitation Act. For lenders, other than financial institutions or credit service providers (as defined under the Credit Business Act) that have obtained the proper license, the maximum interest rate chargeable is 24% per annum under the Interest Limitation Act. Because the Interest Limitation Act is imperative, even foreign lenders that satisfy the Exemption Requirement (as noted above) and engage in cross-border lending to Korean residents from an offshore location will be subject to the interest rate limitation. There may be further limitations and exceptions to the maximum interest rate noted above if the lender is a financial institution based in Korea.

Can a fund hold directly all security granted by a security provider incorporated in the South Korea?

- Yes.

Can a company incorporated in the South Korea provide credit support for the acquisition of its or its holding companies' shares?

- There is no explicit financial assistance rule in Korea. However, all actions taken by the directors of the company providing financial assistance must comply with the relevant fiduciary duty restrictions. Under Korean law, the directors can be subject to civil and criminal liability for breach of fiduciary duty if they act with the intent to benefit a particular third party. In this context, a third party includes the shareholders of the company, since the prevailing view is that the fiduciary duty of directors runs to the company itself rather than to the shareholders of the company. Therefore, the directors of the target that support the provision of guarantees (or providing the assets of the target as collateral) with respect to the obligations of the target's parent could potentially be subject to both civil and criminal liability.

How strong in relative terms is credit support given by a company in the South Korea likely to be?

- Relatively weak. Under Korean law, if there is no justifiable corporate benefit that the Korean company will receive as a result of the contemplated provision of a guarantee or security, such provision of guarantee or security may constitute a breach of fiduciary duty (which is a criminal offence in Korea) for the directors who approved such transaction.

  An upstream security/guarantee raises a potential breach of fiduciary duty issue for the security provider's or guarantor's directors. Korean court precedents generally do not recognize a justifiable corporate benefit where a Korean subsidiary provides an upstream security/guarantee to its parent company. Any benefit that the entire company group receives from the upstream security/guarantee is treated separately from the corporate benefit given to the Korean subsidiary providing the security/guarantee. However, whether the Korean subsidiary in fact enjoys a corporate benefit by providing the security/guarantee is to be determined by the directors of the Korean subsidiary, taking into account the circumstances in their entirety. This is a factual analysis, and a board resolution simply acknowledging that the security/guarantee provides a corporate benefit would not automatically prove the existence of a justifiable corporate benefit to the Korean subsidiary providing the security/guarantee.

Is the enforcement regime in the South Korea relatively lender friendly?

- Generally, yes. A secured creditor can enforce its security right and the enforcement process is relatively straightforward. Enforcement over certain assets can be achieved by a secured creditor without court involvement and reasonably expeditiously. However, the exact enforcement procedure varies according to the security right granted: for example, mortgage enforcements are generally achieved through a public auction process of the Korean courts.

  With respect to claw-back risk, under Korean insolvency law, payments or other acts (such as granting security interest or sale of assets) performed by the borrower may be avoided by the insolvency official after commencement of insolvency proceedings if, in general, they fall into one of the following four categories:

  - malicious payments or acts with the actual intent to harm the creditors;
  - any act detrimental to the creditors which was done after suspension of payment or filing for insolvency proceedings;
  - a payment for an obligation or granting of a security interest without the pre-existing obligation to do so if such an act was made after, or within 60 days before, suspension of payment or filing for insolvency proceedings (the suspect period will be extended from 60 days to one year if the specially related party is the counterparty of that act); and
  - any gratuitous act performed after, or within six months before, the suspension of payment or filing for insolvency proceedings (such six-month period will be extended to one year if a specially related party is the counterparty of that act).

Taiwan

Private Credit remains very limited in the Taiwan market due to the strict regulation of banking and corporate lending activities and ready availability of loans at low cost from Taiwan banks.

Taiwan insurers are increasingly pursuing lending opportunities as a further avenue to deploy their funds. In addition, special regulations provide an avenue for insurers to lend to infrastructure projects in support of Taiwan's renewable energy development goals.

The Taiwan secondary loan market has low volume and most recent transactions have involved credit funds buying out Taiwan bank participations in syndicated loans made to borrowers in other jurisdictions.

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Can a fund make a new loan to a borrower incorporated in the Taiwan without a banking license?

Generally, no. Under Taiwan law, the making of loans on a commercial basis is a banking business activity and requires a banking business license; and there are no statutory exemptions or safe harbours which would clearly allow private lenders to engage in lending activities without a license. However, individual lending transactions are permitted subject to compliance with applicable laws and this provides a basis for making loans without a banking license on a limited basis. Firstly, the lending transactions must not amount to a business of lending. Secondly, where the private lender is a Taiwan company, the lending must comply with Article 15 of the Company Law. Thirdly, where the private lender is a non-Taiwan registered entity, the lending must be on a purely cross-border basis and not involve lending activities physically conducted in Taiwan.

The Taiwan courts have expressed their view that there is a "business" when, according to general social perceptions, regular social activities are conducted and, as its primary purpose, the same kinds of acts are repeated. If the lending activity is only a one-off transaction and the fund does not plan to establish a business in Taiwan or to enter into a series of lending activities in Taiwan, the risk of the fund being deemed to be conducting business activities in Taiwan is low.

In the case of foreign funds, under the Company Law, a foreign company which has not first obtained branch office registration in Taiwan may not conduct business operations in the territory of Taiwan and, under the Limited Partnership Act, a foreign limited partnership may not transact business within the territory of Taiwan without completing the procedure for branch office registration. The registration procedures involve examination of the proposed business scope of the entity and business scopes which are stated to comprise regulated business activities such as lending will be referred to the financial regulator for approval. These restrictions prevent a foreign entity from conducting a lending business in Taiwan without obtaining a banking license although lending activities which fall short of a "business" (such as a one-off loan) and which do not involve lending activities physically conducted in Taiwan have historically not been of concern to the regulators.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Taiwan ?

Generally, taxes do not present a material issue to a local fund lending directly or taking credit support from a company incorporated in Taiwan. Interest and fees paid to a foreign lender (whether or not a bank) without a branch office in Taiwan are subject to a statutory 20% interest withholding tax rate (**WHT**) but this may be reduced (usually to 10%) under applicable double taxation treaties.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Taiwan?

Under Taiwan laws, interest is subject to the usury provisions of the Civil Code, and the highest rate currently permissible is 20% per annum.

Can a fund hold directly all security granted by a security provider incorporated in the Taiwan?

A local fund can hold directly all security granted by a borrower or other security provider incorporated in Taiwan.

In principle, a foreign fund may hold directly all security granted by a security provider incorporated in Taiwan, such as share pledges and account pledges, but this is not the case for land or building mortgages and chattel mortgages.

For land and building mortgages, there are restrictions that prohibit a foreign entity without a branch in Taiwan from creating a mortgage. Article 4 of the Operational Directions for Foreigners to Acquire Land Rights in Taiwan stipulates that a foreign juristic person is required to establish and register a branch in Taiwan pursuant to the Company Law in order to become qualified to acquire or to create land or building rights.

For chattel mortgage, the Ministry of Economic Affairs of Taiwan currently does not accept applications for chattel mortgage registration if the mortgagee is a foreign entity without branch registration in Taiwan. An unregistered chattel mortgage is not enforceable against a bona fide third party.

Can a company incorporated in the Taiwan provide credit support for the acquisition of its or its holding companies' shares?

Yes. There are no financial assistance rules in Taiwan but the directors and managers of the company providing the credit support must comply with their duties to act in good faith for the benefit of the company as a whole and for a proper purpose in approving the credit support.

How strong in relative terms is credit support given by a company in the Taiwan likely to be?

Strong. As long as the security provider is permitted by its articles of incorporation and applicable internal rules/regulations to give guarantees and security and the credit support is validly created and any perfection requirements are complied with, the creditors, in the event of default of the loans, are entitled to take an enforcement action against the credit support provider and seek to be compensated from the enforcement proceeds in accordance with the Compulsory Execution Act. In bankruptcy, the giving of credit support may only be avoided if it is (i) gratuitous or onerous and prejudicial to other creditors; or (ii) new security for existing loans given less than six months prior to the adjudication of bankruptcy.

Is the enforcement regime in the Taiwan relatively lender friendly?

Yes. The main concern is that the court system is slow and inefficient. Ordinary legal proceedings to obtain judgment on a debt may take six months to two years depending on the complexity of the case and whether rights of appeal are exercised. In order to mitigate this issue, lenders often ask borrowers to issue a promissory note so as to enable the lender to obtain an enforcement title and directly commence an enforcement proceeding under the Compulsory Execution Act and which may be completed within approximately six weeks unless the proceeding is defended by the debtor. Security holders may also proceed directly to enforcement under the Compulsory Execution Act and petition the court to auction off the mortgaged/ pledged property.

Thailand

In Thailand, licensed banking financial institutions dominate the lending market, with lending by offshore funds or non-bank entities being relatively uncommon. While lending by an offshore fund to a Thai borrower does not require a banking license, certain exchange controls may apply to loan and interest payments. An overseas lender can also take security over property situated in Thailand, but there are some limitations in holding certain types of collateral.

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Can a fund make a new loan to a borrower incorporated in the Thailand without a banking license?

Yes, it is not necessary for a foreign lender to obtain a banking license to provide a loan to Thai borrower. It is also not necessary for a foreign lender to be licensed under the Foreign Business Act of Thailand to provide a loan to a borrower in Thailand if such person or entity does not conduct any activities in relation to such provision of loans in Thailand. Please note that certain exchange control law requirements will need to be complied with in order for the Thai borrower to make loan and interest payments.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Thailand?

Yes. Interest withholding tax (**WHT**) is an issue in Thailand. The payment of interest to the offshore fund by a Thai company will generally be subject to WHT at the rate determined in the relevant double taxation treaty (**DTT**) and, if none is applicable, the full withholding rate of 15% would apply.

Execution of a loan agreement is subject to Thai stamp duty of 0.05% of the total loan amount, but capped at THB 10,000 (approximately USD 300) per agreement. The creation and transfer of certain security (real estate property mortgages) triggers land registration fee at the rate of 1% of the total mortgaged amount, but not exceeding THB 200,000 (approximately USD 6,000) per mortgagee under each mortgage.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Thailand?

No. The charging of interest (that is not default interest) on a loan by a foreign fund (that is not a financial institution) to a borrower in Thailand is limited to a maximum interest rate of 15% per annum. For the rate of default interest subject to the maximum rate of interest chargeable under Thai law. Thai courts have the discretion to review and subsequently reduce any default interest rate agreed between parties, if the courts determine that the rate is disproportionately high.

Can a fund hold directly all security granted by a security provider incorporated in the Thailand?

Yes, foreign funds can take security over Thai assets directly without having to appoint a security agent. However, only "financial institutions" and those specifically designated under a ministerial regulation can accept all asset "business" security as secured creditors. While parties often enter into any other forms of security as part of the security package, these are typically not recognized as having priority over other creditors under Thai bankruptcy law.

Can a company incorporated in the Thailand provide credit support for the acquisition of its or its holding companies' shares?

Yes. There is no prohibition under Thai law on a company giving financial assistance for the acquisition of its own shares or the shares of its holding company, except that a company cannot accept a pledge of its own shares. Under Thai corporate law, directors must conduct the business of the company in accordance with applicable laws, the articles of association, the objectives of the company, and the resolutions of the shareholders in good faith, and in the best interests of the company. If the financial assistance is also provided by a public limited company or companies issuing securities to public, in certain circumstances, particular additional requirements apply.

How strong in relative terms is credit support given by a company in the Thailand likely to be?

Medium. Provided the type of guarantee or security is capable of being taken in Thailand and all exchange control regulations are complied with, credit support from a Thai company is enforceable in accordance with its terms.

Is the enforcement regime in the Thailand relatively lender friendly?

No. The enforcement process in Thailand can be lengthy and is not lender friendly. Moreover, the enforcement of secured assets located in Thailand must be done in accordance with Thai law regardless of the governing law of security documents. Enforcement requirements differ depending on the type of security.

Thai law also does not specifically provide for the direct enforcement or recognition of foreign court judgments in Thailand. Therefore, new judicial proceedings must be initiated in Thailand, albeit foreign court judgments and documentary evidence generated during any foreign litigation process may be admissible as evidence in Thailand. Thai courts generally recognize and enforce arbitration awards whether they are made in Thailand or elsewhere. Thailand is a member state of the New York Convention 1958 and the Geneva Convention 1927, so an arbitral award made in a member state under either of these conventions will typically be recognized and enforced by Thai courts.

Vietnam

In general, private credit remains limited in Vietnam due to statutory and regulatory restrictions whereby only credit institutions (such as banks or finance companies) licensed by the State Bank of Vietnam are permitted by law to conduct lending activity on a regular basis and for a profitable purpose.

Consumer lending has grown significantly in Vietnam over recent years with a very active participation of non-bank players being finance companies (including foreign-invested companies or domestic companies which are often Vietnamese bank's wholly-subsidiaries). Recently, the State Bank of Vietnam has stopped issuing new licenses on establishment of finance companies due to the "hot growth" of such field. As such, the investors, especially foreign investors, have to access to the market by way of acquisition of shares of already-licensed finance companies. A number of large M&A deals in this regard have been recorded to date.

Corporate bond becomes a common capital source for enterprises. However, with current cumbersome procedures currently in place for the issuance of foreign currency denominated bonds, foreign investors (including private funds and others) find it less attractive since Vietnam Dong is a non-convertible currency.

The secondary loan market in Vietnam remains in its infancy, with a focus on resolving bad debts of banks rather than on having a purely commercial debt trading market.

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Can a fund make a new loan to a borrower incorporated in the Vietnam without a banking license?

- An offshore fund (i.e., a fund incorporated and operating under the laws of a jurisdiction other than Vietnam) is not required to obtain a banking license in order to provide a loan to a Vietnamese borrower.

  With regard to an onshore fund operating under the laws of Vietnam, it is not permitted to conduct lending activity on a frequent basis in Vietnam market, classified as "banking activity" which can only be conducted by credit institutions licensed by the State Bank of Vietnam, a banking regulator in Vietnam. As such, a Vietnamese non-credit institution entity can only provide loans to a borrowers on an irregular basis and for non-profitable purposes – i.e., provide loans on one-time basis without (or with very low) interest, fees or other charges.

Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the Vietnam?

- With regard to cross-border loans/facilities provided by an offshore lender to a Vietnamese borrower (**Offshore Loans**), there is no withholding tax (**WHT**) or other tax or duty to be deducted from the payments of principal sums due and payable by the borrower save that all payments of interest, default interest or fees earned by the lenders will be subject to a withholding of 5% corporate income tax. However, the Vietnamese tax authority would likely interpret that some types of fees incurred under the loan agreement, such as a commitment fee, arrangement fee or agency fee, are not categorized as loan interest but as services fees under Vietnamese tax regulations. If this is the case, these services fees are subject to a withholding of 5% value added tax and 5% corporate income tax.

  In relation to domestic entities providing credit support by way of provisions of loans or guarantees, its income earned from such provisions should be subject to general tax regimes applicable to Vietnamese enterprise.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in the Vietnam?

- In relation to the Offshore Loans, there is no celling rate on interest or default interest. Nevertheless, as a matter of practice, if the interest or default interest rate is too high compared to the market standard, the State Bank of Vietnam (**SBV**) may challenge the registration of the Offshore Loans and, if that is the case, the parties will need to explain the reason for the high rate of interest. The SBV may refuse to register the loan if it considers the interest rate to be too high. There is also a criminal penalty for usury in Vietnam but in practice it is unlikely that an offshore lender would be subject to a usury penalty.

  Furthermore, the remittance bank in Vietnam (i.e., the bank where the borrower's account for performance of the Offshore Loans is opened) may also challenge the payment of such high interest (at the bank's discretion) if there is concern in relation to a potential breach of Vietnam's anti-money laundering regulations. Vietnamese law does not expressly provide for any restriction on lending fees and/or remuneration payable to such offshore lender in connection with the Offshore Loans.

  Regarding an onshore lender which is not credit institution, the laws provide for a statutory ceiling on interest rate, which is 20% per annum on the principal of loans provided by such lender. The default interest rate is not allowed under the law to be more than 150% of the applicable interest rate. The law is silent on fees and/or remuneration that can be paid in connection with loans provided by an onshore non-credit institution lender.

Can a fund hold directly all security granted by a security provider incorporated in the Vietnam?

- Except for security over immovable properties (i.e., land and assets attached to land) located in Vietnam, the fund can take security over certain movable assets owed by security providers in Vietnam. Common types of secured assets include shares, equity interests, bank accounts, receivables and equipment and machinery.

  In relation to enforcement of secured assets being shares or equity interests in a Vietnamese company, the foreign ownership caps (in case the secured party is a foreign entity) must also be taken into account if business lines of that company include business lines that restrict foreign investors.

Can a company incorporated in the Vietnam provide credit support for the acquisition of its or its holding companies' shares?

- Yes. There is no specific Vietnamese law restricting "financial assistance" for private companies. However, while a Vietnamese company can guarantee the debt of a Vietnamese borrower, guaranteeing the debt of an offshore parent company requires prior approval from the Prime Minister of Vietnam, which is not feasible to obtain in practice.

  With regard to a Vietnamese "public" company, which is not a credit institution, it may not extend loans and/or guarantees to:

  - its shareholders unless such shareholders (i) are that public company's subsidiaries, (ii) are not State owned-enterprises and (iii) became subsidiaries of such public company before 1 July 2015); and
  - a related person of an organisational shareholder unless (i) that related person and the public company has a relationship of parent-subsidiary or companies in a group company, and (ii) the transaction is approved by the public company's general meeting of shareholders or board of directors.

How strong in relative terms is credit support given by a company in the Vietnam likely to be?

- Medium. As noted above, while a Vietnamese company can guarantee the debt of a Vietnamese borrower, guaranteeing the debt of an offshore borrower requires prior approval from the Prime Minister of Vietnam, which is not feasible to obtain in practice. Also noted above, security is available over most assets of a Vietnamese company.

Is the enforcement regime in the Vietnam relatively lender friendly?

- No. Enforcement can be prolonged and time-consuming in Vietnam. The courts and/or the enforcement agencies do not force the securing parties to conduct and/or cooperate with the secured parties in realisation of the secured assets unless the dispute is brought to the court or arbitration for hearing.

  The enforcement of a foreign court judgment or foreign arbitral award in Vietnam is subject to a Vietnamese court's recognition and permission for enforcement. Of note, the court's recognition and permission of a foreign court judgment in Vietnam may be permitted (i) if the foreign judgment is issued by the courts of countries that have entered into or acceded to international treaties with Vietnam in that regard; or (ii) on the basis of reciprocity. To date, most of the countries that have entered into such agreements with Vietnam are socialist.

  Note that Vietnam is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so an arbitral award given by an arbitration centre of another New York Convention member country could be recognized and permitted for enforcement in Vietnam by a competent court of Vietnam.

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