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Guide to Private Credit in Asia Pacific

2022 Edition

TRANSACTIONAL POWERHOUSE

Leading and closing complex deals – every day

Introduction

Welcome to the second edition of our Guide to Private Credit in Asia Pacific. Our guide focuses on key issues regarding private credit transactions across 14 Asia Pacific jurisdictions. It also provides both high-level overview and more detailed jurisdiction-by-jurisdiction analysis.

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

Private credit is also playing a key role as the Asia Pacific economy seeks to recover from the effects of COVID-19 and will be an increasingly important source of liquidity in 2022 for borrowers in the Asia Pacific region.

Finally, with the exponential growth in bank-led green/sustainability-linked loans in Asia Pacific, ESG and sustainability is growing in importance in the private credit market and we expect this trend to accelerate in 2022. Until a couple of years ago, ESG and sustainability in private credit were largely limited to excluding investment in certain sectors (e.g., no investment in fossil fuels). However, we are now seeing funds actively seeking to lend to companies with sustainable business models and, like with the banks, hiring dedicated sustainable finance teams within those private credit funds to structure ESG financings and to monitor compliance.

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

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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 this jurisdiction?	● 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 public companies, which may be listed or unlisted)	● Yes	● Yes	● Yes (a private company may, subject to a whitewash)	● Yes	● Yes	● Yes (subject to a whitewash, which is applicable in certain circumstances)	● Yes	● Yes (other than listed companies)	● Yes (with restriction for listed companies)	● Yes
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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, creating a financing gap that is being increasingly filled by private credit providers. Private credit will continue to play a key role in the recovery of the Australian economy following COVID-19, and we expect to see a steady growth in sustainability-linked loans from private credit. 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, the making of loans generally 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 a 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 — 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 facilities, the parties must satisfy one of five public offer tests, which are relatively straightforward procedures. The following are the most common offers made:
  - To at least 10 unrelated lenders
  - 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 to 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 favor 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 or the company's ability to pay its creditors, or where the assistance is either approved by its shareholders under a financial assistance "whitewash" procedure or is exempted.

  Under the financial assistance "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 be satisfied as to the corporate benefit of the transaction and abide by the 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 yet 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.

  It is also important to register all security interests on the Personal Property Securities Register (PPSR), as the Personal Property Securities Act 2009 provides that, subject to specified exemptions, security interests which are perfected by registration have priority over non-registered security interests. This is generally a straightforward procedure, however a lender should always obtain banking and finance advice when seeking to register a security interest.

China (The People's Republic of China)[1]

The 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 crackdown 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
- 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. 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). However, an offshore fund qualified to operate a lending business under the laws of the jurisdiction of its incorporation ("Offshore Fund") making a cross border loan to a PRC borrower does not require a PRC financial license, so long as its marketing activities in relation to such loans are made on a one-to-one and closed-door basis, and both mass and material deal-related marketing in the PRC are avoided.

  The PRC onshore borrower 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 one year) the National Development and Reform Commission (NDRC). Among other things, the offshore borrowing headroom for a PRC company that is not a bank or financial institution is limited to two times (which has been lowered from 2.5 times as of 7 January 2021) 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 a larger foreign debt quota. Nonetheless, cross-border loans to PRC real estate companies and government financing vehicles are 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 a 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%). This is subject to any exemptions or deductions under any applicable double tax treaty between the PRC and the lender's jurisdiction of incorporation. PRC stamp duty will also apply to the loan agreements (but not to the guarantees/security documents) where the loan agreements are executed in the PRC or the proceeds are used in the PRC.

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

- Generally yes for cross-border loans made available to a PRC borrower by an Offshore Fund, unless such amount is so unreasonably excessive that in the case of a dispute between the parties, it may not be upheld by a PRC court. There are no hard-and-fast rules on the level of interest, fees and remuneration that would be deemed by PRC courts to be unreasonably excessive. However, we believe that the judicial interpretations issued by the Supreme People's Court of the PRC (originally promulgated on 6 August 2015 and amended on 19 August 2020 and 29 December 2020, with the latest amendment effective on 1 January 2021) on permitted intercompany loans made by an unlicensed PRC lender to a PRC borrower (the Judicial Interpretation on Private Lending) may, to some extent, reflect the positions of the PRC courts on this issue. Under such judicial interpretations, the PRC courts will not uphold a claim for the payment of interest (including fees and other remuneration in the nature of interest) that exceeds four times the Loan Prime Rate (LPR, introduced by the PBOC in August 2019 and calculated and published by the National Interbank Funding Center (NIFC) on the 20th day of every month (postponed in case of holidays)) for a one-year loan as at the time of execution of the contract. By way of illustration, the latest LPR for the one-year loan published by the NIFC on 20 October 2021 is 3.85% which has remained unchanged since April 2020.

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

- Generally yes. However, in the case of a mortgage over PRC onshore immovable property such as land and building, 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. This needs to be considered on a case-by-case basis. In practice, the operational guidelines of the local registration authorities may vary in different locations across the PRC. If 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, although registration of the cross-border debt under the cross-border loan is required before drawdown with SAFE and (if the term of the loan exceeds one year) the NDRC.

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

- Generally yes, other than listed companies. Under the relevant rules and regulations promulgated by the China Securities Regulatory Commission (CSRC), neither a company listed on the PRC stock exchanges, nor a PRC company seeking to be listed offshore, nor their respective subsidiaries shall 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 express restriction on the giving of financial assistance under PRC law, although this remains subject to the provisions of the company's 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 in the next section.

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

- Medium. There is no concept of "corporate benefit" under PRC law. Therefore, a PRC company is generally allowed to grant upstream, cross stream and downstream security and guarantees. This remains subject to the provisions of the company's 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 in support of the indebtedness of its shareholders or de facto controllers (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 is being guaranteed or secured are not entitled to vote; and (ii) providing a guarantee or security for third-party indebtedness by listed companies is strictly regulated. In particular, please note that the Interpretation of the Supreme People's Court on Application of the Civil Code of the PRC in Respect of Security System (promulgated by the Supreme People's Court and which came into effect on 1 January 2021) requires that any guarantee or security provided by an A-share listed company or a subsidiary controlled and publicly disclosed by such A-share listed company or a company of which shares are traded on the National Equities Exchange and Quotations (NEEQ, also known as the New Third Board) shall be announced by such A-share listed company or such company of which shares are traded on the NEEQ. Such an announcement is required in order for these guarantees and security documents to be deemed by PRC courts to be enforceable against such guarantor or security provider.

Is the enforcement regime in the PRC relatively lender-friendly?

- Medium. In principle, a lender can exercise rights of acceleration and enforcement against any guarantee or security 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 property and pledges over shares in PRC companies, a 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 an agreed price.

  The enforcement proceeds could generally be remitted out of the PRC without the prior approval of or registration with PRC governmental agencies, subject to: (i) completion of the due registration of the cross-border debt under the cross-border loan with SAFE and (where the term of the loan is greater than one year) the NDRC, as mentioned above; and (ii) 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 credit.

1 For the purposes of this Guide, "PRC" or "China" refers to the People's Republic of China and excludes the Special Administrative Region of Hong Kong, 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 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 also requires any lender (other than an AI) that is in the business of making loans in Hong Kong (or who holds themselves 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 others, 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 that is freely convertible into Hong Kong dollars)
  - A company (or any subsidiary of that company) the shares or debentures of which are listed on a recognized stock market

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 Hong Kong?

- No. In Hong Kong, no stamp duty is payable on the granting of a loan nor generally on the taking of security or granting of a 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 valorem stamp duty. Also, there is no requirement to deduct or withhold tax from any amounts to be paid or repaid to a lender.

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

- Generally yes. However, Hong Kong law restricts default interest to the extent it could constitute a penalty (which would render it unenforceable on the grounds that it does not represent a genuine pre-estimate of the loss of the aggrieved party, or is 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 that is freely convertible into Hong Kong dollars). Under the MLO, an effective annual interest rate in excess of 60% is illegal, while 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 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 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 the 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 financial 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. However, 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 Hong Kong likely to be?

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

  The company directors will need to be satisfied 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 protects 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 Hong Kong relatively lender-friendly?

- Yes. The enforcement regime in Hong Kong is similar to that 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 nonbanking 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 decreased due to increasing defaults coupled with the illiquidity in the secondary markets. This has opened up a huge opportunity for alternate investment funds providing structured credit.

The uncertainty, weakening of credit quality and continual adverse impact on businesses due to COVID-19 is likely to increase the demand for private credit in India, especially private distressed credit, 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 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 "nonbanking 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 a Financial Action Task Force or an International Organization of Securities Commission compliant country. Such a fund would not need to be licensed, and is therefore entitled to carry on business in India.

  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 Securities and Exchange Board of India (SEBI) under the SEBI (Foreign Portfolio Investors) Regulations, 2019.

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 India?

- Currently, the applicable rate of withholding tax on interest (WHT) payable by an Indian company to a nonresident lender (situated outside India) on external commercial borrowings and Indian rupee (INR) denominated bonds is 5% (plus applicable surcharge and excess), subject to the satisfaction of certain conditions and the provision of prescribed documents. This tax is withheld from the interest payable to the lender and deposited with the government on the lender's behalf. It is the 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 its 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 India?

- Interest, fees and remuneration in relation to non-convertible debentures may be agreed freely between the investors and the issuer, provided they are reasonable and not extortionate. However, under the guidelines issued by the Reserve Bank of India, if a fund established outside India provides a loan to a company in India in the form of external commercial borrowings, a ceiling has been prescribed for the all-in cost. Such ceiling includes the interest rate, other fees, expenses, charges, guarantee fees and export credit agency charges, whether paid in a foreign currency or INR; it excludes commitment fees and WHT payable in INR. The all-in-cost ceiling allowed for an external commercial borrowing in foreign currency is six-month LIBOR (or an equivalent benchmark for any other currency) plus 450 basis points. The all-in-cost ceiling allowed for an external commercial borrowing in INR is capped at 450 basis points over the prevailing yield on Indian government securities of corresponding maturity.

Can a fund hold directly all security granted by a security provider incorporated in 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, the security will also need to be granted 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 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 an acquisition financing for the acquisition of its shares.

How strong in relative terms is credit support given by a company in 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 corporate benefit to the company giving the credit support. If during insolvency proceedings the creditor cannot show that there was sufficient corporate benefit to the company, the court may rescind the relevant credit support if such credit support had been provided within the hardening periods prescribed under the Insolvency and Bankruptcy Code 2016.

Is the enforcement regime in 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 a pledge) in favor 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. However, after the Asian financial crisis in 1998 and the resultant banking crisis and recapitalization of the banking sector in Indonesia, the Indonesian credit market became 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 commercial loans outstanding as at December 2020. 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 that has led to nonbank financial institutions in Indonesia, 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, particularly during the economic recovery following COVID-19.

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Can a fund make a new loan to a borrower incorporated in 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 entering into loan agreements, Indonesian law security documents and other finance documents to 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 Indonesia?

- There are certain requirements under Indonesian law on taxes and similar charges in relation to financing. However, taxes or similar charges generally do not present a material issue with regard to 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, as well as stamp duty that is payable on each of the loan and security documents when executed in Indonesia. In relation to stamp duty, a new Indonesian Stamp Duty Law was recently enacted, where the applicable stamp duty was increased from IDR 6,000 to IDR 10,000. As a transitional provision, the new Stamp Duty Law provides a transition period until 1 January 2022 for the use of physical stamps printed before the effectiveness of the new Stamp Duty Law. Multiple stamps can be affixed to a document where the aggregate value of the duty stamps affixed should be at least IDR 9,000.

  In relation to the preparation and registration fees for security documents, the most significant fee would be in relation to a land mortgage (Hak Tanggungan) registration, which could be up to 1% of the transaction value, although this amount is subject to negotiation.

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

- Yes. A lender and borrower in this jurisdiction can agree on a rate of interest or default interest that may be charged in an agreement. However, there was a case where an Indonesian 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. However, 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 Indonesia?

- From a regulatory perspective, there are no restrictions to the provision of security or guarantees in favor of 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 need to be signed in front of a notary in Indonesia, while 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; and (v) enforce the security.

Can a company incorporated in 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 suffered losses due to the actions of the company as a result of resolutions passed during a general meeting of shareholders, board of directors meeting, or board of commissioner meeting. Shareholders can use this right if they feel that the granting of any financial assistance will cause them losses.

  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 Indonesia likely to be?

- Strong. The company directors will need to be satisfied as to the corporate benefit of the transaction to ensure that they are not violating their duty of care to the company. In practice, however, most companies can provide full guarantees and security. By obtaining the written consent of all the shareholders, board of directors and board of commissioners of the company authorizing the granting of credit support and confirming that the granting of credit support is in the interest of that company, the company directors should be able to satisfy the corporate benefit in granting the credit support. In practice, most companies can provide credit support in the form of guarantee and undertakings, and security over certain assets.

Is the enforcement regime in 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 either or both of the following:

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

  It is also worth noting that a court judgment of a non-Indonesian court will not be enforceable in Indonesia although such judgment could be admissible as non conclusive evidence in proceedings on the underlying claim in an Indonesian court. A non-Indonesian judgment may, however, be given such evidentiary weight as an Indonesian court considers appropriate. Re-examination of the issues de-novo would be required before an Indonesian court in order to enforce the claims in Indonesia.

  With regard to arbitration, a foreign arbitration award, which meets the requirements in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the requirements under the laws of the Republic of Indonesia should be recognized and enforced in the Republic of Indonesia.

Japan

- Private credit remains limited in the Japanese market due to the strict regulation on banking and corporate lending activities and the ready availability of senior debt at low cost from Japanese banks.
- Japanese financial institutions have also gradually increased the number of loans to small- and medium-sized enterprises in response to guidance from the Japanese government over the past decade, further limiting opportunities for private credit in Japan.
- 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 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 nonbanks, 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 performed by licensed banks). If a security trust scheme is used in Japan, the security trustee must be a company that has obtained a Trust Company license pursuant to the Trust Business Act (Act No. 154 of 2004, as amended). However, security trust schemes are rare in Japan — 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 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 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
- 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 or the Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates. 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.

Further, it is generally understood that arrangement fees and agency fees are not characterized as interest, as long as they are paid for arrangement services and agency services that are in fact provided.

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

Yes.

Can a company incorporated in 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 that the directors do not violate this duty of care.

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

Strong. The company directors will need to be satisfied as to the corporate benefit of the transaction to ensure that they are not violating their duty of care to the company. In practice, however, 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 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 in turn 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. The legal private credit market is 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 compliance scrutiny by regulatory and enforcement agencies.

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 are generally more active in times of economic crisis when local bank credit is tightened and risk appetite reduces.

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Can a fund make a new loan to a borrower incorporated in 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 such fund does not carry on any business, operation or activity that involves: (i) accepting deposits of any kind; and/or (ii) paying or collecting checks. 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 or guarantee 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 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, as follows: (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 Malaysia?

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

- 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) shall not exceed 8% per annum on daily basis.
- The payment of compound interest is illegal.
- 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 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 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, that is, all of the following conditions are fulfilled:

- The financial assistance is approved by special resolutions of the shareholders of such Malaysian company.
- The financial assistance is approved by a majority of the directors of such Malaysian company.
- Each director of such Malaysian company who voted in favor 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.
- The financial assistance is given not more than 12 months after the day the solvency statement was made.

How strong in relative terms is credit support given by a company in 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 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 around 85% combined market share as at February 2021. However, there has been real growth for private capital participants, and we expect that to continue, particularly given the following:

- There is impending increased regulatory capital requirements for banks in New Zealand (noting that these were delayed as a result of COVID-19, but will be phased in from July 2022).
- There is greater flexibility of terms and structures that private credit can offer.
- It will become harder for many borrowers in certain sectors post-COVID-19 to access traditional bank-debt, and 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 and family offices 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 New Zealand without a banking license?

- Yes, noting the specific rules, such as the following, that may apply in some cases:
  - The Reserve Bank of New Zealand Act 1989 (NZ) requires any foreign entity that 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 authorizations may apply or be available for overseas banks that 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 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 that 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 a 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 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 "payer") that make interest payments to nonresident lenders under the nonresident withholding tax (NRWT) rules. A New Zealand payer will be required to apply the NRWT rules on interest payments to a nonresident lender ("NRWT Lender"), unless under either of the following circumstances:
    - i. The nonresident lender lends to the New Zealand payer through a fixed establishment (i.e., branch) in New Zealand.
    - ii. The nonresident lender is a registered bank (that is not associated with the New Zealand payer) engaged in business in New Zealand through a fixed establishment in New Zealand.
  - 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," which stipulates as follows:
    - i. A payer may register with Inland Revenue as an "approved issuer" and register the relevant loan as a "registered security."
    - ii. A payer may make a payment equal to 2% of each gross 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 an NRWT Lender up for the NRWT that would otherwise be payable.
  - New Zealand borrowers are generally entitled to deduct interest expenses and other borrowing costs, subject to New Zealand's thin capitalization and restricted transfer pricing rules.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in 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 the following:
  - i. Penalties: There may be circumstances in which default interest or fees may be considered to be an unenforceable penalty.
  - ii. 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.
  - iii. Related parties: New Zealand's restricted transfer pricing rules effectively limit the interest rate that can be applied to cross-border related party debt.

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

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

Can a company incorporated in 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 shares 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 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 be satisfied 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 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 they 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.

The 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 obtain a license from the Philippine SEC.

Notwithstanding the prevailing regulatory restrictions, security can be 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.

  However, 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 following must be taken into account:
  - 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 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 nonresident foreign corporations are subject to withholding tax. As a general rule, interest payments to nonresident 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 reduced under 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 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 be satisfied as to the corporate benefit of the transaction to ensure they are not violating their duty of care to the company. In practice, however, most companies can provide guarantees and security.

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 the 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-, Hong Kong-, PRC- and Indonesian-based sponsors, promoters and parent companies.

It is expected that private debt will continue to play a key role as Singapore prepares itself for the "new normal" 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 reliable cash flow and to protect the downside.

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

- Yes, a fund can make a loan to a Singapore-incorporated company without the need 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
  - 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 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 to be sourced in Singapore and paid to a non-Singapore tax resident. The applicable WHT rate is generally 15%, but this may be lowered by a 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
  - Interests derived from any qualifying project debt securities

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

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

Can a company incorporated in 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), and 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 Singapore likely to be?

- Strong. The company directors will need to be satisfied 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 that 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.

Is the enforcement regime in 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 to 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 trend reversal is that securities firms that 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 seem to be more projects in the market attracting private credit.

In particular, following the Korean government's energy policies (i.e., 2030 renewable energy target: 20% or more renewable power in the energy mix by 2030) and the strong initiative led by RE100, there is increased interest in renewable energy projects such as wind (including offshore wind) / solar power projects, which are attracting investments from overseas (including private credit).

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

Yes, assuming that the Exemption Requirement (as defined below in this section) has been satisfied. In order to carry out a lending business (e.g., committing to advance funds and advancing funds) in Korea, a license, authorization or registration is required under the relevant Korean laws (including the Act on Registration of Credit Business, etc., and Protection of Finance Users ("**Credit Business Act**"), the Bank Act, or other similar financial laws). However, there is an informal exemption to the above licensing requirement in the 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 ("**Exemption Requirement**"). Korean regulatory authorities have not yet provided any specific guideline on the Exemption Requirement, so 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 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 capitalization rules, 30% EBITDA rules, and anti-hybrid rules.

Can interest, fees and remuneration be agreed freely between a lender and a borrower in 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 20% per annum (decreased from 24% following the recent amendment by presidential decree of the Interest Limitation Act on 6 April 2021) under the Interest Limitation Act. Because the Interest Limitation Act is imperative, even foreign lenders that satisfy the Exemption Requirement 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 South Korea?

Yes.

Can a company incorporated in 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 are owed 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 provide 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 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, the provision of any guarantee or security may constitute a breach of fiduciary duty (which is a criminal offense 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 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 reasonably expeditiously by a secured creditor without court involvement. 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 under one of the following four categories:

- Malicious payments or acts with the actual intent to harm the creditors
- Any act detrimental to the creditors that 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)
- 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 the 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 the 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 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. There are no statutory exemptions or safe harbors that 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 constitute a lending business. 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 that 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 if the business scope comprises regulated business activities such as lending, it will be referred to the financial regulator for approval. These restrictions prevent a foreign entity without a banking license from conducting a lending business in Taiwan, although lending activities that 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 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 Taiwan?

- Under Taiwan laws, interest is subject to the usury provisions of the Civil Code, and the highest rate currently permissible is 16% per annum.

Can a fund hold directly all security granted by a security provider incorporated in 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 entity 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. Furthermore, the home country of the foreign entity, according to treaties or its domestic laws, must allow Taiwan nationals to create a mortgage over land in its home country on a reciprocal basis.

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

Can a company incorporated in 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 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, the credit support is validly created, and any perfection requirements are complied with, the creditors, in an event of default, are entitled to take 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 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, which may be completed within approximately six weeks unless the proceeding is challenged 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 nonbank entities being relatively less common. 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 Thailand without a banking license?

Yes It is not necessary for a foreign lender to obtain a banking license to provide a loan to a 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 the provision of loans in Thailand. However, certain exchange control law requirements will need to be complied with in order for the Thai borrower to make loan and interest payments to a foreign lender.

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 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); if none is applicable, the full withholding rate of 15% will 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 a 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 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. Default interest is also subject to the maximum rate of interest chargeable under Thai law. Thai courts have discretion to review and subsequently reduce any default interest rate agreed between parties where the courts determine that the rate is disproportionately high.

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

Yes, foreign funds can directly take security over Thai assets without having to appoint a security agent. However, only "financial institutions" and those specifically designated under a ministerial regulation as eligible security receivers can accept "business security" over assets, pursuant to the Business Security Act of Thailand. A party (other than in its capacity as a pledgee, a mortgagee, a security receiver of the security interest over scripless securities pursuant to Section 228/1 of the Securities and Exchange Act of Thailand, or a security receiver under the Business Security Act of Thailand) would not be regarded as a "secured creditor" within the meaning of the Bankruptcy Act of Thailand.

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

Yes. Thai law does not prohibit a company from giving financial assistance for the acquisition of its own shares or the shares of its holding company; however, a company cannot accept a pledge of its own shares. Under Thai corporate law, directors must, in good faith and with the best interests of the company in mind, 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. If the financial assistance is provided by or to a public limited company or companies issuing securities to the public, additional requirements will apply in certain circumstances.

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

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

Is the enforcement regime in 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 1958 New York Convention and the 1927 Geneva Convention, 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 (SBV) — the banking regulator in 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 very active participation by nonbank players being finance companies (including foreign-invested companies or domestic companies that are often Vietnamese banks' wholly-owned subsidiaries). The SBV recently stopped issuing new licenses for the establishment of finance companies due to the "hot growth" of the field. As such, investors, especially foreign investors, have to access 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 issuances have become a common capital source for enterprises. However, with the current cumbersome procedures for the issuance of foreign-currency-denominated bonds, foreign investors (including private funds) are finding it less attractive since the 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 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.

Meanwhile, an onshore fund operating under the laws of Vietnam is not permitted to conduct lending activity on a frequent basis in the Vietnam market, as this will be classified as "banking activity." Banking activity can only be conducted by credit institutions licensed by the SBV. As such, a Vietnamese non-credit institution entity can only provide loans to a borrower on an irregular basis and for nonprofitable purposes, i.e., provide loans on a 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 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 Vietnam?

In relation to 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 SBV may challenge the registration of the Offshore Loan. In such 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, although 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.

For an onshore lender that is not a credit institution, the laws provide for a statutory ceiling on the 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 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 or other third-party transferee/assignee 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 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 in practice is not feasible to obtain.

Meanwhile, a Vietnamese "public" company that is not a credit institution may not extend loans and/or guarantees to the following:

- Its individual shareholders and individuals being related persons of such shareholders
- Its organizational shareholders and individuals being related persons of such shareholders, unless such shareholders: (i) are that public company's subsidiaries; (ii) are not state-owned enterprises; and (iii) became shareholders of such public company before 1 July 2015
- An entity being a related person of an organizational shareholder, unless: (i) that related person and the public company has a parent-subsidiary relationship or is within the same group of companies; and (ii) the transaction is approved by the public company's general meeting of shareholders or board of directors in accordance with the public company's charter

It is worth noting that in the case of an onshore loan provided by a Vietnamese credit institution or a Vietnam branch of a foreign bank for financing a borrower's acquisition of shares of a company, such credit institution or branch is not permitted by law to take security over shares of that company to secure the borrower's onshore loan-related liabilities. On the face of legal texts, such restrictions are not applicable to Offshore Loans.

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

Medium. As noted above, and subject to certain restrictions set out 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. Also as noted above, security is available over most assets of a Vietnamese company.

Is the enforcement regime in 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 realization 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 center of another New York Convention member country could be recognized and permitted for enforcement in Vietnam by a competent Vietnamese court.

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We are a transactional powerhouse providing commercially-focused, end to end legal advice to maximize deal certainty and secure the intended value of transactions. Our 2,500 lawyers combine money market sophistication with local market excellence. We lead on major transactions with expertises panning banking and finance, capital markets, corporate finance, restructuring, funds, M&A, private equity and projects. The combination of deep sector expertise, and our ability to work seamlessly across each of the countries where we operate, means we add unique value in shaping, negotiating and closing the deal.

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