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# Guide to Private Credit in Asia Pacific

2024 Edition

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# Introduction

Welcome to the third edition of our Guide to Private Credit in Asia Pacific.

This guide summarizes key issues that a private credit provider should consider across 14 Asia Pacific jurisdictions.

Private credit is playing an increasingly important role on a wide range of financings including distressed and special situations credit, mezzanine facilities, infrastructure debt as well as senior financings to support leveraged acquisitions. While banks continue to receive the lion's share of the overall financing market in the Asia Pacific region, we have observed that the landscape has been changing. Higher funding costs and increased regulatory scrutiny on banks have created a "financing gap" that is being filled by private credit providers who can offer flexibility and speed of execution.

In recent years, we have seen a large number of sizeable fund raisings by private equity funds, asset managers and credit funds focused on private credit investments in the Asia Pacific region and we expect this trend to continue. Private credit as an asset class has also been attractive to institutional investors in search of returns, risk diversification and more opportunities. We expect the private credit market will keep expanding across Asia Pacific in years to come.

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 anticipate this trajectory will persist. Until a few 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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# Private Credit Overview

Issue / Question	Australia	Mainland China	Hong Kong SAR	India	Indonesia	Japan	Malaysia	New Zealand	Philippines	Singapore	South Korea	Taiwan	Thailand	Vietnam
Can a fund make a new loan to a borrower incorporated in this jurisdiction without a banking license?	Yes	Yes (with restrictions for onshore funds)	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in 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 (with restrictions for joint-stock companies which may be listed or unlisted)	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

Level of materiality

High   Medium   Low

# Private Credit Overview

Issue / Question	Australia	Mainland China	Hong Kong SAR	India	Indonesia	Japan	Malaysia	New Zealand	Philippines	Singapore	South Korea	Taiwan	Thailand	Vietnam
How strong in relative terms is credit support given by a company in this jurisdiction likely to be?	Strong	Moderate	Strong	Moderate	Strong	Strong	Strong	Strong	Moderate	Strong	Moderate	Strong	Moderate	Moderate
Is the enforcement regime in this jurisdiction relatively lender-friendly?	Yes	Moderate	Yes	No	No	Moderate	Moderate	Yes	No	Yes	Yes	Moderate	No	No
Are "loan-to own" transactions permitted in this jurisdiction (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?	Yes  (subject to the duties imposed on receivers and other insolvency appointees under Australian insolvency laws)	Yes	Yes  (but credit bids are not specifically permitted under HK law)	Moderate	Yes  (the transactions must consider foreign ownership restrictions and only principal amount can be converted)	Yes  (subject to the duties imposed on receivers and other insolvency appointees under New Zealand insolvency laws)	Yes  (subject to agreement between the parties and compliance with regulatory requirements)	Yes  (a specific transaction structure is required to achieve the commercial objectives of a "loan-to-own" transaction)	Yes  (but the debt can only be converted into the borrower's shares/capital contributions, and is subject to a number of legal requirements as set out below)	Yes	Yes  (subject to agreement between the parties and compliance with regulatory requirements)	Yes  (a specific transaction structure is required to achieve the commercial objectives of a "loan-to-own" transaction)	Yes  (but the debt can only be converted into the borrower's shares/capital contributions, and is subject to a number of legal requirements as set out below)	

Level of materiality

High   Medium   Low



# 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 the Banking Royal Commission which concluded in 2019 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 an increasing role in the financing of the Australian economy. We also 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.

## 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 to a corporate borrower generally does not require an AFSL 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. In addition, an AFSL will generally be required for any fundraising activities as they will likely constitute the carrying on of a financial services business, unless an exemption applies. It should be noted for completeness that Australia also has a licensing system for providers of credit to consumers, with a person engaging in such credit activities generally requiring an Australian Credit License (ACL) or an authorization from a person holding an ACL.

## 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 relief/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 (Cth). 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 the sale of shares and other securities and real property upon the enforcement of security over such assets.

## 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.



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- There are restrictions on a company giving financial assistance to a third party to acquire its shares or its holding companies' 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.

- 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 company's constitution 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.

- 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 (Cth) 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.

- Yes, they are permitted.

The term "loan-to-own" is used in Australia to refer to a range of strategies, covering conversion of a secured position to equity by way of mutual agreement, utilizing a scheme of arrangement to effect a debt for equity swap, and a creditor engaging in a voluntary administration or a receivership process to credit bid a secured creditor's position to taking ownership of the company.

Where that strategy involves a voluntary administration or receivership, the concept of a "credit bid" also is permitted. However, duties imposed on the insolvency appointees in those processes are such that they must undergo a competitive process to satisfy the duties of those appointees.



# Mainland China

The private credit market has become increasingly active in the PRC<sup>1</sup> 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.
- The increasing capital constraints on and tightening credit risk controls by domestic banks 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.

The challenges for the growth of the private credit market in the PRC include:

- PRC real estate companies and government financing vehicles are still restricted from borrowing foreign debts from offshore lenders.
- In the absence of cooperation of the security provider, a lender usually needs to go to the court for enforcement of security over PRC onshore assets, which would be relatively time-consuming.

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

- Generally yes for an offshore fund. 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 National Financial Regulatory Administration (NFR), formerly known as the China Banking and Insurance 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, generally the offshore borrowing headroom for a PRC company that is not a bank or financial institution is limited to three times (subject to the adjustment by PBOC from time to time) its audited net assets, whereas certain types of companies (including foreign investment companies, foreign-invested financial leasing companies, foreign-invested investment companies, and small, medium and micro high-tech enterprises) can enjoy special 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 or used in the PRC.

## Can interest, fees and remuneration be agreed freely between a lender and a borrower under 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 on permitted intercompany loans made by a PRC lender not holding a lending business license 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<sup>2</sup>) for a one-year loan as at the time of execution of the contract. It remains to be tested in judicial practice as to whether such rule will apply to cross-border loans made available to a PRC borrower by an Offshore Fund however. For the current and historical data of LPR published by the NIFC, please refer to: <https://www.chinamoney.com.cn/english/bmklpr/>.



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<sup>1</sup> For the purposes of this Guide, "PRC" or "China" refers to Mainland China and excludes the Special Administrative Region of Hong Kong, the Special Administrative Region of Macau and Taiwan.

<sup>2</sup> LPR was introduced by the PBOC in August 2019 and is calculated and published by the National Interbank Funding Center (NIFC) on the 20th day of every month (postponed in case of holidays).



# Mainland China

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

- Medium. The term "corporate benefit" is referred to but not clearly defined under the new PRC Company Law. 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 one of its shareholders or de facto controllers, the provision of the guarantee or security shall be approved by the majority votes (or higher threshold if so required under the articles of association of the PRC company) of the remaining shareholders excluding the shareholder whose indebtedness is being guaranteed or secured; 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 (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 whose shares are traded on the NEEQ shall be publicly announced by such A-share listed company or such company whose shares are traded on the NEEQ. Such an announcement is required in order for such guarantees and security documents to be held 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 security over PRC onshore assets, a lender usually needs to go to the court for an auction procedure for security enforcement, unless the security provider cooperates to sell the security assets and repay the secured debts.

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 foreign 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.

## Are "loan-to own" transactions permitted in the PRC (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Generally yes. We are not aware of any explicit prohibition of such "loan-to own" transactions. Note however that in the case where the loan is converted into equity interests of a PRC company, any new shareholder which is a non-PRC entity must comply with the applicable requirements in respect of foreign direct (equity) investments which shall be considered on a case by case basis taking into account the details of the new shareholder and the PRC company in question.



# Hong Kong SAR

The private credit market in Hong Kong continues to grow, with an increasing number of credit funds being set up. A number of credit funds have their investment teams based in Hong Kong, predominantly focusing on special situations financings across the Asia Pacific region.

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.

Unlike in Europe and the US (and to a lesser extent, Australia), the acquisition and leveraged finance market continues to be dominated by banks at competitive rates, but we do see some credit funds being appointed to provide financings where flexibility is paramount, in particular, on the amount of leverage that could be incurred.

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

- Yes. A lender which is not otherwise an "authorized institution" (AI) under the Banking Ordinance (Chapter 155 of the Laws of Hong Kong) could advance a loan to a borrower incorporated in Hong Kong if:
  - that lender has obtained a money lender's licence in accordance with the Money Lenders Ordinance (Chapter 163 of the Laws of Hong Kong) (MLO);
  - that lender is an "exempted person" as specified in Part 1 of Schedule 1 of the MLO; or
  - that loan is an "exempted loan" as specified in Part 2 of Schedule 1 of the MLO.

Most lenders that are not AIs became comfortable advancing loans to Hong Kong incorporated borrowers by relying on the exempted loan exceptions. The common exempted loan exceptions relied on by non-AI lenders are loans made to:

- A company that has a paid-up share capital of not less than HK\$1 million (or its equivalent in any other approved currency that is freely convertible into Hong Kong dollars or in a currency otherwise approved in writing by the Registrar of Money Lenders).
- A company (or any subsidiary of that company) whose shares or debentures are listed on a "recognized stock market" as defined in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Chapter 571 of the Laws of Hong Kong) (SFO) or otherwise declared by the Securities and Futures Commission to be approved under section 3(1) of the SFO.
- 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) or that would, if the relevant security provider in question was incorporated in Hong Kong, be able to be registered under the CO.

The Securities and Futures Commission (SFC) requires a license to be obtained for certain types of regulated activities and in the context of loans, a license is required to be obtained by a fund in order to provide securities margin financing (unless the lender is an AI).

## 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. Withholding taxes are not levied in Hong Kong on interest payments, but the tax residence of a Hong Kong incorporated borrower (which might not necessarily be in Hong Kong) should be checked.

There is no stamp duty payable in Hong Kong on loan documents, guarantees or security documents generally, although in the case of a legal mortgage over shares, a nominal fixed stamp duty of HK\$5 is payable on the instrument of transfer transferring the legal title to the mortgagee or third-party purchaser.

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

- Generally, yes but under the MLO, a loan which carries an effective annual interest rate:
  - in excess of 48% is unenforceable, and the person who lends or offers to lend at such rate would have committed an offence under the MLO; and
  - in excess of 36% is presumed to be extortionate and unless the court is satisfied that such rate is not unreasonable or unfair, the court may reopen the transaction between the parties having regard to all the circumstances as the court may think fit.

This applies to any person that lends or offers to lend money (whether or not the lender has a money lender's licence), but it does not apply to AIs (or loans to AIs) and it does not apply to loans advanced to a company that has a paid-up share capital of not less than HK\$1 million as referred to above.

There is case law to suggest that a high default interest rate could constitute a penalty and is therefore unenforceable.

## 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 held by an AI as per the requirement of the relevant government land grant.

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

- A Hong Kong company is prohibited under Section 275 of the CO from directly or indirectly providing financial assistance for the acquisition of shares in itself or its Hong Kong incorporated parent company before or at the same time as the acquisition takes place, or for the purpose of reducing or discharging the liability of any person incurred for such acquisition.

The term "financial assistance" is defined under Section 274 of the CO and includes financial assistance 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 but in the context of an acquisition facility where a Hong Kong incorporated company is one of the targets, the lenders should require that a "whitewash" process be carried out in order for a Hong Kong incorporated company to provide financial assistance.

Contravention of Section 275 of the CO does not affect the validity of the financial assistance or any contract or transaction connected with it, but the Hong Kong company and every responsible person of the company will have committed an offence (which may result in imprisonment for such responsible persons).



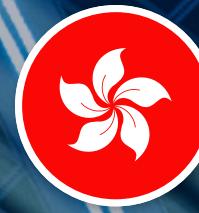
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# Hong Kong SAR

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

- Strong. Hong Kong companies are generally permitted to provide credit support for third party debt including by way of guarantees, contractual subordination of debt and security interests. The directors of the Hong Kong company will need to be satisfied that there is corporate benefit in providing any credit support. This is fact specific but as a practical matter, it would be advisable for lenders to require approval from the shareholders of the Hong Kong company (in addition to approval from the board of directors of the Hong Kong company) for "upstream" or "cross stream" credit support, and a statement from the Hong Kong company's directors that the Hong Kong company will not be unable to pay its debts as they fall due as a result of providing that credit support.

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

- Yes. Enforcement of security could generally be achieved, usually through receivers, expeditiously without engaging in court proceedings. There may be instances where enforcement through the courts would be necessary, in particular in relation to a mortgage over real property, where vacant possession of the real property could not be obtained without court intervention. In principle, a lender could exercise rights of acceleration and security enforcement after an 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). A liquidator of a Hong Kong company has the power to investigate the affairs of that company to review antecedent transactions and seek redress from the court. The grounds to review such transactions include:
  - Unfair preference - A liquidator may challenge any creditor that received a payment from the company and may have been preferred against other creditors within 6 months of the commencement of winding-up (or two years of such date where such preference is provided to a person connected with the company).
  - Transactions at an undervalue - A court may set aside a transaction at an undervalue entered into within five years before the commencement of the liquidation. A transaction at an undervalue includes transactions that result in the company receiving consideration that is significantly less than the value provided by the company.
  - Floating charges - A liquidator may treat a floating charge created within 12 months of the commencement of winding-up (or two years of such date if such floating charge was provided in favor of a person connected with the company) as invalid, unless:
    - the company was solvent immediately after the creation of the floating charge; or
    - new monies were paid to (or paid at the direction of) the company, or property or services were provided to the company, at the same time as, or after, the creation of the floating charge.
  - Disposition after the commencement of compulsory liquidation - A disposition after the commencement of a compulsory liquidation is void unless a validation order has been granted by the court.

## Are "loan-to own" transactions permitted in Hong Kong (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Hong Kong law does not expressly permit or restrict a lender from making credit bids (using its interest in the loan) for equity interests of a member of the borrower group. Whether a credit bid is accepted will be subject to the decision of the directors, liquidator or provisional liquidator of the company in question (as applicable). Unlike in the United Kingdom where the secured creditors could exercise a right of appropriation (i.e., permitting the creditors to unilaterally take such collateral as its own property without a court order) on certain types of financial collateral, including shares, if the security document expressly provides for an appropriation remedy and valuation of the financial collateral, this is not a remedy available under Hong Kong law.



# 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 liquidity crunches 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. Additionally, weakening of credit quality, the adverse impact of COVID-19 on businesses and growing pool of non-performing assets of banks have created a credit gap for borrowers engaged in various sectors. This has opened up a huge opportunity for alternate investment funds providing structured credit. Foreign funds too have become increasingly active in the private credit space. The increase in private credit is also attributable to interest shown by Indian family offices and non-resident investors who are keen to make debt investments in India.

## 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 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 in foreign currency is 20% (plus applicable surcharge and cess) and on Indian rupee (INR) denominated bonds is 40% (plus applicable surcharge and cess). This is subject to the availability of tax treaty benefits and satisfaction of certain conditions to avail these benefits and the provisions 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 any widely accepted interbank rate or alternative reference rate of 6-month tenor plus 500 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 of 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 as well, the security will 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 trustee. 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.

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## 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 of India.

## 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.

## Are "loan-to own" transactions permitted in India (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Loans which can be converted into equity shares of a company are permitted under Indian law. However, "loan-to-own" structures are not prevalent in the Indian market. In certain cases, lenders reserve the right under loan documents to convert the debt into shares of the borrower. Further, typically debt is converted into equity in case of debt restructurings. Any conversion of loan into equity will need to comply with the provisions of the Companies Act 2013 of India and where the entity is listed, with relevant securities regulations. Further, any conversion of debt into equity by an offshore lender will be subject to Indian exchange control regulations.



# Indonesia

The credit market in Indonesia is experiencing significant growth, driven by increasing consumer demand and the expansion of financial services. Currently, the largest of the commercial banks in Indonesia control most outstanding commercial loans. These major banks primarily focus their lending activity on top-tier corporates in Indonesia, with loan products typically being collateral-based.

As borrowers become more sophisticated, they are now seeking alternative financing options to avoid the high cost of finance and the conservative risk appetite of banks. The post-COVID-19 period has seen a robust growth in private credit in Indonesia and, as the market matures, private credit is expected to play an increasingly important role in financing the country's economic development.



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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 with a borrower established in Indonesia.

## Do taxes or other similar charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in 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. To be entitled to the reduced WHT rate under the applicable tax treaty, there are certain requirements that must be fulfilled by the lender including, among others, submitting a certificate of residency using a specific format commonly known as DGT Form.

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. The applicable stamp duty is IDR 10,000 (approx. USD 0.60 cent per document).

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 stated 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 power of attorney 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. Indonesian borrowers can offer a land mortgage (Hak Tanggungan) to foreign creditors, provided the loan is utilized for establishment purposes within Indonesia.

## 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 interests 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 commissioners 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.



# Indonesia

## 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.

## Are "loan-to own" transactions permitted in Indonesia (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Yes. Loan-to-own transactions are a viable option for converting debt into equity in Indonesia. The principal loan amount can be converted into shares, but other payable amounts (e.g., interest, fees, and expenses) cannot be converted into shares. This is because the company is deemed to not actually receive any monies from such other payable amounts unlike the principal loan amount which is actually withdrawn and received by the company.

It is crucial to ensure that the transactions have taken into account the applicable foreign ownership restrictions set out in Indonesia's latest positive investment list, especially for restricted business activities and sectors. Under Indonesian capital investment law, structuring the loan-to-own transactions as a nominee arrangement is prohibited.

Overall, loans are the most common debt instruments used for debt-to-equity arrangements in Indonesia. Other private debt instruments (e.g., non-listed bonds, commercial paper) may be subject to certain specific requirements when offered to Indonesian investors.



# 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.

Also, while domestic players in private credit are relatively limited, low interest rates and high hedging costs have encouraged investment in private credit, and the number of domestic investors in domestic private credit deals has more than tripled over the past few years. However, 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.

## 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.



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## 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).

## Are "loan-to own" transactions permitted in Japan (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Yes, it is permitted for a lender to convert a loan into ownership interests of a borrower by way of debt equity swap (DES), an equity kicker or the issuance of convertible bonds. In order to acquire ownership interests through these methods, the same procedures generally required to issue such interests (such as holding a general shareholders meeting and the conclusion of the relevant agreements) must be followed. The Foreign Exchange and Foreign Trade Act (Act No. 228 of 1949, as amended) broadly applies to investments by a foreign investor in a Japanese company. While this generally only requires a post-investment notification, foreign investment into certain businesses (eg, manufacture of weapons, aircraft, satellites, nuclear power plants, information processing related equipment, industrial robots, storage batteries, cybersecurity and mining, etc.) may require prior regulatory approval. For reasons of national security and public safety, maximum foreign ownership restrictions also apply in limited industry sectors (such as telecommunications, airlines and broadcasting) which may, broadly speaking, limit foreign investment to no more than one-third or one-fifth of the ownership interests in such companies.



# 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 (regardless of the currency of that loan) are subject to stamp duty at the rate of 0.5% on the loan sum (calculated based on Ringgit-equivalent amount) 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 2.15) 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. Whether the amount of damages or compensation to be awarded is reasonable or not will be assessed on a case-by-case basis based on the facts and circumstances of the case as a whole.

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.

## Are "loan-to own" transactions permitted in Malaysia (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Generally, yes as Malaysian laws do not restrict a lender from lending to a borrower, with the prospect of converting such loan into ownership interests of a member of the borrower group. However, the issuance of securities or instruments constituting ownership interest may be subject to the relevant foreign exchange administration rules and requirements issued by the Central Bank of Malaysia. Also note that financial assistance restrictions under the Malaysian Companies Act 2016 apply to the subscription of shares in a Malaysian company.



# New Zealand

The New Zealand debt market is dominated by the big four Australian-owned banks. However, there has been some erosion of this dominance by private capital participants, which we expect to continue, particularly given the following:

- International trends and more awareness of private credit as an asset class for investors.
- Increased regulatory capital requirements for banks in New Zealand.
- Greater flexibility of terms and structures that private credit can offer.
- It will become harder for many borrowers in certain sectors to access traditional bank-debt and the equity capital and debt capital markets.

## 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:
    - The NRWT Lender lends to the New Zealand payer through a fixed establishment (i.e., branch) in New Zealand.
    - The NRWT 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:
    - A payer may register with Inland Revenue as an "approved issuer" and register the relevant loan as a "registered security."
    - 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 up 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:
  - Penalties: There may be circumstances in which default interest or fees may be considered to be an unenforceable penalty.
  - Oppression: The terms of a credit contract may be unenforceable to the extent that: (a) the terms are oppressive (including the interest rate); (b) the exercise by a party of any of its rights and powers is oppressive; or (c) a party has been induced to enter into the transaction by oppressive means.
  - 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 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.

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# New Zealand

## 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.

## Are "loan-to-own" transactions permitted in New Zealand (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Yes. The term "loan-to-own" could cover a range of transactions in New Zealand, covering conversion of a secured position to equity by way of mutual agreement, utilising a scheme of arrangement to effect a debt swap and, most likely, a secured creditor engaging in a voluntary administration or a receivership process to credit bid a secured creditor's positions to taking ownership of the company.  
While "loan-to own" transactions have not been common in New Zealand, they are an exit-option for secured creditors, particularly given New Zealand's creditor-friendly enforcement regime. For personal property the ability to enforce share security, appoint a receiver over secured assets and ultimately buy the assets/business or shares as the highest bidder provides creditors with a potentially valuable exit option for non-performing credits. In this scenario the duty to get the best price reasonably obtainable lies with the receivers not the secured party.

There is no prohibition against a mortgagee selling a mortgaged real property to a related or interested party. However, case law holds that there will be greater scrutiny of the mortgagee to ensure that the sale was made in good faith. This includes ensuring that the mortgagee take reasonable steps to obtain the best possible price at the time of sale (s 176 of the Property Law Act 2007 (NZ)). Case law suggests that taking expert advice as to the sale process and purchase price is beneficial in showing that the sale was made in good faith. The other option is to ask the court to rubber stamp the sale (via section 200 of the Property Law Act).

Having these rights is particularly beneficial for creditors given the relatively illiquid secondary loan market in New Zealand.



# 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 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.

## 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.

If the credit support involves security interests in personal property, the PPSA allows for perfection of security interests (in order to bind third persons) through (i) registration of a notice with the Personal Property Security Registry (PPSR), (ii) possession of the collateral by the secured creditor, or (iii) control. Perfection through registration requires the payment of registration fees. To date, the fees for registration with the PPSR have not yet been finalized. In the meantime, registration can be made in the security grantor's principal place of business or the place where the property is located pursuant to the Philippines' chattel mortgage law. The registration fees are comprised of a base fee of up to PhP 8,796.00 plus an effective rate of 0.45% of the amount secured by the chattel mortgage in excess of PhP 1,700,000.00.

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 comprised of a base fee of up to PhP 8,796.00 plus an effective rate of 0.45% of the amount secured by the real estate mortgage in excess of PhP 1,700,000.00.

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



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## 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.



# The Philippines

## 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.

## Are "loan-to own" transactions permitted in the Philippines (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Yes. Lenders are permitted to enter into "loan-to-own" transactions in the Philippines.

This transaction will involve the lender assigning the amount of its loan as payment in exchange for the subscription by the lender to shares in the borrower. However, for the transaction to be valid and enforceable under Philippine law, the following requisites must be present:

- The additional issuance of shares representing the lender's ownership interests in the borrower must be authorized by requisite corporate approvals, including, in certain instances, by the shareholders of the borrower.
- The borrower files an application for confirmation of valuation together with relevant supporting documents with the Philippine SEC.

In addition, lenders should consider the following:

- If the borrower's authorized capital stock is not sufficient to cover the additional issuance of shares, the borrower will also need to amend its articles of incorporation to increase its authorized capital stock. This can be done together with the confirmation of valuation application.
- If the borrower is publicly listed, the issuance of additional shares may trigger the tender offer requirements depending on whether the relevant thresholds under Philippine securities laws are met.
- Existing shareholders of the borrower will need to waive their pre-emptive rights and approve the issuance of shares, in addition to other contractual restrictions (e.g., share issuance restrictions under shareholder agreements or bonds).
- Separate from the DST that would have been previously paid on the loan agreement, the additional issuance of shares will be subject to DST at an effective rate of 1% of the par value of the shares of stock.



# 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, Vietnam and Indonesian-based sponsors, promoters and parent companies. The private credit market in Asia Pacific has grown significantly over recent years, providing an opportunity 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.

It is expected that private debt will continue to play a key role 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.

## 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 1970. However, the fund must be a licensed moneylender under the Moneylenders Act 2008 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 (WHT) on any interest, 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.
  - Interest derived from any qualifying debt securities.
  - Interest 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 1967 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 1967, it is possible to "whitewash" financial assistance. There are a number of ways 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 1967, 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.



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## 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 an antecedent transaction (e.g., transactions at an undervalue, unfair preference, or a floating charge for no or past value) by a company, rarely present an issue in practice if credit support has been provided for a new loan by a company which was solvent at the time of the transaction.

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.

## Are "loan-to own" transactions permitted in Singapore (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Generally, yes. However, do also note the following points:
  - to the extent that the loan acquired is a convertible loan, or any other document that may appear to be in the nature of a security, there is a higher risk of the loan in question being deemed to be "securities", the offering of which may attract prospectus requirements on the part of the borrower, unless an offering exemption applies;
  - to the extent that a lender repeatedly acquires securities, the lender may be deemed to be in the business of dealing in capital markets products which are securities, which may trigger licensing requirements, unless a licensing exemption applies; and
  - to the extent that the lender is a bank licensed under the Banking Act 1970, this may have implications on its credit risk and regulatory capital requirements.



# 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 economic uncertainties and shifting market dynamics. Government strategic measures, investors' determination and favorable conditions have collectively fostered an environment for growth of the private credit market. Recent concerns about a debt crisis among construction companies have been addressed by the swift expansion of a government support program to mitigate the fallout. Despite the post-pandemic landscape being anything but predictable, the private credit market driven by private equity has normalized and is poised for continued growth. With interest rates predicted to ease in the latter half of 2024, there is still enough market appetite for refinancing existing financing deals. Although major Korean commercial banks continue to play a big role in the market, at the same time there seem to be more projects in the market attracting private credit.

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

- Yes, so long as the Exemption Requirement (defined below) can be satisfied. Generally, 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 guidelines 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 to non-resident lenders. 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 under the Interest Limitation Act. The Interest Limitation Act will apply even to foreign lenders that satisfy the Exemption Requirement and engage in cross-border lending to Korean residents from an offshore location with such lenders being 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 is 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 a 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:
  - Debtor's malicious payments or acts with the actual intent to harm the creditors;
  - Any act of a debtor detrimental to the creditors that was done after suspension of payment or filing for insolvency proceedings;
  - A debtor's 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); or
  - Any gratuitous act of a debtor 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).

## Are "loan-to own" transactions permitted in South Korea (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

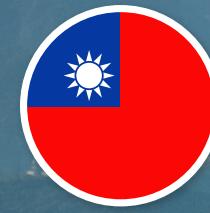
- Yes. In the case of a joint stock company, convertible bonds may be issued, i.e. bonds that can be converted into equities under predetermined conditions. Also, in the case of a joint stock company or a limited company, creditors may convert their loans into equities through an agreement with the respective joint stock company or limited company under certain corporate procedures. In the past, court approval was required for the conversion of loans into equities, but after the amendment of the Korean Commercial Code in 2011, it became possible to convert loans into equities without court approval. In addition, if the lender is a foreign entity, certain reporting or approval procedures are required under the Foreign Exchange Transactions Act or the Foreign Investment Promotion Act.



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# 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.

## 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.

- 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.

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

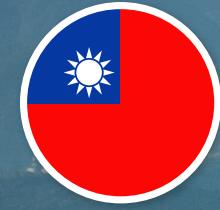
- Strong. As long as the security provider is permitted by its articles of incorporation and applicable internal rules/regulations to give guarantees and security, the credit support is validly created, and any perfection requirements are complied with, the creditors, in an event of default, are entitled 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.



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# Taiwan

## 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.

## Are "loan-to own" transactions permitted in Taiwan (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Yes. Under Taiwan corporate laws, lenders and private company borrowers can, by agreement, effectively convert ordinary loans (i.e. loans not structured as convertible loans at the outset) into newly-issued shares subject to certain requirements. Generally, the conversion would be structured as a new share issuance by the company with the issuing company agreeing to accept the debt comprising the loan (which would otherwise be repayable in cash) as cash payment for the subscription of the new shares. The company would need to engage a Certified Public Accountant to issue a capital verification report confirming the contribution of cash (from other shareholders, if any) and of the loan (from the lender, in lieu of cash). Registration of the capital increase underlying the new share issuance requires approval from the Ministry of Economic Affairs. The new share issuance will also need to comply with corporate law requirements for new share issuances and which, for instance, requires that new share issuances be offered for subscription to all existing shareholders pro rata in proportion to their existing shareholdings.

The same approach may also be available to lenders to Taiwan public companies but with further requirements for the issuance of new shares under Taiwan securities laws.

In the case of a Taiwan private company with foreign investment, additional requirements will apply to the foreign lender under Taiwan's foreign investment regime with slight differences depending on whether the foreign lender is a foreign shareholder who has also made a shareholder loan or is solely a foreign lender. Foreign shareholders are required to have obtained Foreign Investment Approval (FIA) from the Department for Investment Review for their equity investments in the company and for any shareholder loans with a term of more than one year. Where the foreign shareholders have complied with these FIA requirements, the foreign shareholders may apply for and obtain a further FIA to subscribe for new shares in the capital increase of the company and to apply the existing shareholder loans towards subscription of their participation in the capital increase. Foreign lenders who are not existing FIA-approved shareholders will need a FIA to become a foreign investor in the company and to subscribe for new shares in the capital increase of the company. However, the foreign lender would need to subscribe for the new shares in cash and then procure the company to apply these subscription proceeds in repayment of the loans – the loans cannot be directly converted or applied towards the subscription of the shares.



# 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.

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

- Yes, a foreign lender may provide a loan to a borrower incorporated in Thailand without a banking license. It is also not necessary for a foreign lender to be licensed under the Foreign Business Act of Thailand to provide an offshore loan to a borrower in Thailand if (i) such person or entity does not conduct any activities in relation to the provision of loans in Thailand or (ii) such person or entity provides lending businesses in Thailand to its related persons (as defined in the relevant ministerial regulation). 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. 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. In addition, 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/or transfer of certain security also attract stamp duty requirements, although the amount varies depending on the type of security created. A real estate property mortgage will trigger 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, but can include any fees, expenses, or remuneration of the lender which accrues on the loan in a similar manner as 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. The parties cannot agree to calculate interest on outstanding interest, unless such interest has remained outstanding for at least 1 year and the parties agree in writing to compound such outstanding interest into the principal amount. Default interest (which can include any fees, expenses, or remuneration of the lender which accrues on the loan in a similar manner as default interest or penalties) is also subject to Thai courts' discretion to review and subsequently reduce any default interest rate agreed between parties where the courts determine that the rate is disproportionately high. Interest may not be charged on outstanding default interest.

## 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 hold or 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 in granting such credit support. 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 credit facilities and the type of guarantee or security is capable of being taken in Thailand, and all laws and regulations relating thereto (including exchange control regulations) are complied with, credit support from a Thai company and which is governed by Thai laws is enforceable in accordance with its terms.

## Is the enforcement regime in Thailand relatively lender-friendly?

- No. 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, and the enforcement process in Thailand for certain types of security (including mortgage) can be lengthy and is not lender-friendly. 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. However, 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.

## Are "loan-to own" transactions permitted in Thailand (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- No. Under Thai corporate laws, private companies cannot directly offset their existing obligations owed to a person with the obligation of such person to make payment for the newly-issued shares, meaning that a debt-to-equity conversion under Thai laws is not permissible. The same principle applies to Thai public companies, except where the conversion is for the purpose of issuing new shares to the creditors of the public companies under a debt conversion plan which has been approved by a special resolution of the shareholders' meeting and which will be carried out in accordance with the relevant ministerial regulation. Therefore, if a lender wishes to pursue a "loan-to own" transaction, the lender will need to enter into a separate share subscription arrangement with the borrower, whereby the lender will utilize the repayment amount received from the borrower to subscribe for the newly-issued shares in the borrower or any other entity within the borrower's group.

Alternatively, the "loan-to own" transaction can be achieved through the borrower's issuance of convertible debentures, provided that such transaction meets the requirements under Thai securities laws.



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# 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 gradually risen as a common capital source for enterprises despite a few incidents and downturn reported in recent years. However, as foreign investors (including private funds) may find this form of investment less attractive since the Vietnam dong is a non-convertible currency, bond issuers are increasingly considering the issuance of international bonds (denominated in a foreign currency) to offshore investors. Also, there is currently a rise in demand for redemption of bonds. As such, bond issuers are exploring and diversifying the sources of funds (including equity and/or loans) for completing such bond redemption.

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.

## 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 non-profitable 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 earned by the foreign lender in connection with the loans will be subject to a withholding of 5% corporate income tax. While the current withholding tax regulations provide that interest include fees paid by the borrower to the lender as provided in a loan agreement, it is uncertain whether the Vietnamese tax authorities would apply the same WHT treatment at 5% corporate income tax for all types of fees incurred under the loan agreement (e.g. commitment fee, arrangement fee, agency fee, etc.), or if they would try to interpret that those fees are not in the nature of loan interest and should be instead considered as service fees. If such fees are deemed service fees, they would be 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 enterprises.

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

- In relation to Offshore Loans, there is no ceiling 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 use rights and assets attached to land) located in Vietnam, the fund can take security over certain movable assets owned 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 cases where 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 joint stock company, such credit institution or branch is not permitted by law to take security over shares of that joint stock 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 which is issued on a case-by-case basis but is impractical in practice to obtain. Also as noted above, security is available over most assets of a Vietnamese company.



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# Vietnam

## 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.

## Are "loan-to own" transactions permitted in Vietnam (where a lender lends to, or otherwise acquires a loan made to a borrower, with the prospect of ultimately converting such loan into ownership interests of a member of the Group)?

- Yes, a "loan-to-own" transaction is permitted under Vietnamese laws. However, it is worth noting that:
  - The outstanding debt can only be converted into the borrower's shares/capital contributions.
  - The debt-to-capital conversion must comply with the provisions of the Investment Law and Enterprise Law of Vietnam. If the borrower is a public company or a listed company, the conversion must also comply with relevant securities laws and regulations.
  - The conversion will result in regulatory licensing requirements such as an update to the previously issued SBV approval in the case of debts arising under or in connection with an offshore medium/long-term loan, the M&A approval<sup>1</sup> if the lender is an offshore entity and an update of the borrower's existing enterprise registration certificate and/or investment registration certificate recording the increased charter capital as a result of the conversion.
  - Vietnamese law imposes certain restrictions for a foreign-invested company depending on the business operation of that company including a foreign ownership limit. Vietnamese law also imposes a foreign ownership limit for a public or listed company operating in Vietnam in certain conditional business sectors. As a result, transfer of shares to foreign investors will not be possible if existing foreign investors already hold shares up to the foreign ownership limit of the relevant company.
  - Under Vietnamese competition laws, if the conversion results in an ownership by the lender of shares/capital contributions of the borrower, which are sufficient to control or govern any business line of the borrower (i.e. the ownership of more than 50% of shares/capital contributions of the borrower in any business line of the borrower)<sup>2</sup>, the aforesaid taking of shares/capital contributions (by way of conversion) would be subject to merger filing and pre-approval by the Vietnamese competition authority if any one of the following reportable thresholds is met:
    - the total assets value in the Vietnamese market of (X) one of the parties participating in the economic concentration, or (Y) of the group of affiliated companies of which, one of the parties participating in the economic concentration is a member reaches VND 3,000 billion (approx. USD 121,261,115)<sup>3</sup> or more in the financial year immediately preceding the year of submission of the notification on economic concentration;
    - the total revenue in the Vietnamese market of (X) one of the parties participating in the economic concentration, or (Y) of the group of affiliated companies of which, one of the parties participating in the economic concentration is a member reaches VND 3,000 billion (approx. USD 121,261,115)<sup>3</sup> or more in the financial year immediately preceding the year of submission of the notification on economic concentration;
    - the transaction value of the economic concentration reaches VND 1,000 billion (approx. USD 40,420,371)<sup>3</sup> or more; or
    - the combined market share of the parties to the economic concentration is 20% or more in the relevant market in the financial year immediately preceding the year of submission of the notification on economic concentration.

<sup>1</sup> This is an approval by the licensing authority (i.e. the local Department of Planning and Investment (the "DPI") where the borrower is incorporated) of the new investor of the borrower (i.e. the lender) as a result of the aforesaid conversion.

<sup>2</sup> Competition Law No. 23/2018/QH14 adopted by the National Assembly on 12 June 2018 ("Competition Law"), Articles 291(c) and 294; Decree No. 35/2020/NĐ-CP detailing several articles in the Competition Law issued by the Government on 24 March 2020 ("Decree 35"), Article 2.1(b).

<sup>3</sup> USD 1 is equivalent to VND 24,740.

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