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Banking & Finance

Singapore
WongPartnership LLP

chambers.com

2019

SINGAPORE

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Law and Practice

Contributed by WongPartnership LLP

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WongPartnership LLP is a major provider of regional and international legal services in Asia-Pacific, with more than 300 lawyers. The firm has a twin focus on advisory and transactional work in the areas of finance, corporate and capital markets, where it has been involved in landmark banking and finance, M&A and capital markets transactions, as well as complex and high-profile litigation and arbitration matters. In addition, the firm has specialised practices dealing with corporate governance and compliance, employment, energy and projects, environmental and green economy, IP, restructuring and insolvency, and TMT.

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1. Loan Market Panorama

1.1 The Impact of Recent Economic Cycles and the Regulatory Environment

Loan volume numbers in 2018 generally saw year-on-year growth in comparison with those in 2017. The Singapore banking sector, however, faced continuing risks, including the rise in corporate defaults that commenced in 2016 (particularly in the Singapore oil and gas sector), downward pressures faced by the Singapore construction sector, ongoing investigations into financial transactions related to 1MDB, the uncertainties arising from Brexit and trade tensions between the US and China. That said, not all is doom and gloom. There remains a strong demand for infrastructure development within the Asian region, and private infrastructure financing looks set to expand with this demand. Coupled with the opening of markets such as Myanmar, this could see Singapore well placed to tap into such markets and opportunities for cross-border loans out of Singapore.

In 2017, the focus of the banking sector regulations made by the Monetary Authority of Singapore (the 'MAS') was on strengthening the resolution regime for distressed banks and tightening regulations on over-the-counter ('OTC') derivatives. This included the further strengthening of the MAS's ability to resolve distressed financial institutions with the introduction of the Monetary Authority of Singapore (Amendment) Act 2017 and the issuance of revised notices and guidelines on OTC derivatives to further implement the G20 OTC derivative reforms. With the aforementioned risks arising in 2018, it remains to be seen how the regulatory landscape in Singapore will change or respond to these issues. The MAS will be introducing changes to the 'accredited investor' regime in response to the rise in corporate defaults in Singapore, while also responding strongly to serious failures in anti-money laundering controls and improper conduct by financial institutions in relation to 1MDB-related fund flows.

1.2 The High-yield Market

The high-yield market is primarily confined to high-yield bond issuances. With the continued low interest rate environment in Singapore, corporates have continued to tap the Singapore bond market for liquidity and capital needs, and to lock in interest rates. High-yield issuances in the Singapore market increased from 2016 to 2017. However, appetite for such high-yield issuances may decline based on the risk factors outlined above.

The migration of high-yield terms and structures into the Singapore loan market remains uncommon, if not rare. While corporate borrowers have sought to align their financing terms and structures closer to the terms of their bond issuances, these alignments have not sought to replace traditional financing terms and structures – instead, such alignments are primarily tied to common terms such as negative pledge restrictions and cross-default thresholds while still retaining the other typical terms, covenants and structures seen in traditional loan financings. High-yield 'second lien' and mezzanine financing structures – which largely retain traditional loan financing terms, covenants and structures – remain more common instead of the adoption of such borrower-friendly and covenant-lite high-yield terms similar to those seen in the US Term Loan B market. While relatively rare, Singapore corporates that are keen to tap the high-yield loan market have generally sought Term Loan B financing in the US loan markets, such as the 2015 financing obtained by Avago and the 2014 take-out by Goodpack (in which DBS, a Singapore bank, also secured a joint lead and underwriter role).

1.3 Alternative Credit Providers

Banks and financial institutions continue to form the traditional core and bulk of lending in the Singapore market. The usual alternative to bank lending in Singapore is for a company to tap the capital markets, especially given the continued low interest rate environment and tax incentives, which have led to unprecedented levels of corporate bond issuances in recent years. Borrowers in the Singapore market are also beginning to tap alternative credit providers for loans, including direct lending arms of debt funds, but the use of such alternative credit providers remains dwarfed by the dominance of bank lending and corporate debt issuance in Singapore. The market for alternative credit providers remains one focused on the US and European markets, and certain funds based in Singapore have sought to actively court such markets, including a recent deployment by Singapore's sovereign wealth fund, Government Investment Corporation, of EUR1 billion into the European loan market. As recently as 2014, the MAS acknowledged the emergence of alternate credit providers in the market, including direct lending and crowd-funding; in 2016, the MAS clarified that crowd-funding platforms are subject to licensing.

1.4 Evolution of Banking and Finance Techniques

Banking and finance techniques have rapidly evolved to meet the needs of the borrower and client base in Singapore. 2014 witnessed the development of a unique and highly innovative investment platform involving the issuance and financing of SGD750 million profit-participating securities ("PPS") by a subsidiary of City Developments Limited in partnership with Blackstone (a product developed and spearheaded specifically by the aforementioned partners) to monetise the cash-flow of the issuer's assets (which structure is possibly the first of its kind in Singapore). The financing in this case was intrinsically linked to the requirements of the partners in relation to the PPS. Since then, more PPS have hit the local market. In 2016, a spate of take-private acquisitions saw a greater complexity in terms of leveraged financing as lenders sought greater access to target-level conditionalities with the greater uncertainty in the market.

1.5 Recent or Expected Legal, Tax, Regulatory or Other Developments

On 1 July 2015, the amendment of the Companies Act, Chapter 50 of Singapore (the 'Companies Act') came into effect to remove prohibitions on the giving of financial assistance by private companies (which are not subsidiaries of a public company), to ease the financing and provision of security for such leveraged acquisitions. The amendment also saw the introduction of a new 'whitewash' procedure based on, inter alia, whether such financial assistance would be 'materially prejudicial' to the interests of the company providing the assistance or its shareholders or creditors. At this stage, it seems that this procedure has not seen widespread adoption, possibly due to uncertainty as to what constitutes 'material prejudice'.

In 2016, Singapore also enacted the Choice of Court Agreements Act 2016, which should provide greater assurance for cross-border financings as to the enforceability of Singapore court judgments vis-à-vis other jurisdictions that have ratified the 2005 Hague Convention on Choice of Court Agreements.

In 2017, further amendments to the Companies Act came into effect to introduce a new rescue financing framework for Singapore companies. The framework enables new financing raised to support the debtor during a restructuring to be afforded super-priority over other creditor claims. The amendments also removed the need for companies to use common seals to execute deeds by introducing an alternative of signature by authorised persons, which should help to reduce the administrative burden and streamline loan documentation.

Given the current economic trends and issues that have arisen so far in 2017 and 2018, it remains to be seen how the legal and regulatory frameworks will respond, and how such response will affect the loan market in Singapore. In the meantime, the governmental authorities in Singapore

will probably be keen to continue the development of the loan market into projected new areas of growth, particularly in growing sectors in the Asia region, such as intellectual property financing and infrastructure financing.

2. Authorisation

2.1 Requirements for Authorisation to Provide Financing to a Company

Financing in the context of the 'lending of money' is a regulated activity subject to the jurisdiction of a number of statutes in Singapore. As a general rule, a person who engages in the business of moneylending in Singapore needs to be licensed under the Moneylenders Act, Chapter 188 of Singapore (the 'Moneylenders Act'), or needs to fall within one of the categories of 'excluded moneylenders' as prescribed by the Moneylenders Act.

'Excluded moneylenders' include a bank that is licensed under the Banking Act, Chapter 19 of Singapore (the 'Banking Act') or a merchant bank that is licensed under the Monetary Authority of Singapore Act, Chapter 186 (the 'MAS Act').

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

As discussed above, a lender who engages in the business of moneylending in Singapore needs to be licensed under the Moneylenders Act or the Banking Act, or as a merchant bank under the MAS Act, as the case may be.

3.2 Restrictions on Foreign Lenders Granting Security

Generally, Singapore companies are not restricted or impeded from providing security or guarantees in favour of foreign lenders. From the Singapore context, the usual legal considerations in relation to the granting of security and the provision of guarantees by Singapore companies to Singapore banks would similarly apply where such security and guarantees are provided to foreign lenders.

3.3 Restrictions and Controls on Foreign Currency Exchange

As a general rule, there are no exchange controls in Singapore, but the MAS does issue guidelines and notices in relation to lending in specific currencies. For example, Notice 757 'Lending of Singapore Dollar to Non-Resident Financial Institutions' provides that banks in Singapore may only lend Singapore dollars to non-resident financial institutions as long as the aggregate Singapore dollar credit facilities do not exceed SGD5 million per entity; if they do, restrictions and conditions will apply.

3.4 Restrictions on the Borrower's Use of Proceeds

In general, a borrower is required to use the proceeds from drawdowns on loans or debt securities in compliance with the law. This would mean complying with applicable sanctions, and anti-terrorism, anti-corruption and anti-money laundering laws, amongst others. In addition, the loan documents or debt securities will often specify the purpose for which the proceeds are to be utilised. Other than the foregoing, there are generally no restrictions on the use of proceeds.

3.5 Agent and Trust Concepts

The concepts of agency and trust are recognised in Singapore and, accordingly, a security agent or a security trustee may hold security on trust for a group of lenders. Therefore, there has been no immediate need for the development in Singapore of an alternative to the trust structure. However, where the security package comprises security taken over assets located in jurisdictions that do not recognise the concepts of agency or trust, the requirements of such local jurisdictions are invariably taken into account and considered on a case-by-case basis for the purposes of considering whether an alternative structure is required.

3.6 Loan Transfer Mechanisms

In the Singapore context, the usual method of loan transfer is by way of a novation of the loan effected by the execution of a 'Transfer Certificate', which is understood to be in line with the transfer mechanisms in international loan documentation. As Singapore recognises the concepts of agency and trust, security may be granted in favour of a security trustee who holds the security property on trust for the 'floating' group of lenders, which may include the new transferee lender. Nevertheless, where the security package includes security governed by foreign laws or assets located in foreign jurisdictions, it will be important to determine whether the 'Transfer Certificate' mechanism allows for the benefit of the security to be extended to such new transferee lender under the laws of the relevant foreign jurisdiction; this will need to be considered on a case-by-case basis, depending on the security package.

3.7 Debt Buy-back

Although bond buy-backs are not unheard of in Singapore, a debt buy-back of a loan by a borrower or sponsor from the secondary loan market is rare (although there was some consideration of buy-backs in the Asian financial crisis in the late 1990s). This is in contrast to the spate of borrower and sponsor buy-backs in other markets after the financial crisis of 2008. In Singapore, while the issue of whether debt buy-back by the borrower or the sponsor is permitted has yet to be considered in greater detail, it is relatively common for a borrower to exercise its ability to prepay loans and refinance loans (if it has the right to do so) if the market conditions are favourable for it to do so. Given the relative rarity of borrower and sponsor buy-backs, the issue has also yet to see consideration in the form of loan documentation;

however, it should be noted that, as the Loan Market Association form of facilities agreement for leveraged acquisition finance transactions has specifically considered this issue, it may just be a matter of time before such considerations also gain traction in the Singapore market.

3.8 Public Acquisition Finance

Where (a) a corporation, business trust or real estate investment trust with a primary listing in Singapore or (b) an unlisted public company incorporated in Singapore or an unlisted registered business trust with more than 50 shareholders or unitholders (as the case may be) and net tangible assets of SGD5 million or more is intended to be acquired, the acquisition will need to comply with the Singapore Code on Take-overs and Mergers (the 'Take-over Code').

Pursuant to Rule 23.8 of the Take-over Code, if the offer involves an element of cash, the offer document will need to include a confirmation that the offeror has sufficient resources to satisfy full acceptance of the offer. Where the offer is intended to be funded by way of a loan, it is usual and market practice for the loan documentation to include 'certain funds' provisions that minimise the conditions precedent to funding and limit the ability of the lenders to call a drawstop. Although leveraged acquisitions of private companies are not subject to the Take-over Code, it is not unusual for offerors to request and have similar 'certain funds' provisions in their loan documentation.

The Take-over Code does not prescribe the form or length of the loan documentation required to satisfy the confirmation of sufficient resources. It is generally market practice to have long-form documentation (eg, a facility agreement) executed by the offeror and the lenders, as the Securities Industry Council of Singapore (the 'SIC') may require evidence to support such confirmation.

The Take-over Code does not require the loan documentation to be publicly filed in Singapore, but, as mentioned above, the SIC may require the offeror to provide evidence to support such confirmation.

4. Tax

4.1 Withholding Tax

The repayment of principal sums will not be subject to Singapore withholding tax. Payments of interest and other payments in connection to a loan to Singapore tax resident lenders and Singapore branch lenders will also not be subject to Singapore withholding tax. Payments of interest and other payments in connection to a loan to non-Singapore tax resident lenders are generally subject to Singapore withholding tax.

4.2 Other Taxes, Duties, Charges or Tax Considerations

There is a withholding tax exemption regime known as the qualifying debt securities (QDS) scheme in Singapore, under which interest and other payments such as discounts, prepayment fees and redemption premiums made by borrowers on notes issued to non-Singapore tax resident note-holders may qualify for exemption from Singapore withholding tax, subject to prescribed conditions being met.

4.3 Usury Laws

Where a loan is granted to an individual, the maximum rate of interest is regulated by the Moneylenders Rules 2009, under which it shall not exceed a nominal interest rate of 4% per month.

While legislation and regulation in Singapore has not set a cap on the amount of interest that may be charged in a commercial transaction, lenders will still need to note that, inter alia, 'extortionate credit transactions' may be set aside or varied by the Singapore courts if they are entered into within a period of three years before the commencement of winding up/judicial management of a company.

5. Guarantees and Security

5.1 Assets Typically Available and Forms of Security

There are generally no restrictions on the assets that may be provided as security to lenders. The form of the security, the applicable formalities and the perfection requirements depend on the type of asset being provided as security. For ease of reference, the following is a non-exhaustive list of the details relating to assets located in Singapore that are commonly provided as security in bank financings.

Shares

Security may be created over scripless shares and scrip shares in a Singapore company.

In Singapore, scripless shares may be held directly with the Central Depository (Pte) Limited (the 'CDP') or in a nominee account with a depository agent (as defined in the Companies Act). In the former case, the security over the scripless shares may be created by way of statutory assignment or statutory charge, as prescribed by the Securities and Futures Act and the Securities and Futures (Central Depository System) Regulations 2015. In addition to the security document, the Securities and Futures (Central Depository System) Regulations 2015 require certain forms to be filed with the CDP, upon which the statutory assignment or (as the case may be) the statutory charge will take effect. Where the scripless shares are held in a nominee account with a depository agent, security over such scripless shares is usually taken by way of common law security, and notices of charge

and/or assignment will need to be served on the depository agent in order to perfect the security.

Scrip shares are commonly provided as security by way of an equitable charge. In order to "perfect" such equitable charge over scrip shares, the physical share certificates relating to such scrip shares will be delivered to the lender or the security trustee together with share transfer forms executed in blank. It is also possible to create a legal charge over scrip shares, but this method is less commonly adopted in Singapore financings as it involves the transfer of legal title to such shares.

Real Property

In the case of real property in Singapore, the form of the security will depend, inter alia, on whether the land is registered with the Singapore Land Authority and whether separate title has been issued in relation to it.

Where separate title to the property has been issued, security may be taken by way of a mortgage, the form of which is prescribed by statute and will need to be registered with the Singapore Land Authority. The title deeds relating to such land will also need to be deposited with the lender or the security trustee.

Where separate title to the property is yet to be issued, it is possible to create security by assigning the rights under the relevant contract (eg, a building agreement or a sale agreement relating to such property). This is usually executed in tandem with a mortgage over said property, executed in escrow, which would allow the lender or the security trustee to register the mortgage once separate title has been issued for the land. Once separate title has been issued, the security provider will similarly need to deposit the title deeds with the lender or the security trustee.

Contractual Rights

It is possible to assign contractual rights (including rights relating to insurances and receivables) by way of security. Such an assignment is usually taken where there are contracts that are material to the security provider's business or that provide significant cashflow. Where contractual rights are assigned, the assignment will need to be perfected by way of delivery of a notice of assignment to the relevant counterparty. Such notice of assignment would also request the relevant counterparty to acknowledge the assignment and any restrictions and obligations in relation to the assigned rights (eg, restrictions on any variation of the underlying contract and the exercise of rights of set-off).

Where rights to receive payments are assigned (eg, receivables), the assignment of such rights is usually coupled with an obligation to deposit any payments received into a specified bank account and a charge over such bank account. Please also see the comments below in relation to charges over bank accounts.

In project finance deals, it is not uncommon for direct agreements to be entered into between the relevant obligor, the relevant counterparty and the finance parties. While not a 'security interest' per se, such direct agreements would generally provide the finance parties with direct contractual rights with respect to the counterparty, and also allow the finance parties to step in to remedy defaults in relation to the project.

Bank Accounts

Charges may be created over bank accounts in Singapore. Depending on the operational requirements of the security provider (eg, whether such accounts are operating accounts or are specifically meant to house certain cashflows), relevant restrictions or permitted withdrawals may be built into the security document. Notice of assignment will also need to be issued to the account bank in order to perfect the security.

Intellectual Property

Security interest in intellectual property rights may generally be taken by way of assignment or charge. The form of the security interest will generally depend on the underlying nature of the intellectual property rights that are to be taken as security. Where the intellectual property rights are registered (eg, registered marks, patents, registered designs), the assignment or charge must be recorded with the relevant registry.

As the security document may become a matter of public record as result of the lodgement with the registry, parties who do not want the full security document to be a matter of public record commonly prepare short form instruments (typically as a standalone document to be executed pursuant to the underlying security document), so that only the short form instrument is lodged with the registry for the purposes of recording the security interest.

Where the security provided falls within one of the categories of registrable charges as prescribed by Section 131 of the Companies Act, the company providing the security will also need to file a statement containing the particulars of the charge created with the Accounting and Corporate Regulatory Authority of Singapore (the 'ACRA') within 30 days of the creation of such charge if the charge is created in Singapore, or within 37 days of the creation of such charge if the charge is created outside Singapore (or such further period as the Registrar of Companies may allow). This requirement also applies to entities incorporated outside Singapore but which subsequently become registered in Singapore under the Companies Act. A foreign company seeking to change its place of incorporation to Singapore must also register its existing charges within 30 days of registration of the company in Singapore. Filing fees for the above with the ACRA are in the region of SGD60 per filing. Borrowers and security providers should note that the particulars filed will be available to the public for a fee imposed by the ACRA.

Stamp duty is payable to the Inland Revenue Authority of Singapore where security is created over shares or real property, subject to a cap of SGD500.

The above is not an exhaustive list and there may be other security structures, formalities, perfection and other requirements (eg, where security is taken over vessels and aircraft).

5.2 Floating Charges or Other Universal or Similar Security Interests

Singapore law recognises the creation of security by way of floating charges, which may be over all present and future assets of a company. Such floating charges are usually documented in a single security document – commonly known as a debenture – which would usually couple the use of fixed charges over specific asset classes with a floating charge over all assets. Where the use of a floating charge is considered, the secured creditors should always be mindful that, prior to the crystallisation of a floating charge, the floating charge will rank behind competing fixed charges in priority and other comparative issues in relation to the use of a floating charge.

5.3 Downstream, Upstream and Cross-stream Guarantees

It is generally possible for entities in Singapore to give downstream, upstream and cross-stream guarantees. Where a guarantee is to be provided, the guarantor will need to consider whether there are financial assistance issues (discussed further below) and also assess and ensure that there is corporate benefit to the guarantor in providing such a guarantee. The corporate benefit issues are especially pertinent in the case of upstream and cross-stream guarantees; however, it is not uncommon for upstream guarantees to be provided, especially in acquisition financings where the target and its subsidiaries guarantee the offeror's liabilities in relation to the acquisition financing subject to financial assistance and corporate benefit issues (if any).

Please also see **5.5 Other Restrictions** below in relation to Section 163 of the Companies Act.

5.4 Restrictions on Target

The Companies Act prohibits companies incorporated in Singapore from providing 'financial assistance' – directly or indirectly – in connection with the acquisition of its shares or the shares of its holding company. Examples of such financial assistance include, without limitation, the provision of security and guarantees.

Previously, the financial assistance prohibitions applied to all companies incorporated in Singapore. However, as of 1 July 2015, the Companies Act was amended such that the financial assistance prohibitions apply only to public companies incorporated in Singapore, or companies whose holding (or ultimate holding) company is a public company. As a result, acquisition financings for take-private acquisitions and acquisitions of private companies have been simplified; whitewash procedures will no longer need to be conducted if the target and its subsidiaries are expected to provide security for the financing post-acquisition, or if the debt is intended to be pushed-down to the target level.

The amendments to the Companies Act which came into effect on 1 July 2015 also introduced a new whitewash procedure, based on a test of whether the financial assistance is 'materially prejudicial' and whether the terms of such financial assistance are fair and reasonable to the company providing the financial assistance. As mentioned above, it is unclear how much traction the new whitewash procedure will gain, given the uncertainty around how the Singapore courts will determine whether there is 'material prejudice'.

5.5 Other Restrictions

In addition to the other issues discussed in **5.3 Downstream, Upstream and Cross-stream Guarantees** above, Section 163 of the Companies Act prohibits companies from making loans or quasi-loans to or giving guarantees or security for loans or quasi-loans made to another company in which the directors of the first-mentioned company are interested in 20% or more of the total number of equity shares in the latter company. There are exceptions to the prohibition, particularly where such loan, guarantee or security is provided to, or in respect of the obligations of, a related corporation. In addition, such loan, guarantee or security may be provided with the prior approval of the company in a general meeting, provided that the interested director(s) and their family members abstained from voting.

5.6 Release of Typical Forms of Security

The release of security is usually documented by way of a deed of discharge and release. Certain specific forms of security will require additional formalities. For example, where a mortgage over land in Singapore is to be discharged, a discharge document will need to be executed in the form prescribed by the Singapore Land Authority. Further, where the particulars of the security created have been filed against a security provider pursuant to the requirements of the Companies Act, a statement of satisfaction of registered charge would also need to be filed with the ACRA.

5.7 Rules Governing the Priority of Competing Security Interests

The priority of competing security interests in Singapore is governed by the principles of common law. As a general rule, priority will be determined by the time of creation of the security interest as well as the type of security interest created. The following is a non-exhaustive list of the principles:

- where the competing security interests are of the same type (eg, a legal fixed charge against another legal fixed charge), the earlier security interest will have priority;

- where the two competing security interests are fixed charges, a legal fixed charge will have priority over an equitable fixed charge; and
- where the two competing security interests are a fixed charge and a floating charge, the fixed charge will have priority over the floating charge.

Where the same security is provided to different classes of creditors, the priority of each class of creditor to the proceeds of such security may be contractually provided for, usually by way of an intercreditor agreement.

The rules of priority are necessarily subject to exceptions – for example, limitations arising from insolvency law, where a competing security interest with priority had notice of the earlier competing security interest, or where perfection requirements in relation to the relevant asset secured have not been completed.

The usual methods of subordination are structural subordination and contractual subordination (ie, turnover subordination and subordination of rights of payment in the event of the insolvency of the debtor). The efficacy of subordination arrangements remains open to question in Singapore, though it is likely that they will be upheld so long as the general body of unsecured creditors is not prejudiced thereby.

6. Enforcement

6.1 Circumstances in Which a Secured Lender Can Enforce Its Collateral

In Singapore, the most common mechanism for taking security over the assets of a corporate borrower is the fixed and floating charge. This involves a first legal fixed charge over the borrower's real property (and perhaps personal property of a permanent and non-fluctuating nature) and a floating charge over the entire remainder of the borrower's assets and undertaking. Such security is typically embodied in a debenture.

Security over land can be enforced upon default by the borrower by:

- appointing a receiver;
- obtaining possession of the mortgaged property either by consent or by court order, and subsequently exercising the power to sell the mortgaged property; or
- obtaining an order for foreclosure.

The second option is the most commonly exercised mode of enforcement.

A debenture creating a fixed and floating charge usually provides for the crystallisation of the floating charge and the enforceability of the fixed charge upon the occurrence of an event of default. Singapore law gives wide power to lenders to define events of default, and recognises automatic crystallisation. The debenture also typically confers on the lender the power to appoint a receiver or a receiver and manager out of court upon the occurrence of an event of default.

Unless the power to foreclose is exercised, any shortfall upon realisation of the security can be recovered from the borrower under its personal covenant to repay.

In Singapore, the power of a company to take or give a guarantee is governed in the first instance by the general contractual principles of common law relating to contractual capacity, the intention to create legal relations and vitiating factors such as undue influence and duress. The power of a company to give guarantees will normally be governed by its Constitution. However, companies other than exempt private companies are prohibited by statute from giving guarantees in certain circumstances. Please also see **5.5 Other Restrictions** above in relation to Section 163 of the Companies Act.

Guarantees are generally required to be enforced in strict accordance with the terms of the contract creating them.

A secured lender can also apply to wind up a defaulting borrower but this option is not often exercised, as Singapore law allows secured creditors, insofar as their debt is secured, to stand outside the liquidation and enforce their security.

For unsecured creditors, the recovery method most commonly employed is to commence court proceedings, obtain judgment and thereafter levy execution on the known assets of the corporate debtor. The method of execution used depends on what information, if any, the judgment creditor has regarding the assets of the judgment debtor.

Most unsecured creditors are reluctant to initiate winding up proceedings, because the liquidation process is generally perceived as expensive and slow, with low recovery rates. A creditor who initiates the liquidation process will also have to share the assets of the company with all other unsecured creditors. The only exception to this general observation is a preferential creditor who is assured of payment in priority over the general body of unsecured creditors and thus has an incentive to commence winding up proceedings.

6.2 Foreign Law and Jurisdiction

A choice of foreign law as the governing law of a contract will generally be upheld in the Singapore courts, unless one or both of the parties made that choice in bad faith. Insofar as the choice of foreign law was made in good faith, then a law unconnected to Singapore is not a barrier to its application.

The Singapore courts generally give effect to a choice of submission to the courts of a foreign jurisdiction. Where a party to the contract contends that the action should be heard in Singapore notwithstanding such choice, the test applied is whether there is strong cause amounting to exceptional cir-

cumstances for the action to be heard in Singapore despite such an exclusive jurisdiction clause.

A waiver of immunity through written agreement by a foreign state is effective as a submission to the jurisdiction of the Singapore courts. However, a choice of Singapore law as the governing law of a contract is not, in itself, a submission to jurisdiction.

6.3 A Judgment Given by a Foreign Court

A judgment (which has an in personam effect) from a foreign court may be recognised in Singapore or enforced by an action at common law through the Singapore courts.

Some foreign judgments may be registered in Singapore to be enforced. There are two statutory registration regimes. The first regime is that under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Ed) ('RECJA'), which enables judgments from the United Kingdom, Australia and certain specific Commonwealth countries to be registered in the Singapore High Court. The second regime is that under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Ed) ('REFJA'), where, so far, only Hong Kong SAR has been a gazetted country recognised for registration.

Once registered, the foreign judgment may be enforced in Singapore as if it was a judgment issued from the Singapore High Court, without fresh proceedings being commenced.

Foreign judgments may also be enforced under the Choice of Court Agreements Act 2016 (Cap 39A) ('CCAA'), which came into force on 1 October 2016. For the CCAA to apply, the foreign judgment must be issued by a court of one of the contracting states to the Hague Convention on Choice of Court Agreements, which currently include all of the member states of the European Union as well as Mexico. In addition, the judgment to be enforced must arise from an international case where there is an exclusive choice of court agreement concluded in a civil or commercial matter. In the event of overlap, the CCAA overrides the RECJA and REFJA.

A foreign judgment that is recognised potentially has an estoppel effect on a specific issue or on a cause of action. Singapore common law recognises certain foreign judgments if certain conditions are met. A judgment for a fixed sum of money from a foreign court of law is capable of recognition if it is final and conclusive by the law of that country, and where that court had international jurisdiction (as defined by Singapore law) over the parties.

Certain limited defences are available to resist recognition and enforcement of a final foreign judgment.

6.4 A Foreign Lender's Ability to Enforce Its Rights

A foreign lender who is not ordinarily resident within the jurisdiction and initiates court proceedings against a borrower may be required by the Singapore courts to provide security for the borrower's legal costs. With respect to a company, its place of ordinary residence is the place of its central management.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

In Singapore, the most commonly utilised company rescue or reorganisation procedures are schemes of arrangement and judicial management.

A scheme of arrangement is a statutory framework facilitating compromise with creditors. An application is first made to the court for an order granting permission to convene a creditors' meeting. Approval by the requisite majority of creditors in each class (more than 50% in number and 75% or more in value) and, subsequently, by the court then binds all the creditors to the scheme. The court has the power to approve the scheme of arrangement even if certain classes of creditors do not vote in favour of the compromise, subject to certain safeguards.

Judicial management is a corporate rescue process supervised by the court. It involves the appointment of a judicial manager by the court, pursuant to an application by the company or a creditor. The judicial manager replaces the company's management, and his duty is to present creditors with a rescue plan. The court will only make such an appointment if it is convinced that judicial management is likely to result in the survival of the company as a going concern, the approval of a scheme of arrangement, or a more advantageous realisation of the company's assets than would occur in a liquidation. An order for judicial management is initially valid for 180 days, but may be extended by the Court.

7.2 Impact of Insolvency Processes

The commencement of liquidation proceedings brings into effect a moratorium on legal proceedings against the company without leave of court. The rights of secured creditors to enforce their security outside of the courts remain unaffected.

A company that seeks to enter into a scheme of arrangement may apply for a moratorium on legal proceedings against the company, prior to a compromise or arrangement being proposed between the company and its creditors. There will be an automatic 30-day moratorium imposed once the company applies for the moratorium, pursuant to the amendments to the Companies Act introduced in May 2017. The scope of the moratorium is at the court's discretion, and may be as wide as a broad moratorium on creditor enforcement (including out-of-court security enforcement) without leave of court.

The amendments to the Companies Act introduced in May 2017 also made it possible to apply for a moratorium in respect of a company that is a subsidiary or holding company of the company in respect of which such a moratorium has been granted, if that first company plays a necessary and integral role in the relevant scheme of arrangement.

The commencement of judicial management proceedings brings into effect a broad moratorium on creditor enforcement (including out-of-court security enforcement) without leave of court.

7.3 The Order Creditors Are Paid on Insolvency

Secured creditors generally hold the highest priority. Thereafter, the costs and expenses of the winding up, employees' remuneration, and taxes assessed prior to the deadline for the proving of debts are paid out in priority to floating charge holders and unsecured creditors.

Singapore also introduced amendments to the Companies Act in 2017 that allow for rescue financing to be accorded super-priority status. Secured creditors are protected, however, as super-priority over assets that are subject to a security interest would only be allowed if adequate protection is provided to the creditor holding the secured interest.

7.4 Concept of Equitable Subordination

In the winding up of a company, any amounts due to a shareholder in his capacity as a shareholder by way of dividends shall not be a debt of the company payable to that shareholder in a case of competition between himself and any other creditor that is not a member. However, such amounts shall be taken into account for the determination of the rights of the shareholders amongst themselves. Aside from the above, which is limited to amounts due to a shareholder in his capacity as a shareholder only, the concept of equitable subordination has not been recognised thus far under Singapore law.

7.5 Risk Areas for Lenders

Liquidators and judicial managers have the power to set aside pre-liquidation transactions at an undervalue or transactions that constitute an unfair preference. A transaction is at an undervalue where the consideration received by the company is of significantly less value than that which it provided, while a transaction constitutes an unfair preference when it is both intended to, and actually does, put a creditor in a better position than it would otherwise have been in upon liquidation of the company. The claw-back periods are five years in respect of undervalue transactions and six months in respect of transactions constituting an unfair preference, calculated backwards from the date of commencement of liquidation or the application for judicial management, as the case may be. Where an unfair preference was given to an associate of the company, the claw-back period extends to two years prior to the commencement of liquidation or application for judicial management, as the case may be.

Floating charges created within six months prior to the commencement of liquidation are void, unless the company is shown to have been solvent at the time of creation. There is an exception where monies were advanced to the company at the time of creation, in which case the floating charge is valid in respect of those monies and the resultant interest, which is calculated at 5% per annum.

8. Project Finance

8.1 Introduction to Project Finance

The project financing market in Singapore looks set to develop further as stakeholders continue to seek out opportunities both domestically and in foreign markets, particularly in the Asian region.

Given geographical limitations, financing for projects in the domestic Singapore market has historically been focused on the oil and gas industry and the utilities sector. Since the early 2000s, the Singapore government has explored the development of infrastructure and other projects through public-private partnerships ('PPP'). While there have been concerns as to the adoption of PPP structures in specific sectors and industries, PPP structures have seen sustained use, particularly in the utilities sector. There is also a continued focus on outbound project financing – reports indicate that Asia will require USD20 trillion of infrastructure investments from 2016 to 2030, and stakeholders are keen to utilise Singapore as a base for infrastructure financing in the greater Asian region, as seen by the establishment by Nomura of a new Asia infrastructure project office in Singapore and the continued initiatives on the part of Enterprise Singapore, including their launching of the Asia-Singapore Infrastructure Roundtable series to catalyse projects and anchor the Project Finance International2 Asia Best Practice citations in Singapore.

In Singapore, project financing itself is not subject to a specific legal framework. Financiers will need to continue to comply with banking and financial regulations while being cognisant of the regulations and restrictions applicable to the particular project being financed. Stakeholders are generally free to structure their financing within the ambits of the law.

8.2 Overview of Public-private Partnership Transactions

As mentioned above, the PPP model has seen continued use in Singapore, particularly in the utilities sector. The PPP model is a relatively recent introduction in Singapore, with the first PPP project adopted only in 2003. As of 29 October 2018, there have been ten PPP projects awarded, the largest being the Sports Hub project, which was completed in 2014 and was the first time in the world that a sports facilities infrastructure was financed as a PPP. Traditionally, the involvement of the private sector in public projects has been limited to the construction of facilities and the supply

of equipment, while the public sector continues to operate the facilities and equipment and deliver the services to the public. The key factor in Singapore's case remains whether a PPP model is suitable for the particular project, with the Sports Hub project coming under heavy scrutiny in recent years with respect to its operations.

While there is no specific legislation governing PPPs in Singapore, government procurement is generally regulated by the Government Procurement Act (Cap 120), and the Ministry of Finance is empowered therein and responsible for developing the government procurement policy framework in Singapore, including the policies and rules for the framework. The Auditor-General's Office forms a check on the framework and conducts regular audits on compliance with the policies and rules for the government procurement framework. The SPV operating the project will also need to comply with industry- or sector-specific regulations, although, as mentioned above, there is no legislation specific only to PPPs.

8.3 Government Approvals, Taxes, Fees or Other Charges

In addition to the approvals mentioned above in relation to the conduct of the business of money lending, the government approvals required for project financing will depend on the nature and type of the project involved. While there are no specific taxes, fees or charges levied specifically in relation to project finance, Singapore has introduced and continues to maintain tax incentives for project and infrastructure finance in an effort to incentivise project and infrastructure expertise in the region.

8.4 The Responsible Government Body

The key projects in Singapore in recent years have mostly related to public utilities, incineration plants, educational institutions and sporting infrastructure, and in those projects the responsible bodies have been the Public Utilities Board, the Energy Market Authority, the National Environment Agency, the Institute of Technical Education or (as the case may be) the Singapore Sports Council, although it is expected that there would be some level of inter-agency involvement within the public sector as to the different aspects of the projects. As mentioned above, traditionally the public sector has retained ownership of such projects but the recent public utilities PPPs helmed by the Public Utilities Board have also seen the private sector own such projects under Design, Build, Own and Operate PPP models – for example, the SingSpring Desalination Plant PPP and the Tuaspring Desalination Plant PPP.

The gas industry in Singapore is regulated by the Energy Market Authority ('EMA'), a statutory board under the Ministry of Trade and Industry. As the industry regulator, the EMA is responsible for issuing licences to operators and for setting the performance standards for licensees, with the overall aim of ensuring the safe and reliable supply of natural gas to users and promoting competition in the sector. The primary legislation governing the sector is the Gas Act (Cap 116A), which is administered by the EMA.

In addition, the EMA is empowered under the Energy Market Authority Act (Cap 92B) and the Electricity Act (Cap 89A) to regulate the electricity industry. The Electricity Act (Cap 89A) aims to create a competitive framework for the electricity sector and provide for the safety, technical and economic regulation of the generation, transmission, supply and use of electricity. To that end, the EMA imposes certain restrictions and conditions on the holders of electricity licences, which are required for the generation, transmission, retail, import, trade and operation of the wholesale electricity market.

As Singapore has no known oil reserves, there are no specific regulatory regimes pertaining to the exploration and production of oil. Similarly, as Singapore lacks mineral resources, there are no specific regulatory regimes covering the mining sector.

8.5 The Main Issues When Structuring Deals

Ultimately, the legal form of the project company will depend primarily on the type of project and the industry of the project. Funding techniques for projects would usually involve a mixture of both external borrowing and internal funding (usually from the relevant shareholders and stakeholders). While there are no specific laws relating to project companies in general, there may be restrictions, depending on the industry in which they operate. These may not be explicit but may be built into conditions for the relevant licences required to operate the business. For example, although the Electricity Act (Cap 89A) and the Gas Act (Cap 116A) do not stipulate express restrictions on foreign ownership, certain licences may be issued subject to conditions on ownership and restrictions on the transfer of such ownership.

While Singapore is not party to any treaty that directly governs project financing, it is party to 36 bilateral investment treaties ('BIT') currently in force, which provide some protection for foreign companies against expropriation and nationalisation risks. In addition, the Singapore government has announced that it is co-operating with the Chinese government to find ways to expand project financing relating to China's Belt and Road Initiative through Singapore.

8.6 Typical Financing Sources and Structures for Project Financings

Financing for projects in the Singapore market has typically come from private lenders. In addition, project sponsors would typically inject capital into the project company by way of equity contributions.

A typical project finance structure would involve limited or non-recourse financing being granted to the special purpose vehicle (the 'SPV') executing the project and the SPV

granting security over the project assets, including project revenues. Support from sponsors may be expected throughout the life of the financing, although the extent of support expected (eg, guarantees, security) would differ depending on the project, and would typically be, at most, on a limited recourse basis to the sponsors, if not on a non-recourse basis.

Due to Singapore's strong fiscal position and large banking base, the traditional routes of government financing and bank debt have historically been the dominant sources of financing in Singapore, with project bonds playing a small role in the market. However, in recent years, the MAS has made efforts to develop the project bond markets through programmes such as the Asian Bond Grant Scheme ('ABGS'). Introduced in 2017, the ABGS aims to broaden the base of issuers in the Singapore bond market by helping to offset 50% of one-time issuance costs such as international legal fees, arranger fees and credit rating fees.

Korean and Japanese export credit agencies ('ECAs') have played a key role in major project financing deals in the region. For example, in 2011, the Export-Import Bank of Korea, the Korea Trade Insurance Corporation and a group of 11 lenders provided financing for a USD2.5 billion petrochemical facility located on Jurong Island in Singapore for Jurong Aromatics.

8.7 The Acquisition and Export of Natural Resources

As mentioned above, Singapore has no significant natural resources and it is often said that its one true natural resource is its people. As an economy, Singapore is dependent on oil and natural gas imports.

8.8 Environmental, Health and Safety Laws

There is no legislation specific to projects. However, environmental, health and safety laws are generally governed by the Environmental Public Health Act (Cap 95) and generally monitored by the Ministry of Manpower. Depending on the specific industry, there may be further regulations regarding the operations and safety requirements specific to that industry.

9. Islamic Finance

9.1 Overview of the Development of Islamic Finance

Islamic finance has been available in Singapore since 1998, and has developed rapidly alongside conventional banking products, hitting several landmarks:

- Islamic banking assets in Singapore grew by 73% between 2010 and 2015, and are increasingly cross-border in nature – the latest sukuk issuance in Singapore, and one of Singapore's largest, was by Malaysia's national mortgage company, Cagamas, a one-year wakalah facility worth SGD162.75 million that is part of the company's USD2.5 billion multicurrency programme;
- assets under management have also risen, by 22% between 2010 and 2015. Singapore is home to Sabana REIT, which is one of the largest Islamic REIT globally by asset size; and
- Islamic capital market activities have also taken off, with 31 sukuk issuances between 2013 and 2017. Singapore has more sukuk issuances than other conventional jurisdictions, with total outstanding issuance reaching a high of SGD3.8 billion in 2014, compared to SGD440 million in 2009.

The MAS has actively encouraged the development of Islamic finance in Singapore. Initiatives include the establishment of a sukuk facility in 2009 to provide Singapore dollar Islamic regulatory assets for banks undertaking Islamic finance activities in Singapore. However, there have also been stumbling blocks, such as the winding down of operation of Singapore's sole fully-fledged Islamic bank, Islamic Bank of Asia, in September 2015 due to the inability to generate economies of scale. Stakeholders, however, continue to be keen to develop the market, with the establishment of a Shari'a crowd-funding platform and capital-raising platform, and discussions on Shari'a products for the Silk Routes investments and other fund management platforms in China.

9.2 Regulatory and Tax Framework for the Provision of Islamic Finance

As a general principle, Singapore does not have a separate regulatory regime for Islamic financing, as the MAS is of the position that the risk profile of an Islamic bank should not be expected to be fundamentally different from its conventional banking counterparts. Banks and financial institutions offering Shari'a-compliant products are therefore required to continue to comply with the single regulatory framework with respect to banks and financial institutions, as regulated by the MAS.

As Islamic finance products are a relatively recent introduction to the Singapore markets, Islamic finance products (and not just sukuk or takaful) suffer from the challenges faced by any nascent industry, ranging from market challenges (eg, lack of market penetration, awareness and familiarity) to structural issues (eg, there have been calls for greater regulatory and tax incentives to be provided in order to stimulate the development of Islamic finance). From a legal perspective, there are also issues in relation to Islamic finance products that merit further consideration, including issues of conflict of laws (eg, whether and/or how Shari'a law is to apply in relation to such products) and issues of dispute resolution (eg, how the existing dispute resolution mechanisms in Singapore, such as the courts and arbitration tribunals, would deal with Islamic finance products).

In terms of tax treatment, clarifications have been made since 2005 regarding stamp duty, income tax, goods and services tax and other tax treatments of Islamic financial

products in order to ensure that Islamic finance products are not disadvantaged against conventional banking products. While two tax incentives introduced in Singapore for Islamic finance were allowed to lapse in 2013, the MAS then reiterated its intentions to continue to incentivise Islamic finance activities and their development.

9.3 Main Shari'a-compliant Products

Singapore does not have a central authority regulating the Shari'a compliance of Islamic financing products. As mentioned above, banks and financial institutions are subject to the single regulatory framework of the Banking Act and oversight by the MAS. Pronouncements of Shari'a compliance continue to be handled directly by the relevant parties (eg, by in-house Shari'a supervisory boards), instead of involving the MAS or any other regulatory body.

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9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

In general, the claims of sukuk holders in insolvency or restructuring proceedings would depend on the manner in which the particular sukuk is structured. Although there is yet to be a reported Singapore decision on this issue, it is likely that, where the sukuk is asset-backed, the sukuk holders would have recourse to the assets underlying the sukuk to meet their claims. However, where the sukuk is not asset-based (where the assets are not intended to provide security for the transaction), the recourse of the sukuk holders may be limited to the payment obligations of the company, and the investors may not have recourse to the underlying assets.

9.5 Recent Notable Cases

There have not been any recent cases in Singapore on Shari'a law, the applicability of Shari'a law or the conflict of Shari'a and local law that are relevant to the banking and finance sector.