



Happy Place by Andrea Edwards

TAKING SECURITY IN HONG KONG SAR

WHAT TYPES OF SECURITY INTERESTS CAN BE TAKEN IN HK?

The security interests mostly commonly seen on lending transactions are:

- **Mortgages:** mortgages are traditionally taken over land (and are referred as a legal charge under HK law) and can also be taken over other assets including ships and aircrafts. In Hong Kong, mortgages are created by way of “legal charge”. As a matter of HK law, a security interest over real property must be created by way of a mortgage. A mortgage may also be taken over other assets including ships, aircraft, shares and contractual rights (although security interests over shares are more usually taken by way of ‘charge’ - see below).
- **Charges:** are usually taken over assets including plant, equipment and choses in action (e.g. shares, bank accounts, rights under contracts). A charge may be fixed (i.e. the charge attaches to a specific, identifiable asset over which the charge is able to exercise control) or floating (over a shifting pool of assets such as trade inventory). A floating charge will only crystallise and attach to specific assets in certain circumstances.
- **Pledges:** can be used to take security on tangible assets but are less commonly seen than mortgages or charges as they require transfer of the possession of the relevant

assets to the person in whose favour the pledge is created.

ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

Most assets can be secured. If security is taken on rights arising under contracts or permits, the beneficiary of the security will want to review the underlying instrument to confirm that such rights can be assigned.

DO SECURITY INTERESTS NEED TO BE REGISTERED?

If the person granting the security is a company incorporated in HK or is incorporated elsewhere but maintains a registered place of business in HK, generally yes. Such persons are required to register the types of security interests specified by the Companies Ordinance (Cap. 622) with the Companies Registry. These types of security interests include most of the charges and mortgages described above. There are also requirements to register security interests taken over certain types of assets with specialised registries, such as land mortgages (which must be registered with the Land Registry).

In practice, some security interests which are not required to be registered with the Companies Registry are nevertheless registered with it (such as charges on bank accounts). It is also common practice to notify (and seek consent from) counterparties to contracts or debtors of choses in action of the creation of security interests over the relevant rights.

DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

No. Security documents governed by HK law and creating security over assets in HK do not need to be notarised. However, entities incorporated outside of HK may still need to have the document notarised if required by the law of their place of their incorporation. If an HK law governed security document covers assets outside of HK, the applicable requirements in the place where the assets are located should be confirmed.

DOES IT TAKE LONG TO REGISTER OR PERFECT SECURITY?

Registration and perfection of security at the HK Companies Registry and the HK Land Registry is straightforward and generally takes a few days to a few weeks once all documents are ready. Registration of security interests in other

specialist registers (e.g. the trademark register) may take a much longer period of time.

IS STAMP DUTY PAYABLE?

Stamp duty is generally not payable on the creation of security although it may be payable upon enforcement of security (e.g. on the transfer of land or shares).

ARE “PARALLEL DEBT” PROVISIONS REQUIRED IN SYNDICATED FINANCINGS?

No. HK law recognises trusts and therefore the benefit of a security interest can be held on trust for the beneficiaries.

CAN A FOREIGN LENDER TAKE AND ENFORCE SECURITY IN HK?

There are no restrictions on the taking and enforcement of security by foreign persons in HK.

However, “money lending” requires a license or the benefit of an exemption under the Money Lenders Ordinance (Cap 163).

The same position applies to foreign Export Credit Agencies, noting there is a specific exemption available to certain ECAs which are members of the Berne Union.

Multilateral Development Banks may be exempted from licensing requirements under treaties and associated implementation legislation (HK enforces a dualist system in relation to international law).

CAN A FOREIGN SECURITY GRANTOR WAIVE ITS SOVEREIGN IMMUNITY?

HK applies the doctrine of absolute foreign sovereign immunity. This extends immunity to all transactions of foreign sovereign entities, including commercial transactions.

Recent case law suggests that a waiver agreed by a foreign sovereign entity in a contract prior to any dispute may not be effective under HK law and that for a waiver of sovereign immunity to be valid the waiver must be effected “in the face of the court” (i.e. before the jurisdiction of the HK court).



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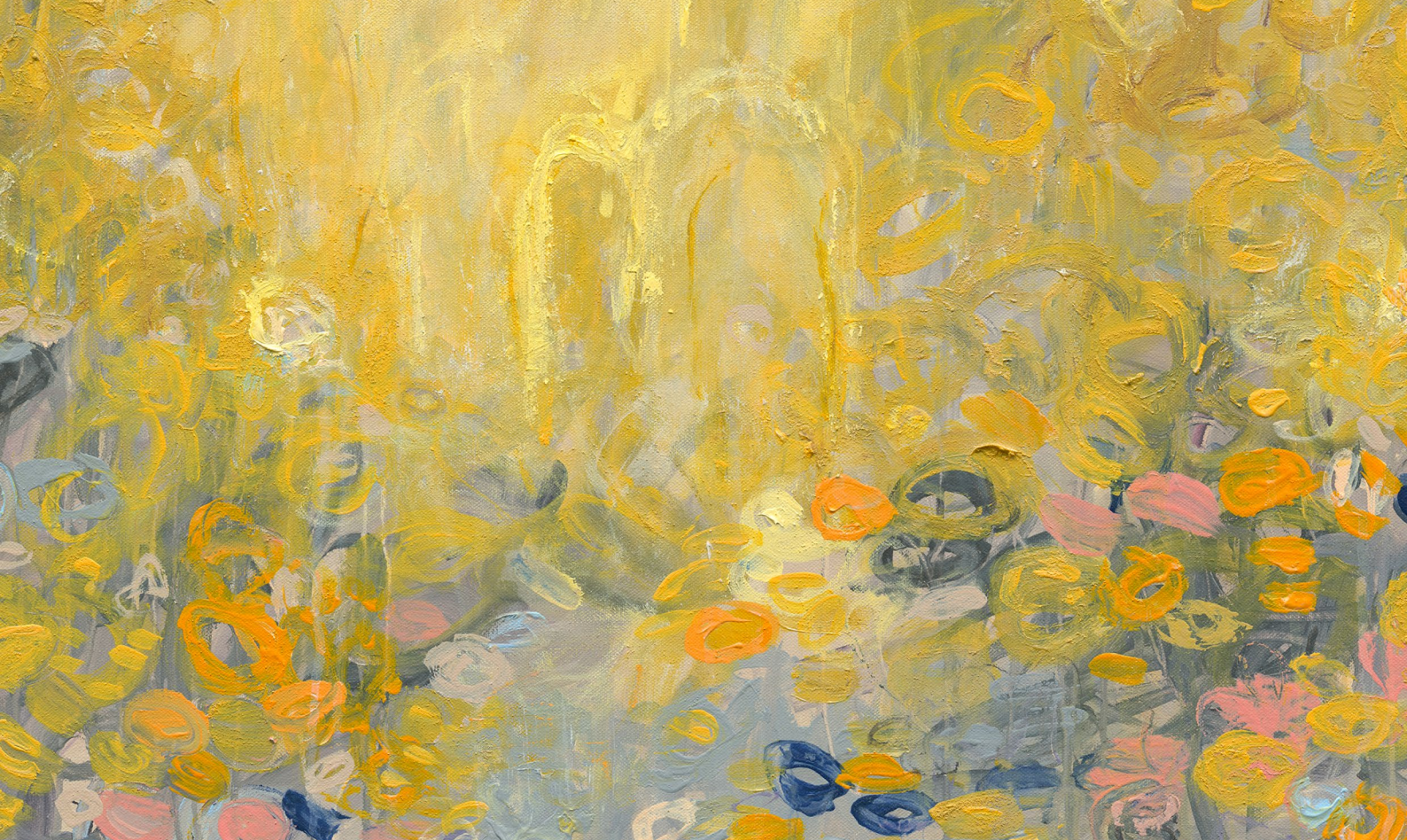
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