



Happy Place by Andrea Edwards

---

# TAKING SECURITY IN INDIA

---

## WHAT TYPES OF SECURITY INTERESTS CAN BE TAKEN IN INDIA?

The security interest most commonly seen in lending transactions are:

- **Mortgage:** which is used to secure immovable properties. There are two preferred types of mortgages used in lending transactions: (i) an ‘English mortgage’, created under a mortgage deed, whereby the mortgaged property is transferred absolutely without possession to the mortgagee with a condition to re-convey the property once the debt has been discharged; or (ii) an equitable mortgage through the deposit of title deeds with an intent to create mortgage but where the mortgagor retains the possession of the immovable property.
- **Hypothecation:** which is used to secure movable assets (tangible and intangible). Hypothecation is a charge (fixed or floating) created on any moveable assets without delivery of possession of such moveable assets. Typically for lending transactions, a hypothecation with a floating charge is created on the movable assets so that the borrower has the ability to deal with the ability with the movable property until such time there is a default under the loan which the floating charge secures upon which the floating charge will crystallise into a fixed charge.

- **Pledge of shares and/or debentures:** A pledge is characterised by a delivery of movable goods. Shares and debentures ('financial instruments') are movables goods under Indian law. For a pledge to be taken over financial instruments represented by physical certificates, the actual possession of such certificates needs to be provided to the lender. If the financial instruments are dematerialised, a marking of the pledge needs to be undertaken with the central depository which holds such financial instruments in its dematerialised form. A power of attorney is also usually issued by the pledgor in favour of the pledgee to deal with such 'financial instruments'.
- **Assignment:** which is used to secure a person's rights and claims. For lending transactions, it typically involves a party assigning its rights under its business or project agreements as well as clearances and approvals. The assignment is done by way of security with a condition that the assignor can "step-into" the shoes of the assignor under the assigned documents upon a default. Assignment by way of security of actionable claims is typically done using an English mortgage.

## ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

Most assets can be secured. To mitigate any claims against the secured assets, approval of the income-tax authorities may be required for creation of charge over certain assets. In addition, certain statutory or contractual rights may not be secured without approvals of counterparties, such as a participating interest in a production sharing contract for oil and gas exploration, concession agreement, etc. Moreover, certain assets which are sovereign assets such as the oil field assets under production sharing contract, road itself in a road concession cannot be secured, however rights under the licenses/concessions can be secured, where permitted by the relevant agreement and with the general or specific consent of the relevant licensing authority/grantor. Further, if security is created over assets located in India in favour of a non-resident, prior approval of the Reserve Bank of India ("RBI") is required under the extant foreign exchange control regulations of India, unless a specific regime exists for which approval has been given (such as the regime for external commercial borrowings in India wherein only a no-objection certificate from an Authorised Dealer bank is required).

## DO SECURITY INTERESTS NEED TO BE REGISTERED?

Security created by an Indian entity over its assets must be registered with the Registrar of Companies in India. Certain forms of mortgage must also be registered with the local authorities where the immovable property is located.

## DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

Security documents do not need to be notarised in India. A power of attorney, however, which may be executed incidentally as part of the security package will need to be notarised.

## DOES IT TAKE LONG TO REGISTER OR PERFECT SECURITY?

Under Indian company law, the security provider is given 30 days from the date of security creation to make the necessary perfection filings. Typically, the filings can be done sooner. Registration of a mortgage can take a few weeks' time and depends on the location of registration and the liaison with local authorities.

## IS STAMP DUTY PAYABLE?

Stamp duty is payable in respect of any document executed in India or brought into India. The amount of stamp duty will depend on the State where the documents are executed or brought into and the nature of the document.

## ARE "PARALLEL DEBT" PROVISIONS REQUIRED IN SYNDICATED FINANCINGS?

No. India recognises trusts and therefore the security can be held in trust for the beneficiaries.

## CAN A FOREIGN LENDER TAKE AND ENFORCE SECURITY IN INDIA?

If the lending is under a said specific regime for which approval has been given or if a specific approval is obtained from the Reserve Bank of India then yes, foreign lenders can take and enforce security in India. They, however, cannot sell any immovable assets to a person resident outside India. Any sale of pledged shares to a person resident outside of India will have to comply with the Indian foreign exchange regulations. Similarly, any repatriation of enforcement proceeds will have to comply with the Indian foreign exchange regulation While no specific exemptions are available for multilateral



development banks, the 'External Commercial Borrowing Guidelines' which is the most prevalent route for foreign lending to Indian entities allows Indian borrowers to take loans from overseas institutions (including multilateral development banks) and allows such overseas institutions to take and enforcement security subject to certain conditions.

## CAN A FOREIGN SECURITY GRANTOR WAIVE ITS SOVEREIGN IMMUNITY?

In principle, yes. The judgments passed by the various courts in India suggest that, if the transaction is categorised as a commercial act, sovereign immunity cannot be sought. Further, in accordance with Section 86 of the civil procedure code, consent of the Central Government of India would be required prior to initiation of any suit against the 'foreign state', and such consent from the 'Central Government' shall be provided, inter alia if the 'foreign state' has waived of its immunity privileges.



# CONTACTS

---

## ASIA PROJECT FINANCE CONTACTS



### SU MENG (MOLLY)

PARTNER  
Shanghai

E [sumeng@cn.kwm.com](mailto:sumeng@cn.kwm.com)



### LV YINGHAO

PARTNER  
Beijing

E [lvyinghao@cn.kwm.com](mailto:lvyinghao@cn.kwm.com)



### SCOTT GARDINER

PARTNER  
Hong Kong

E [scott.gardiner@hk.kwm.com](mailto:scott.gardiner@hk.kwm.com)



### JOHN SHUM

PARTNER  
Singapore

E [john.shum@sg.kwm.com](mailto:john.shum@sg.kwm.com)

## LOCAL COUNSEL CONTACTS

---



### SANTOSH JANAKIRAM

PARTNER  
Mumbai

E [santosh.janakiram@cyrilshroff.com](mailto:santosh.janakiram@cyrilshroff.com)



### PURURAJ BHAR

PARTNER  
Mumbai

E [pururaj.bhar@cyrilshroff.com](mailto:pururaj.bhar@cyrilshroff.com)

Cyril Amarchand Mangaldas (the “Firm”) is a leading full service law firm in India. The Firm advises a large and diverse set of clients, including domestic and foreign commercial enterprises, financial institutions, private equity funds, venture capital funds, start-ups, government and regulatory bodies. With over 850 lawyers and 160 Partners, the Firm is the largest full-service law firm in India, delivering truly multidisciplinary advice to the Firm’s clients’ business needs.

This publication has been prepared with the assistance of Cyril Amarchand Mangaldas (local counsel in India), and Gallien Lefevre, Senior Associate (Hong Kong). It is prepared for information only and does not constitute legal advice.

This publication supports our International CloudOffices (ICO) initiative, which further support our clients’ global objectives in jurisdictions where we do not have a physical office. The KWM ICOs give us flexibility to bring multinational and multidisciplinary teams together, and to scale up or down our services in response to client demands, as and when required.





---

## ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3000 lawyers in 31 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

With 31 offices across Asia, Europe, North America and the Middle East we are strategically positioned on the ground in the world's growth markets and financial centres.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

### Disclaimer

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. Legal services are provided independently by each of the separate member firms. No member firm nor any of its partners or members acts as agent for any other member firm or any of its partners or members. No individual partner or member in any member firm has authority to bind any other member firm.

See [kwm.com](http://kwm.com) for more information.

This publication is provided for general informational purposes only and should not be construed as legal advice. KWM CloudOffices do not provide legal advice in relation to, or practise, local law in the jurisdictions where we do not have a physical presence. Any legal services undertaken by KWM will be provided by one or more of the separate King & Wood Mallesons member firms as described in the Terms of use & legal notices and only in relation to the laws of jurisdictions in which the relevant member firm is licensed to practise.



JOIN THE CONVERSATION



SUBSCRIBE TO OUR WECHAT COMMUNITY.  
SEARCH: KWM\_CHINA

Asia Pacific | Europe | North America | Middle East

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See [kwm.com](http://kwm.com) for more information.

[www.kwm.com](http://www.kwm.com)

© 2023 King & Wood Mallesons

