



Happy Place by Andrea Edwards

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# TAKING SECURITY IN MALAYSIA

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

The security interests most commonly seen in lending transactions are:

- **Mortgage:** mortgages are traditionally taken over land (and are referred as a legal charge under the Malaysian National Land Code). Mortgages can also be taken over other assets including ships and aircrafts. They can technically also be taken over choses in action (e.g. shares) however this type of structure is more rarely used due to complications arising from the fact that the beneficiary of the mortgage will be regarded as the owner of the chose in action.
- **Debentures:** fixed charges are usually taken over assets including plant and machinery, motor vehicles (which are not the subject of a hire-purchase agreement) equipment and choses in action (e.g. shares, bank accounts, rights under contracts). Floating charges are commonly used for assets which are not individually identified or on which it is not practicable for the beneficiary to exercise control (such as stock-in-trade).
- **Pledges:** pledges can be taken over tangible assets, but are less common compared to mortgages or charges, as pledges require transfer of the possession, custody and control of the relevant assets to the pledgee.

- **Liens:** liens are usually taken when the loan is for a small amount and is required for a short duration.
- **Assignments:** assignments are generally taken over borrower's rights, title and interests, including a sale and purchase agreement, where the title documents to the real estate are not yet issued, over cash deposits, and over claims and receivables.

## ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

Generally, security can be taken over all types of assets, including future assets that have yet to come into existence, if the assets can be sufficiently identified and are free from encumbrances.

Certain immovable assets cannot be charged, unless the approval of the relevant state land authority is first obtained, a process which may take weeks or months.

If security interests are taken on rights arising under choses in action (such as contracts, concessions, permits, etc.), the chargee should review the underlying instrument to confirm that such rights can be charged.

## DO SECURITY INTERESTS NEED TO BE REGISTERED?

Security interests granted by a company incorporated under the Companies Act 2016, must be registered with the Companies Commission of Malaysia (the "CCM") within 30 days of their creation. Security interests granted by a company incorporated under the Labuan Companies Act 1990 must be registered with the Labuan Financial Services Authority (the "LFSA") within 1 month from the date of their creation.

There are no registration requirements for security interest created by non-Malaysian/Labuan companies.

Security interests over assets such as real estate, aircraft, ships and motor vehicles in Malaysia must be registered in the relevant registries in Malaysia.

## DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

No. Security documents creating security interests over assets in Malaysia need not be notarized.

However, note that Malaysian law requires the execution of powers of attorney (including the powers of attorney that may be set out in security

documents) which are to be exercised in West Malaysia to be registered with the High Court of Malaya. Prior to this, they must be authenticated by certain prescribed persons, such as an advocate and solicitor, a notary public or a commissioner of oaths, in accordance with the Power of Attorney Act 1949.

Entities incorporated outside of Malaysia may still need to have security documents notarised if required by the law of their place of their incorporation.

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

Generally, the registration of security interest with the CCM or the LFSA is fairly straightforward and usually takes around 3 to 5 working days.

## IS STAMP DUTY PAYABLE?

Yes. Where a credit facility is a Ringgit Malaysia-denominated credit facility, the stamp duty payable on a principal instrument which secures the credit facility would be at the ad valorem rate of 0.5% of the principal amount of the credit facility. If the credit facility is denominated in foreign currency, the 0.5% ad valorem stamp duty payable on a principal instrument would be capped at RM2,000.00 (approximately USD 480).

Any secondary instrument to be stamped in connection with the loan would attract stamp duty of RM10.00 (approximately USD 2.4) for each document. In addition, stamp duty of RM10.00 (approximately USD 2.4) would be chargeable in relation to any power of attorney contained in such documents.

Instruments executed by a Labuan entity in connection with a Labuan business activity (which is defined widely) and instruments of transfer of shares in a Labuan entity are exempted from stamp duty, provided that such Labuan entity satisfies certain substance requirements set out by the Inland Revenue Board of Malaysia.

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

No, a parallel debt structure is not required in syndicated financings. Malaysian law recognizes that security interests created in favour of a security agent may secure a debt owed to the Lenders. There is no necessity under Malaysian law to create a parallel debt in favour of the security agent for syndicated financings.



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

Generally, a foreign lender can take and enforce security interests in Malaysia.

However, there are certain regulatory hurdles when taking and enforcing certain security interests which a foreign lender should be aware of, such as restrictions on title to immovable assets which prevent the granting of security interests to foreign lenders (or make it subject to approval of the competent state land authority) and foreign shareholding limits imposed by regulators. In this situation, it should be possible to appoint a Malaysian bank as security agent to take and enforce the security interests.

In addition, depending on the loan sum and security or collateral involved, the borrowing by a Malaysian borrower from a foreign lender, and the provision of security by a Malaysian charger in favour of a foreign chargee, may be subject to foreign exchange administration rules and requirements issued by the Central Bank of Malaysia. There are no express exemptions for multilateral development banks and other financial institutions in the relevant legislation.

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

Malaysian courts apply the concept of restrictive sovereign immunity. Malaysian courts have held that the concept of sovereign immunity did not apply to a foreign entity entering into commercial transactions. Therefore, a waiver of sovereign immunity by a foreign entity would likely be upheld by a Malaysian court.



# CONTACTS

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## 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)

## MALAYSIA INTERNATIONAL CLOUDOFFICE CONTACTS



### JAKE ROBSON

PARTNER  
Singapore

E [jake.robson@sg.kwm.com](mailto:jake.robson@sg.kwm.com)



### WU HAN

PARTNER  
Beijing

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

# LOCAL COUNSEL CONTACTS

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### LOO TATT KING

PARTNER  
Malaysia

E [tatt.king.loo@zicolaw.com](mailto:tatt.king.loo@zicolaw.com)



### CHOW WAN SAN

PARTNER  
Malaysia

E [wan.san.chow@zicolaw.com](mailto:wan.san.chow@zicolaw.com)

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