

SECTION B – AVAILABILITY AND FORMS OF FINANCING FOR ENTERPRISES

B1. Business financing arrangements generally

- (a) Financing needs of corporates are variously sourced out of capital markets, external and domestic borrowings and earnings.
- (b) The main sources of borrowing for these corporates would be domestic lenders. There are also innovative products from offshore investment banks. Some non-bank domestic lending exists through, for example, the Malaysia Employees Provident Fund. Domestic insurance companies also are a source of funds.
- (c) It is not possible to generalize as to whether there is significant competition amongst lenders. Different segments of the market have different conditions. Competition in the upper-end, sophisticated product segment of the market is mainly from local subsidiaries of foreign banks or offshore lenders, whereas traditional commercial banking product segment of the market is fiercely competitive and over-banked.
- (d) The present average interest rate for unsecured debt is approximately 11 - 12% and for secured debt 10 - 11%.
- (e) Finance has been available for long, medium and short term borrowings in the past. Sources of lending became scarcer in the height of the Asian economic crisis. However, measures have been implemented in Malaysia to bring interest rates down and to encourage more lending at least in the short to medium term.

B2. Central or other similar bank control or influence

- (a) The central bank of Malaysia, Bank Negara Malaysia, plays a pivotal part in the regulation of the banking and finance sector. It is extremely professionally run and has a history of being independent. Prior to the initiation of the Corporate Debt Restructuring Committee

(“CDRC”)[as to which see Section Q and R of this paper], if there was any intervention by Bank Negara Malaysia in corporate debtor problems at all, it would have been subtle and indirect and addressed to the domestic banks. With the CDRC, Bank Negara has a more direct, though more of a facilitative, role to play.

- (b) It would not be possible to say that the instances of such banks having taken on the role of a “lead” bank would elevate these instances into any form of a tradition. Now with the CDRC [see Sections Q and R of this paper], there is provision for a “Lead Bank” under the CDRC Framework, and thus an opportunity for this concept to take root.

B3. Assessment of borrowing risk and monitoring of financial position

- (a) Assessment or analysis of lending risk is widely practised in Malaysia, though with varying degrees of skill and perception. There is insufficient use of risk analysis tools. Also, even if the risk analysis was carried out professionally, the decision to lend may be made by someone or some people who may not necessarily be familiar with those tools.
- (b) The average lending would make an acceptable, though possibly not ideal, assessment of lending risk.
- (c) Regular monitoring of the performance of a corporate borrower is a common feature of lending in Malaysia.
- (d) It is common for lending banks to request that they be supplied regularly with financial statements.

B4. Foreign Bank Lending

- (a) As of 1994, pursuant to policy dictates and the requirements of the Banking and Financial Institutions Act 1989, all business in Malaysia conducted by local branches of foreign banks was transferred to a local subsidiary of the foreign bank concerned by statutory vesting order. The subsidiary would be a Malaysian incorporated company and it would hold a licence under the

Banking and Financial Institutions Act 1989 to conduct the relevant banking or other business. The foreign bank would lose its banking licence. Therefore, the expression “foreign banks” would, in the Malaysian context, mean offshore lenders. In this context, there would be a significant amount of foreign bank lending in this country. Banking has to all intents and purposes become “borderless” subject to some exchange control regulatory requirements.

- (b) There are instances of foreign banks lending together with local banks but it need not necessarily be the case and thus cannot be said to be usual or common.
- (c) There are some differences as to funding terms between domestic and foreign lenders.
- (d) Given that foreign banks in the Malaysian context would be offshore lenders for the reasons explained above, not being physically present in or entirely familiar with local conditions, these lenders may extract or impose far more stringent lending covenants in comparison with domestic lenders.

B5. Exclusive lending

- (a) An “exclusive” lending relationship between one bank and a corporate borrower is not common, though that is not to say that it may not exist.
- (b) Given that exclusive lending relationships are not common, if a corporate borrower is in difficulty, it makes the resolution more complex for the borrower.

B6. Syndicated Lending

- (a) Syndicated lending (i.e. where a group of banks or financial institutions join together to provide funding for a corporate borrower) is relatively common in Malaysia.

(b) That being the case:-

- It is common for one bank to perform the role of agent on behalf of all the lenders.
- The concept of trustee where one bank holds the security on trust for the lender banks is also common.
- The agent or trustee may have multiple roles to perform, occasionally walking a tightrope between apparent conflicts arising out of other capacities. The agent can act as the initial facilitator between the lenders and borrower for an informal resolution of the borrower's difficulties, where possible. Otherwise it seeks instructions from the defined majority to initiate recovery and enforcement procedures.

B7. Subordinated debt

- (a) As a contractual matter between lenders *inter se*, debt subordination is recognised and practiced in Malaysia.
- (b) The insolvency regime as such has no special statutory provision for debt subordination but in practice, as between lenders, the contractual position will eventually sort out the priorities between those lenders.

B8. Banks and equity/debt

- (a) There are a number of statutory provisions, regulations and guidelines that govern and regulate the ability of a bank to hold shares in Malaysia. The statutory provision in question is section 66 of the Banking and Financial Institutions Act 1989 ("BAFIA"). In the Banking and Financial Institutions (Acquisition and Holding of Shares and Interests in Shares) (Licensed Banks, Licensed Finance Companies and Licensed Merchant Banks) Regulations 1991, a licensed bank, a licensed finance company or a licensed merchant bank, may acquire or hold in its account shares or interests in shares of any corporation, provided:

- (i) The acquisition or holding of such shares/ interest in shares shall not exceed 10% of the investee corporation's paid-up capital or 10% of the banking institution's paid-up capital and published reserves (net working funds in the case of a foreign bank) whichever is lower; and
- (ii) In aggregate, the value at cost shall not exceed 25% of the banking institution's paid-up capital and published reserves (net working funds in the case of a foreign bank).

There are also provisions that authorise banks to hold "trustee", "non-trustee" shares, redeemable convertible loan stock, and equity derivatives.

Bank Negara may on an ad hoc basis give approval to any licensed institution to hold or acquire shares in corporations without any restriction.

- (b) It is possible for banks to accept a conversion of debt into equity with Bank Negara Malaysia approval.
- (c) There are instances where banks have accepted a debt to equity conversion in the context of a formal court approved scheme of arrangement though the position is not so clear in relation to work outs as the information is not readily to hand.
- (d) Banks are generally wary of accepting board positions because of the liabilities that this status brings with it; but having said the possibility of banks getting seats on the board of companies in which it holds a significant amount of equity pursuant to a Bank Negara Malaysia exemption cannot be ruled out.

B9. Debt Trading

- (a) There are debt traders that operate in the Malaysian market.

- (b) Whilst debt trading is known to exist, and is important enough for Bank Negara Malaysia to allude to debt trading in the published “Framework” for the Corporate Debt Restructuring Committee” (“CDRC”) [as to which see sections Q and R of this paper], the size of the market in it cannot be determined and consequently it is not possible to indicate whether it is common in this country.

B.10 Guarantees to Support Lending

- (a) The concept of a third party guarantee as security for corporate borrowing is known and practised in Malaysia.
- (b) There is no law that regulates the power to take a third party guarantee. The ability or capacity of a corporation to validly give a third party guarantee to secure the borrowing of another corporate entity is determined by reference to the powers and objects of a company as set out in its Memorandum of Association. Section 19 of the Companies Act 1965 (Statutes of Malaysia, Act 125) provides that a company may have the powers set out therein and in the 3rd Schedule to the Act.
- (c) It is indeed common and usual for a corporate borrowing to be supported by a third party guarantee.
- (d) Third party guarantees are typically taken from the main shareholders or directors of the corporate entity or from a related company or company that is associated with the corporate borrower or a combination thereof.
- (e) The relationship between guarantor, the principal borrower and the creditor, and their rights and obligations *inter se* are in general governed by sections 77 to 100 in part VIII of the Contracts Act 1950 (Statutes of Malaysia, Act 136). These provisions regulate the enforcement of guarantees in general.

- (f) Save for the possibility of some delays in the course of court proceedings, it is not difficult in practice to enforce a third party guarantee.
- (g) The taking of security over the property of a third party guarantor as an additional comfort to the lender is not usual or common but does occur in some cases where the lender considers itself to be inadequately covered.
- (h) It is common to include provisions in the guarantee *ex abundante cautela* to make it clear that the liability of the guarantor is preserved notwithstanding the insolvency of the corporate borrower.