

SECTION C – SECURED FINANCING

C1. Property Rights Regime

(a) By and large the system of ownership rights in respect of both land and other property is reasonably stable and certain in Malaysia. All Malaysian land registration is based on the Torrens system that originated in South Australia in the 19th century. However, within Malaysia, different regimes exist. Rights in land in the various states (Malaysia is a federation of separate states) that comprise Peninsular or West Malaysia (other than Malacca and Penang) are governed by the National Land Code 1965 whilst Malacca and Penang are governed by the National Land Code (Penang and Malacca Titles) Act 1963. Sabah and Sarawak, the two states that comprise East Malaysia or Borneo, have separate land ordinances that respectively govern land ownership rights in each of those states. All of these Torrens based land registration systems emphasise the primacy of the register of titles, though the conclusiveness of the register can be challenged under appropriate circumstances. There is some element of uncertainty as to the exact position of equitable interests in land under the National Land Code. The Civil Law Act 1956 (Statutes of Malaysia, No.67) provides in section 6 that the law of England relating to tenure or conveyance or assurance or succession to any immovable property or any right, interest or estate therein shall not apply in Malaysia or any of the states comprising the federation.

(b) The system of:

- ◆ land (i.e. immovable property) ownership and rights is sufficiently developed to encourage lending on the security of land.

- ◆ ownership and rights in property other than land (i.e. intangible or moveable property) is sufficiently developed to encourage lending on the security of such property.

C2. Secured Financing

- (a) The following types of securities are available under Malaysian law to secure borrowings by a corporation:
- (i) registered charge over land under the National Land Code 1965;
 - (ii) debentures containing fixed and floating charges over land and movable or personal property;
 - (iii) legal and/or equitable mortgages of property of an intangible or personal nature.
 - (iv) pledges of personal property;
 - (v) lien over land.
 - (vi) assignment of proceeds of contracts or other chose-in-action.
- (b) Generally, debentures containing fixed and floating charges over assets of the borrower company and registered charges over land are the most common forms of securities. Companies that have been awarded major projects may also assign proceeds of such contracts to the lender. For borrowings by public listed companies that are listed on the Kuala Lumpur Stock Exchange, it is common to supplement the security coverage with a mortgage of shares created by the controlling shareholder(s).
- (c) The following must be registered with the Registrar of Companies under section 108 of the Companies Act 1965. If not, such charges are void as against the liquidator and any creditor of the company.
- Charge to secure an issue of debentures;
 - Charge on uncalled share capital of a company;
 - Charge on shares of a subsidiary of a company;
 - Charge on land;
 - Charge on book debts;
 - A charge on calls made but not paid;
 - A floating charge on the undertaking or property of a company;
 - A charge on ship or aircraft or any share in a ship or aircraft;
 - Charge on goodwill, patent or licence, on a trademark, or copyright;
 - Charge on a credit balance of a company in any deposit account.

Charges over land under the National Land Code must be registered under section 243 of the Code. As such charges also come within the ambit of section 108(3)(e) of the Companies Act, such charges must also be registered under the Companies Act.

(d) As for priorities:

- in so far as statutory charges over land are concerned, if more than one charge has been created over the land and registered in accordance with the provisions of the Code, then if the security is enforced thereby resulting in a sale by public auction, the proceeds of sale are applied by the Bailiff of the High Court towards satisfaction of the charges in order of registration. As these statutory charges are registered and appear on the register of titles, there is constructive notice of their existence.
- As regards charges registered under the Companies Act, case law has held that there is constructive notice of the existence of the charge but not of its contents. Priority vis-à-vis such charges is determined by order of registration. In the case of any security interest not required to be registered under any statute, general equitable principles that derive from English law would apply, and priorities as between competing interests would be determined accordingly.

C3. Enforcement of Securities

- (a) If a corporate borrower is in financial difficulty and a secured debt has become due, it is not usual or customary for a secured lender and corporate borrower to attempt to negotiate a suitable arrangement for repayment. In most circumstances the lender would typically issue a letter of demand in the usual way. If no payment were made, the lender would typically, depending on the type of security, either initiate legal proceedings by way of enforcement or exercise extra-judicial remedies. In some cases, particularly if the relationship between borrower and lender is good, some form of accommodation of the borrower's requests may be made before enforcement commences.
- (b) Security over land typically takes the form of a debenture containing a fixed or floating charge over land or a statutory charge under the Code.

Enforcement mechanisms differ accordingly. Debentures are enforced mainly by the appointment of a receiver and manager over the charged asset. In the first instance, the receiver and manager would take possession of the assets, including land. However, the Supreme Court in a recent decision, namely *Kimlin Housing Development Sdn Bhd (In Liquidation)(Receiver and Manager appointed)* [1997] 2 MLJ 805 ruled that land subject to not only a fixed charge but also a statutory charge, couldn't be sold privately by the receiver using his power of sale under the debenture. The Court ruled that the land must be sold by way of the mechanism laid down under the Code for enforcement of statutory charges with the safeguards that the Code provided. The Supreme Court also went on to hold, against other authority in the Commonwealth, and contrary to what had been perceived to be the position in Malaysia before the decision, that the receiver and manager's powers come to an end once a liquidator is appointed. Receivers and managers have applied to court for directions in the wake of the *Kimlin* decision. Some judges of the High Court have attempted to distinguish the *Kimlin* decision by reference to the second half of the judgment, which dealt with the termination of the receiver and manager's powers upon the advent of liquidation, saying that the sale by the receiver and manager was struck down because the company was in liquidation. Lenders have also attempted to persuade the company's directors to consummate the sale of the land by executing the memorandum of transfer, given the receiver and manager's inability to execute the same on behalf of the company. This measure is not thought to infringe the ruling in the *Kimlin* case. Lenders who follow the letter of the ruling in *Kimlin* would on the other hand normally seek a sale under the auspices of the High Court in accordance with the provisions of the Code. Other assets such as plant, machinery and vehicles can be sold by the receiver and manager pursuant to the power of sale in the debenture. Shares that are the subject of a pledge or mortgage can be force-sold, the former in accordance with the provisions of the Contracts Act 1950 and the latter in accordance with the mortgage instrument.

- (c) As indicated above, a substantial degree of self-enforcement is permitted, save for land that is subject to both a fixed charge in a debenture (or a crystallised floating charge) and a statutory charge created under the Code.
- (d) In practice, except where a lender has no choice in relation to land for the reasons explained above, lenders generally prefer self-enforcement for secured

assets.

- (e) Briefly, the enforcement procedures for different types of security are as follows:
- Land that is subject to a statutory charge is sold by public auction. The process differs for different categories of land. “Registry title” land is sold through court proceedings that require a hearing before a judge where a sale will not be ordered if the chargor can show “cause to the contrary”. “Land Office title” or rural land is sold through quasi-judicial proceedings before a land administrator. Again, a hearing is held and the chargor can show “cause to the contrary”.
 - Land that is not subject to a statutory charge can be sold through a private treaty sale by a receiver, who will advertise the land for sale or put it out to tender.
 - Similarly, plant, machinery, vehicles and stock-in-trade can all be sold by private treaty or by public tender in the same way by the receiver.
 - Proceeds of a contract, such as a building contract, that have been assigned to the lender, can be collected by the receiver or a court order can be obtained directing the debtor to pay the proceeds to the lender or the receiver, as the case may be.
 - Listed shares can be sold on the open market through a broker. These shares are now “scripless” and are transferred electronically under SICDA [see Section A of this paper]. As the shares would normally be registered in the name of the lender’s nominee company (lenders in Malaysia are generally prohibited from holding shares in their own name without Bank Negara approval), the nominee company would execute the necessary authorisation forms for the broker to initiate the electronic transfer following a sale on the stock exchange. The shares may be sold in batches if the mortgaged block is a large one, so as not to depress the price of the shares on the stock exchange.
 - Shares in private companies, which are not governed by the electronic regime under the Central Depositories, can either be sold privately by the lender or the receiver using a power of attorney to consummate the sale or be sold judicially through the means of a charging order obtained from the High Court.

C4. Effectiveness of Judicial System

Whilst most lenders may prefer self-enforcement, the judicial system is relatively effective for the purpose of enforcing secured property rights. The main qualification to the foregoing statement is the fact that there may at times be considerable delays in obtaining hearing dates.

C5. Effect of Insolvency Proceedings

- (a) The advent of insolvency proceedings can have an effect on the process of security enforcement. If winding-up proceedings are pending, but no winding order has been made, then where court enforcement is either desired or compulsory, the secured creditor need not obtain leave of court to commence enforcement proceedings. However, the secured creditor may require, *ex abundante cautela*, a validation order so as to overcome the possibility that if a winding up order is made, the sale resulting from such enforcement proceedings will not be rendered void under section 223 of the Companies Act. Strictly, if the beneficial ownership of the asset has passed to the lender when the security was created, no validation is technically required as the asset would not constitute “property” of the corporate borrower. Once a winding up order has been made, if a secured creditor needs to apply to court for judicial enforcement of a security, the creditor would require leave of court prior to commencing the proceedings.

- (b) There is no provision for formal court-based insolvency “administration” as such under Malaysian law. The effect of special administration under the