An introduction to Security in common law and civil law jurisdictions

Dan Marjanovic
Partner
Calvin Tan
Partner
Rina Lee
Consultant

15 March 2017
Overview

Security principles 101

International security laws

Indonesia

Issues to consider when taking/giving security
What is security?

Rights in rem vs in personam

Guarantees & Quasi-security
Why take security?

Paripassu principle

Protection of secured creditors
Forms of security - Possessory

- Pledge
- Lien
Forms of security – Non-possessory

Mortgage

Charge
Charge

“all present and future assets”

Fixed vs Floating

Priorities

Mortgage vs Charge
Assets that may be subject to security

- Land and buildings
- Goods
- Shares
- Contractual rights
- Bank accounts
- Intellectual property
- Insurances
Perfection of security

- Registration
- Notice
- Possession
Enforcement of security – Self-help

- Enforcement event
- Appointment of receiver
- Sale of secured assets
- Application to debt
Enforcement of security in the PRC

- Enforcement event
- Court injunction / Objection
- Civil claim / Appeal
- Local enforcement / Objection
Main legal groups

Anglo-American common law
- English common law group
- American common law group

Napoleonic jurisdictions
- Western and Southern Europe
- Central and South America
- Parts of Africa
- Parts of Middle East
Main legal groups

Roman-Germanic jurisdictions

• Germany
• Dutch group (including Indonesia)
• Switzerland

Mixed / new jurisdictions

• East Asia (China, Japan and Taiwan)
• Vietnam
• Mongolia
### COMPARATIVE LEGAL SYSTEMS IN SOUTH EAST ASIA

**EXAMPLES** (not exhaustive)

<table>
<thead>
<tr>
<th>COMMON LAW BASED</th>
<th>CIVIL LAW BASED</th>
</tr>
</thead>
<tbody>
<tr>
<td>SINGAPORE</td>
<td>THAILAND</td>
</tr>
<tr>
<td>MALAYSIA</td>
<td>VIETNAM</td>
</tr>
<tr>
<td>HONG KONG</td>
<td>INDONESIA</td>
</tr>
<tr>
<td></td>
<td>PHILIPPINES</td>
</tr>
</tbody>
</table>
## SECURITY COMPARISON TABLE

<table>
<thead>
<tr>
<th>COMMON ASSET TYPES</th>
<th>SINGAPORE</th>
<th>INDONESIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>LAND / BUILDINGS</td>
<td>LEGAL MORTGAGE</td>
<td>LEGAL MORTGAGE (HAK TANGGUNGAN ATAS TANAH or “HT”)</td>
</tr>
<tr>
<td>BUSINESS UNDERTAKING</td>
<td>FIXED AND / OR FLOATING CHARGE</td>
<td>NO CONCEPT OF UNIVERSAL BUSINESS CHARGES</td>
</tr>
<tr>
<td>SHARES</td>
<td>MORTGAGE (LEGAL / EQUITABLE) CHARGE (FIXED / FLOATING)</td>
<td>PLEDGE (OR FIDUSIA)</td>
</tr>
<tr>
<td>CONTRACUAL RIGHTS</td>
<td>ASSIGNMENT (LEGAL / EQUITABLE) FIXED/FLOATING CHARGE (RECEIVEABLES)</td>
<td>FIDUSIA OVER RECEIVABLES CONDITIONAL ASSIGNMENT OVER CONTRACTS</td>
</tr>
</tbody>
</table>
# SECURITY COMPARISON TABLE

<table>
<thead>
<tr>
<th>COMMON ASSET TYPES</th>
<th>SINGAPORE</th>
<th>INDONESIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>BANK ACCOUNTS</td>
<td>CHARGE (FIXED / FLOATING)</td>
<td>PLEDGE</td>
</tr>
<tr>
<td></td>
<td>ASSIGNMENT (MORTGAGE)</td>
<td></td>
</tr>
<tr>
<td>INSURANCES</td>
<td>ASSIGNMENT / CHARGE</td>
<td>FIDUSIA (OVER PROCEEDS)</td>
</tr>
<tr>
<td>Goods</td>
<td>CHARGE (FIXED / FLOATING)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>PLEDGE</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BILL OF SALE</td>
<td></td>
</tr>
<tr>
<td>IP</td>
<td>MORTGAGE / CHARGE / ASSIGNMENT</td>
<td>FIDUSIA</td>
</tr>
<tr>
<td>GUARANTEES (although not asset type)</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>
Forms of security in Indonesia

- **Pledge** – goods, shares, bank accounts
- **Fidusia** – goods, shares, machineries, [buildings, bank accounts and contractual rights?]
- **Land Mortgage** – land together with any buildings and fixtures attached to it.
Perfection of Indonesia security

**Pledge**
- Possession by the pledge/ a collateral manager/bank
- Shares – shareholder register and for listed shares, blocked by KSEI

**Fidusia**
- Registration – online by a notary
- Receivables: Notice + acknowledgment

**Mortgage**
- Registration
Legal issues across jurisdictions

- Availability of universal charge
- Perfection steps
- Availability of a trustee
- Preferential creditors
Legal issues across jurisdictions

- Restrictions on enforcement
- Transaction costs
- Financial assistance
- Priority between creditors
Legal issues across jurisdictions

- Grace period for enforcement
- Future debt
- Prescribed limits
- Negative pledge / restriction on assignment
Contact us

Dan Marjanovic, Partner, Singapore

Dan is a banking and projects partner based in our financial markets practice in Asia. He has considerable experience in acting for banks, corporate borrowers and project parties on major financing transactions in the Asia Pacific region on matters ranging from acquisition financings, the development and financing of infrastructure projects in the energy/oil & gas and transport sectors, electricity generation (including Cleantech), water and wastewater projects, mines and mining related activities, commodity trade flows and a range of structured financing transactions.

Calvin Tan, Partner, Singapore

Calvin specialises in banking & finance, restructuring & insolvency and banking regulatory matters. He has significant experience advising on commodity finance, M&A and leveraged finance, funds finance and project finance in Asia, Africa and Australia. Calvin’s current client roster includes Natixis, Bank of China, OCBC Bank, Gunvor and Anglo American.
Contact us

Rina Lee, Consultant, Singapore

Rina is an experienced Indonesian lawyer who has worked for international companies and financial institutions on Indonesian law matters. Most recently Rina was noted by Chambers & Partners as a “notable practitioner” saying “Singapore based Rina Lee has a great deal of experience in Indonesia and works on mining, banking and M&A matters.” Rina also has oil & gas experience.

T +86 6831 5630
E rina.lee@simmons-simmons.com