

# IFLR

INTERNATIONAL FINANCIAL LAW REVIEW

## PROJECT FINANCE REPORT 2014



Guest edited by Martin Kavanagh  
and Brendan Quinn



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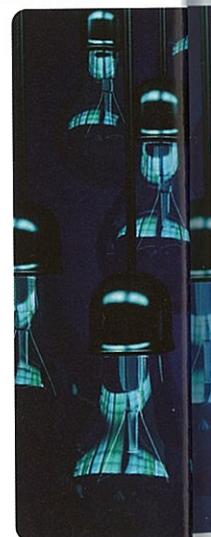
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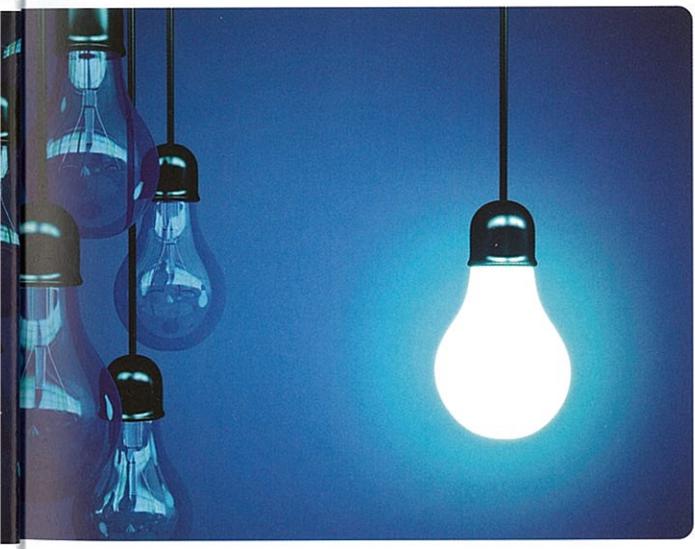
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# Taiwan

Jackson Shuai-Sheng Huang and Simon Hsien-Wen Hsiao, Formosa Transnational

## Section 1 – Collateral/security

### 1.1 What types of collateral/security are available?

In Taiwan, although there are no special regulations governing types of collateral/security required in project finance, a project lender, in general, may request the following types of collateral/security to minimise the risk of the project company's default:

- mortgages over immovable (for example, land) or movable (such as equipment, ships, bank accounts) assets;
- pledges over chattels or rights (for example, future credit);
- equitable mortgages over the shares or units in the project company or its holding company, and any rights attached to them; and,
- assignments by way of a direct or tripartite agreement as security of key project contracts, insurances, or relevant project documents.

## Section 2 – Perfection and priority

### 2.1 How is a security interest in each type of collateral perfected and how is its priority established?

#### *Mortgages over land or other real property (immovable assets)*

Under Taiwan's Civil Code, mortgages over land or other real property are perfected by registering the mortgage with the competent registration authorities, the local land offices, and are prioritised by their respective filing date. After registration, a mortgage over land or other real property takes priority over all subsequent security interests in that land or other real property.

#### *Mortgages over chattels (movable assets)*

Under Taiwan's Personal Property Secured Transactions Act, a written contract will be entered into for a movable property secured transaction. Unless registered, a personal property secured transaction will not be effective against a bona fide third party. Such mortgages are also prioritised by their respective filing date.

#### *Pledges over chattels or rights*

Due to Taiwan's Personal Property Secured Transactions Act, the project company and the project lender tend to adopt mortgages over movables instead of pledges over the same because the movables secured can be kept and utilised by the project company by mortgages. However, pledges over rights are still a main security method in project finance. The creation of a pledge over movables becomes effective and is perfected by the transfer of the same from the debtor to the creditor. As to a pledge over rights, the creation of it should be made in accordance with the provisions concerning the transfer of such rights, and with the provisions of Taiwan's Civil Code. In other words, the pledge should be created in writing, and if there is any document evidencing such rights, the debtor or pledgor is obligated to deliver it.

### 2.2 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Before taking security and closing the financial deal, the project lender can check with the competent local land offices and the relevant personal property registration authorities, such as the Industrial Development Bureau, the Ministry of Economic Affairs or the Ministry of Transportation and Communications (if applicable) to ensure that there are no other registered security interests in respect of the relevant immovable or movable assets. In

addition, the lender can also request the project company to warrant and represent that no other security interests have existed.

### 2.3 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

#### *Real property mortgage registration fee*

A fee is payable at the rate of 0.1% of the declared value of real property or 0.1% of the value of any right over it other than ownership, as the case may be upon registration of a mortgage at the land offices.

#### *Mortgages over chattels*

A small fee of NT\$900 (\$31) per case is payable upon registration of a security interest at the relevant personal property registration authorities.

### 2.4 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

A corporate entity may act as trustee or agent and hold securities on trust for the other project lenders, provided that the security trustee or agent is one of the project lenders. In addition, a security trustee or agent can enforce the security and distribute the proceeds from the sale of the security to satisfy the respective debts to all the project lenders if authorised by an agreement among the lenders.

## Section 3 – Foreign investment and ownership restrictions

### 3.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies?

There is a list of industries which are prohibited or restricted for overseas Chinese and foreign investment for national security or public policy reasons. According to the Statute for Investment by Foreign Nationals, the Statute for Investment by Overseas Chinese and the Regulations Governing Investment in Securities by Overseas Chinese and Foreign Nationals, all foreign investment is subject to the approval of the Investment Commission (IC), the Ministry of Economic Affairs, except foreign portfolio investment in publicly traded securities.

In addition, as to investment from the People's Republic of China (PRC), a list of industries which are permitted will apply instead. There are many special restrictions such as limitation on share holdings.

### 3.2 Do these restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

See 3.1.

In addition, the following types of land should not be transferred or leased to foreign investors or creditors, nor may encumbrance on them be created in favour of foreign investors or creditors: forest lands, fisheries, hunting grounds, salt fields, lands with mineral deposits, sources of water and, lands lying within fortified and military areas and lands adjacent to the national frontiers.

Foreign investors or creditors may acquire the following types of land for self-use, investment and public welfare (but the area and location of such land shall be subject to restrictions imposed by the competent local governments): residences; business places, office buildings, shops and factories; churches; hospitals; schools for the children of aliens; diplomatic and

consular buildings and office buildings of organisations for the promotion of public welfare; cemeteries; and, investments helping important construction in the country, the economy as a whole, and agriculture and pasture, which have been approved by the central authority in charge of the business.

**3.3 Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?**

There are no bilateral or multinational investment treaties signed by Taiwan affording any exemption from the restrictions stated in question 3.1.

**Section 4 – Documentation formalities and government approvals**

**4.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?**

Under the laws of Taiwan, parties are free to agree to submit their disputes to a foreign jurisdiction or an arbitral tribunal located outside of Taiwan, and also to execute a contract governed by the law of that foreign jurisdiction. In other words, such contracts are effective and enforceable, and are recognised by Taiwanese Courts. However, the waiver of sovereign immunity does not apply to projects in Taiwan.

**4.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable? For instance, does collateral need to be notarised?**

In general, a specific financing or project document need not be registered or filed with any government authorities to be valid or enforceable, nor do the laws require that such documents comply with specific legal formalities. However, written contracts or certain application documents are required with respect to security. Whether registration is required depends on types of assets provided as security (see 2.1). In addition, collateral does not need to be notarised.

**4.3 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority?**

There are various central and local governments being authorised to implement projects. The Promotion of Private Participation Department, the Ministry of Finance, is responsible for administering and overseeing projects in the typical project sectors.

**4.4 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?**

In general, according to the Environmental Impact Assessment Act, environmental impact assessments will be conducted and approved by the Environmental Protection Administration, Executive Yuan, for the following development activities for which there is concern of adverse impact on the environment: the establishment of a factory or the development of an industrial park; the development of a road, railway, mass rapid transit system, harbour or airport; the extraction of soil and rock or the exploration and extraction of minerals; the development of water storage, water supply, flood control or drainage projects; the development or use of land for agriculture, forestry, fisheries or livestock; the development of recreational areas, scenic areas, golf courses or sports fields; the development of cultural, educational or medical facilities; the construction of new municipal districts, construction of tall buildings or renovation of old municipal districts; the construction of environmental protection projects; the development of nuclear energy or other energies or the construction of radioactive waste storage or treatment facilities; and, those other activities officially announced by the central competent authority.

**Section 5 – Natural resources**

**5.1 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?**

According to the Mining Act, all mineral ownerships within the territory, the exclusive economic marine zone and continental shelf of Taiwan are owned by the government of the Republic of China (Taiwan) and shall not be exploited unless a mineral right has been acquired. Under the Act on Regulating Private Utilities Enterprises, operations supplying water, electricity, gas, and so on also require a licence.

Also see 3.2.

**5.2 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?**

Under the Mining Act, only Taiwanese persons or legal entities can obtain mineral rights to exploit natural resources. The mineral right holder shall pay mineral royalties of the mineral price at the rate of 2% to 50% for petroleum and natural gas, 2% to 20% for metallic minerals, and 2% to 10% for other minerals. Such mineral royalties and mineral rights fees should be paid twice a year.

**5.3 What restrictions, fees or taxes exist on the export of natural resources?**

There is no tariff for exporting natural gas and petroleum, but there may be a fee imposed on the export of petroleum for the Petroleum Fund under the Petroleum Administration Act.

**5.4 Can private parties grant security over any such rights in natural resources, and in the event of enforcement of that security would the local granting body be bound by that security. Would change of control in the borrower (for example, upon exercise of share security) trigger a forfeit of those rights?**

Regulatory approvals are not required for the creation of security over real property, chattels, unless the owner has made contractual commitments with the government agencies. As, the relevant facilities of utilities are owned by the government or government-owned enterprises, such assets are unlikely to be provided as security.

In addition, according to the Mining Act, only Taiwanese persons or entities are allowed to obtain the mineral right in Taiwan, and the establishment, extension, alteration, closing or transfer due to assignment or entrustment will not be valid without approval by and registration with the competent authorities.

A change of control in the project company does not automatically trigger a forfeit of rights in natural resources. However, there might be some terms as set forth in the licence, which confers rights to exploit natural resources, providing that the approval of the relevant competent authorities is obtained prior to any change of control in the project company. If that approval is not granted, the licence will generally be cancelled.

Under the Act for the Promotion of Private Participation in Infrastructure Projects, a project company may not, without approval of the competent authorities, transfer, lease or create any encumbrance on the operating assets or machinery or its rights under the investment agreement with the government agency, or have such rights subject to compulsory enforcement. Without said approval, any such action would be rendered void.

## Section 6 – Bankruptcy proceedings

### 6.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?

If the project company goes bankrupt, the assets it owned and provided as security will become a part of the bankruptcy estate. In general, a secured project lender has its preferential right to claim proceeds from the sale of the assets through the bankruptcy proceeding. If the sale proceeds are insufficient to repay the claims in full, the project lender could still participate in the bankruptcy proceeding to get additional distribution, if any, with the unsecured creditors.

### 6.2 Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral/security?

There are no preference periods with respect to the security. Under the Bankruptcy Act, the trustee may apply for the invalidation of the following acts made by the debtor, the project company, within six months prior to the bankruptcy adjudication: (i) provision of security for outstanding debts within six months prior to the bankruptcy adjudication except when the provision is due to a promise made by the project company more than six months before the bankruptcy adjudication; and (ii) repayment of debts not yet due. In addition, costs of compulsory enforcement against the security and taxes, such as land value increment tax and house tax, have priority over the claims of secured project lenders.

### 6.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

A project lender and the project company may sign an agreement whereby the ownership of the mortgaged or pledged assets will be transferred to the mortgagee or pledgee automatically when the project company defaults. However, in the case of a pledged security, such agreement to transfer cannot be enforced against a bona fide third party, and in the case of a mortgaged security, such agreement is not a valid mortgage, unless the mortgage or pledge is registered with the competent authorities.

### 6.4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?

In general, the project lender should ensure that it has all of the documentation necessary to enforce its security without any further action being required on the part of the project company. Any steps a project lender is required to take are subject to the terms and conditions of the security agreement between it and the project company.

### 6.5 Does the jurisdiction recognise the concept of trustees in bankruptcy, receivership, liquidators or similar persons?

The concept of trustees in bankruptcy, receivership and liquidators are recognised in Taiwan.

## Section 7 – Foreign exchange, remittances and repatriation

### 7.1 What, if any, are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

There are foreign exchange restrictions and controls depending on the amount exchanged. For example, a legal entity may process the foreign exchange settlements against the New Taiwan dollar without further approval from Taiwan's Central Bank, provided that the foreign exchange purchased or sold by a local company is within the annual aggregate settlement amount not exceeding \$50 million, or the foreign exchange purchased or sold by an association or an individual is within the annual aggregate settlement amount not exceeding \$5 million. No government fee or tax is payable purely on foreign currency exchange transactions.

### 7.2 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Any remittance and repatriation of funds above a certain amount to a party in another jurisdiction will be subject to foreign exchange control in Taiwan, if it involves exchange settlements against New Taiwan dollars. A company should make a declaration to the remitting bank, and the bank should confirm whether the said declaration is consistent with relevant contracts and letters of approval if any foreign exchange transaction involves an amount over \$1 million.

The remittance of dividends is subject to a withholding tax at 20% or lower if there is a tax treaty between Taiwan and that jurisdiction. However, the remittance of loan repayments is not taxable except for its interest, which is also subject to a 20% withholding tax or a lower treaty rate.

### 7.3 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There is no requirement for foreign companies to repatriate foreign earnings.

### 7.4 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

A project company may open a foreign currency account, provided that it provides all necessary documents required by the bank for opening the account. There is no restriction on companies establishing and maintaining foreign currency accounts in other jurisdictions, subject to compliance with other international sanctions.

### 7.5 What, if any, tax incentives or other incentives are provided preferentially to foreign investors or creditors? What, if any, taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

The tax regulations treat foreign and local investors almost exactly the same, except that no withholding tax applies to the profits repatriated to a foreign company by its Taiwan branch office, and that certain interest income of a foreign company is exempt from withholding tax. Also see 2.3.

## Section 8 – Other restrictions

### 8.1 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

In Taiwan, hiring foreign workers is subject to certain restrictions under the Employment Services Act, and the relevant application procedures and government administrative measures are provided in the said Act and the relevant regulations promulgated by the Council of Labour Affairs. In general, a permit from the competent labour authorities is required to hire technicians, engineers or executives, and such foreign employees must comply with the relevant visa requirements. In addition, there are stricter restrictions on labour from the PRC.

### 8.2 What restrictions exist on the importation of project equipment?

Some equipment and components such as cables and wires are subject to inspection during import clearance procedures by the competent authority, the Bureau of Standards, Metrology and Inspection. In addition, under the Act for the Promotion of Private Participation in Infrastructure Projects, an import duty exemption for certain qualified equipment is available for construction contractors, and a deferred instalment payment of import duty on operating equipment can be adopted by a project company.

Imported products are classified in accordance with the Customs' CCC Codes, which are published on the website of the Directorate General of Customs (<http://www.customs.gov.tw/Rateweb/search1.aspx>), with corresponding import duty rates. To develop certain industries, the importation of some equipment and key products in such industries may enjoy zero import duty.


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