

CHAPTER 11 THE LAW OF CREDIT AND SECURITY

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SECTION 1 INTRODUCTION

11.1.1 This chapter deals with the law relating to debt financing or credit for an individual (consumer credit) or for a business (commercial credit). Singapore law in this area is essentially based on English law. Common law concepts have generally been followed and applied by Singapore courts unless modified by local statutes. Hence the references to common law in this chapter.

Credit

11.1.2 Credit is the provision of finance in exchange for a promise to pay at a future date. It can be provided in two ways: (i) by a cash advance known as 'loan credit' or 'lender credit'; or (ii) by postponing payment for goods or services supplied known as 'sale credit' or 'vendor credit'.

Security

11.1.3 Security is any form of asset obtained by a credit provider from the debtor or a third party to ensure repayment of usually the full sum of the debt.

Security Interests

11.1.4 Singapore law adopts the traditional common law forms of security interest, i.e. the mortgage, equitable charge, pledge and lien. Local statutes provide for certain additional or modified forms of security interest. Each type of security interest involves different legal formalities and creates different legal rights and obligations. Further, different assets can be subject to different security interests. The following sections therefore look at the various forms of security interests with reference to the types of asset.

Classification of Assets

11.1.5 Assets are generally classified as real property (land and building) or personal property (cars, jewellery, rights to sue under a contract e.g. for a debt owed or for insurance proceeds under a contract of insurance). Personal property is commonly further sub-classified as chattels or choses-in-possession (tangible property like cars and jewellery) and choses-in-action (intangible property like debts and rights to sue under a contract).

Real Security vs Personal Security

11.1.6 Security over all forms of assets is known as real security. In contrast, personal security does not involve any assets but refers to an individual's or corporation's personal undertaking to pay on behalf of the debtor upon the debtor's failure to make payment.

11.1.7 Sometimes, the provider of 'sale credit' or 'vendor credit' may enter into contractual arrangements with the debtor to 'secure' his position vis-à-vis the unpaid purchase price for goods or services supplied. These arrangements are known as quasi-security as they fulfil the same function as security but are not security in the legal sense. An example is the hire-purchase.

Sources of Credit

11.1.8 The main source of credit in Singapore is the commercial bank. Credit is also available from finance houses, insurance companies, cooperatives societies, moneylenders, pawnbrokers, mutual benefit organisations and credit and charge card organisations. Yet other sources of credit are suppliers of goods or services who provide trade credit by postponing payment for goods or services supplied.

Unsecured vs Secured Credit vs Credit with Quasi-security

11.1.9 Credit can be obtained on terms which do not require the provision of security to the financier (unsecured financing). Unsecured financing is commonly, though not exclusively, a form of consumer credit. Purchases charged to a credit card are an example of unsecured financing. On the other hand, commercial credit is commonly extended on terms which do require the provision of security (secured financing). An example is a loan to finance the working capital of a corporation's business that is secured by a floating charge on the inventory of the business. As mentioned above, where credit is extended to a debtor, contractual arrangements may be made to provide the creditor with quasi-security.

11.1.10 Whether the credit transaction is secured or not, the legal rights and obligations governing the relationship of creditor (financier) and debtor (borrower) are mainly based on the terms of the contract made, apart from those terms implied by common law. Some forms of credit are additionally regulated by statute.

Attachment, Perfection & Priorities

11.1.11 Attachment refers to the creation of a security interest over an asset in favour of a creditor so as to enable the creditor to assert/enforce the security right against the debtor but not necessarily against third parties. Without attachment, no enforceable security interest exists at all.

11.1.12 Perfection refers to the further step that must be taken to give notice to third parties of the security interest over the property so as to enable that creditor to be able to assert/enforce his security right against the third parties. Perfection normally involves either taking possession of the property, registration in a public register or the actual giving of notice. Failure of perfection would render the security interest invalid against subsequent parties who are granted security interests over the same property, an outright purchaser of the property, an execution creditor or a landlord seeking to distrain the property of the debtor for unpaid rent. The unperfected security interest would, in the event of insolvency, be invalid against the debtor's other unsecured creditors as well.

11.1.13 Priority issues arise where more than one security interest is created over the same property in favour of different parties. The same issues would arise where the property is first subjected to a security interest in favour of one party and subsequently sold to another or subjected to a contractual arrangement giving rise to quasi-security to another. This problem is compounded when the debtor's collective debts far exceed the value of his total assets and insolvency proceedings are commenced against the debtor. Although priority issues are primarily resolved by reference to common law rules (which are modified by statutes in some cases), the concepts of 'attachment' and 'perfection' of a security interest are relevant.

11.1.14 The rules governing priority amongst the various claimants against the debtor's property are complex. The Singapore courts generally follow the English common law priority rules which are in some cases modified by local statutes. The existence of legal and equitable interests and questions of constructive notice of an interest add to the complexity of the rules.

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SECTION 2 UNSECURED CREDIT

'Loan Credit' or 'Lender Credit'

11.2.1 Providers of unsecured loan or lender credit include banks, finance companies, moneylenders and ordinary individuals.

11.2.2 A loan from an individual would be treated as a simple contract of loan and the usual contractual principles apply. However, an individual who lends money in return for a larger sum to be repaid *may* be regulated by the Moneylenders Act 2008 (Act 31 of 2008) which came into operation in replacement of the former Moneylenders Act (Cap 188, 1985 Rev Ed) on 1 March 2009.

'Moneylender'

11.2.3 Section 2 defines the terms 'moneylender', 'excluded moneylender' and 'exempt moneylender'. Anyone who is a moneylender under the Act must comply with its requirements while an 'excluded moneylender' need not. 'Exempt moneylender', however, refers to any moneylender who has applied for and been granted a conditional and temporary exemption by the Minister of Law from complying with any or all provisions of the Act; for example, from holding a moneylender licence (see sections 35 & 36). Generally, anyone carrying on a

business of moneylending is a moneylender under the Act. Singapore courts have held that lending activity that is regular, and shows a degree of system and continuity is evidence of a business of moneylending. Section 3 raises a rebuttable presumption that a person who lends money in return for a larger sum to be repaid is a moneylender. Excepted categories ('excluded moneylender's) include:

- entities whose lending activities are already regulated by other statutes (eg the Banking Act (Cap 19, 2008 Revised Ed) or Finance Companies Act (Cap 108, 2000 Revised Ed));
- any person who lends *solely* to:
 - his employees (as part of their employment benefits); or
 - corporations, limited liability partnerships; or
 - trustee-managers or trustees of business trusts, or trustees of real estate investment trusts (for the purposes of the respective trusts); or
 - accredited investors as defined by section 4 of the Securities & Futures Act (Cap 289, 2006 Rev Ed); and
- 'any person bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.'

Hence, credit extended by credit and charge card organisations may fall under the first exception while suppliers of goods or services who provide credit facilities fall under the last exception.

Moneylenders Act

11.2.4 The business of moneylending is regulated under the Act through strict licensing and procedural requirements. A contract for the repayment of money lent by an unlicensed moneylender is rendered unenforceable as is security or guarantee given for such a loan. Under the Act, the court is vested with wide discretion to grant relief to a borrower or surety or any other person liable under the contract of loan where the interest charged is excessive and the loan transaction is harsh and unconscionable or substantially unfair. Contravention of the requirements under the Act attracts penal sanctions apart from civil consequences relating to enforceability of the contract of loan and security furnished.

'Sale Credit' or 'Vendor Credit'

11.2.5 Unsecured sale or vendor credit is provided when a supplier of goods or services allows postponement of payment for goods (albeit ownership of goods has passed to the buyer) or services. This may be a term stipulated in the contract of sale or supply itself. Sometimes, the buyer is issued with the supplier's in-house credit or charge card to which purchases at the supplier's retail outlets can be charged. The issue and use of the card are governed by the terms of a contract entered into between the buyer-cardholder and the supplier-card issuer. Hence, the usual contractual principles apply to these transactions.

Credit or Charge Card

11.2.6 Unsecured sale credit may be provided by a body other than the supplier of goods or services, typically a credit or charge card organisation. In

this scenario, the supplier would enter into a contract with the card issuing organisation agreeing, amongst others, to accept payment for its goods or services made via the cards issued by the organisation (the 'merchant agreement'). The card issuing organisation would enter into contracts with persons to whom cards are issued (the 'cardholder agreement'). Again, normal contractual principles apply to govern these contracts.

Banking Regulations

11.2.7 Sale credit extended by suppliers of goods or services is not regulated by statute. The supplier is not considered a moneylender under the Moneylenders Act (see [Section 11.2.3](#) above). Sale credit extended by credit or charge card organisations falls outside the purview of the Moneylenders Act (see [Section 11.2.3](#) above) but are subject to Part VIII of the Banking Act (Cap 19, 2008 Revised Ed) and regulations issued pursuant to section 78(2) of the said Act.

11.2.8 The Banking (Credit Card and Charge Card) Regulations 2004 specify limits on the issue of credit cards and charge cards which include: minimum qualifying income of an individual (of 55 years and below or above 55 years of age) applying for a card with an unsecured credit limit; conditions for issuing a corporate card or business card, a card with a secured credit limit, and a supplementary card to individuals below 18 years of age; maximum allowable credit limit; prohibition on solicitation of cardholders; and the prescribed method of disclosure of finance and late payment charges.

11.2.9 Other Banking Regulation prohibit card issuing organisations from conduct that induce, urge or encourage any individual to use the card to pay for the legally required cash deposit portion of the purchase price of a residential property.

11.2.10 Contravention of the regulations attracts penal sanctions.

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SECTION 3 REAL SECURITY OVER LAND AND BUILDING

Definition of Land

11.3.1 Singapore law adopts the common law definition of land. Land is also defined in section 2 of the Conveyancing and Law of Property Act (Cap 61 1994 Revised Ed) and section 4 of the Land Titles Act (Cap 157 2004 Revised Ed). Land refers to the surface of any delineated parcel of earth, the column of airspace above it, the minerals underneath it, and all plants growing and structures built upon it. It extends to any rights that run with the land such as rights to air, light, water and the right of access to any adjacent highway.

Fixtures

11.3.2 Chattels or choses-in-possession on the land may be considered a part of the land (thus known as 'fixtures') such that security interests granted over the land would extend to the fixture. To determine if chattels have become fixtures, Singapore courts apply the common law two-prong test of degree and purpose of annexation. A chattel physically annexed to the building raises the rebuttable

presumption that it has become a fixture. A chattel that merely rests upon the ground by its own weight raises the converse rebuttable presumption. The purpose of annexation is also relevant. A chattel attached to the building may not become a fixture if the purpose of attachment is temporary and intended for the better enjoyment of the chattel. Whilst a chattel resting on its own weight may become a fixture if it was for the permanent and substantial improvement of the land.

Systems of Registration

11.3.3 Historically, to prevent the incidence of fraud when transfer of ownership of land is effected, a system of registration was put in place requiring records of dealings in land, whether outright transfers of ownership or transfers by way of mortgage, to be kept.

Deeds System

11.3.4 Two systems exist in parallel in Singapore. Under the first, the Deeds System, ownership of common law or 'unregistered' land is transferred by deed. Lodging deeds at the Registry of Deeds is not compulsory but necessary to secure priority where there are conflicting and competing interests in the same property and to enable the deed to be introduced as evidence in any court proceeding. The Deeds System is governed by the Conveyancing & Law of Property Act and the Registration of Deeds Act (Cap 269, 1989 Revised Ed).

Torrens System

11.3.5 The second, the Land Titles System (also known as the Torrens system) was introduced later to provide a more simplified system. Dealings in land registered under the Land Titles Act (Cap 157, 2004 Revised Ed) are noted in the Land Titles Register. Registration of transfers is compulsory as transfers have no effect unless registered. A person investigating the owner's title need only look into the register and may ignore dealings not noted in the register. Priority is conferred to the first party to register amongst competing interests in the same property.

Mortgage over Land

11.3.6 A security interest commonly created over real property is the mortgage. Thus, contractual principles apply apart from common law principles and statute law.

11.3.7 The traditional mortgage involves the transfer of ownership of land by the debtor or a third party ('the mortgagor') to the creditor ('the mortgagee') subject to the debtor or third party's right to have ownership transferred back to him upon full repayment of the sum owed (this right is known as 'the equity of redemption'). Although ownership is transferred, possession of the property remains with the debtor or third party. Generally, the terms of the mortgage agreement would confer upon the creditor the right to sell the mortgaged property and apply the proceeds in satisfaction of the sum owed to him. A mortgagee would also enjoy a right of foreclosure, that is, to obtain a court order to bring the mortgage to an end and extinguish the mortgagor's right of redemption of the mortgaged property and any subsequent security rights created over the same property. Other remedies for the mortgagee may be

contractually agreed between the parties, for example, the mortgagee's right to retake possession of the mortgaged property. The traditional mortgage, as described, may be legal (created by transfer of the legal title to the land) or equitable (by an informal deposit of title deeds coupled with an intention to create a mortgage over the property or by transfer of an equitable title to the property).

11.3.8 Mortgages of land under the Deeds System must comply with the formalities in the Conveyancing & Law of Property Act. The rules of the Act, together with the terms contractually agreed in the mortgage agreement, govern the rights and obligations between mortgagor and mortgagee. Certain rules apply unless expressly excluded or varied by the terms of mortgage.

11.3.9 Mortgages of land registered under the Land Titles Act must comply with the formalities in the said Act the rules of which, together with terms contractually agreed in the mortgage agreement, govern rights and obligations between mortgagor and mortgagee. Certain rules apply unless expressly excluded or varied by the terms of the mortgage.

11.3.10 As of 31 December 2002, all land in Singapore has been converted to 'registered land' under the Land Titles or Torrens system. The effect of the conversion is that new mortgage over land created after that date will be subject to the rules of the Land Titles Act. The rules of the Conveyancing & Law of Property Act continue to apply together with the rules of the Land Titles Act to these new mortgages, insofar as they do not contradict the Land Titles Act.

11.3.11 The traditional concept of mortgage of land has been modified by the Land Titles Act. The modified mortgage thus applies to mortgages of land registered under the Act and new mortgages created after land has been converted to "registered land" under the Act.

Statutory Mortgage

11.3.12 Under the Land Titles Act, two types of security interest may be created over registered land according to the purpose served by the security interest. If the purpose is to secure payment of a debt, a mortgage in the prescribed form may be registered. In contrast, if the purpose is to secure payment of money other than a debt, then a charge in the prescribed form may be registered. A Land Titles mortgage differs from the traditional mortgage in that it does not involve a transfer of ownership in the property at all although the rights and obligations between mortgagor and mortgagee remain largely the same.

Charge over Land

11.3.13 A charge is created when a debtor or third party ('the chargor') agrees to appropriate or make available a property towards the satisfaction of the debt so that the creditor is entitled, in the event of default of repayment of the debt, to take possession of the property, sell it and apply the proceeds in satisfaction of the debt. Unlike a mortgage, both ownership and possession of the land remains with the debtor or third party.

Statutory Charge

11.3.14 Charges over land are rare. As mentioned, under the Land Titles Act, a statutory charge can be created over registered land to secure payment of money other than a debt.

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SECTION 4 REAL SECURITY OVER CHATTELS / GOODS

Chattel Mortgage

11.4.1 A mortgage over goods is created in the same way as a traditional mortgage over land (see [Section 11.3.7](#) above). Generally, the same rights and obligations are contractually agreed between the mortgagor and mortgagee. Mortgages over chattels can also be legal or equitable.

Bills of Sale Act

11.4.2 An oral chattel mortgage is rare. Written chattel mortgages created by individuals or unincorporated entities (e.g. sole-proprietorships or partnerships) are considered bills of sale and governed by the Bills of Sale Act (Cap 24, 1985 Revised Ed). Chattel mortgages created by incorporated companies are regulated by the Companies Act (Cap 50, 2006 Revised Ed).

11.4.3 The Bills of Sale Act regulates written chattel mortgages through strict registration and procedural requirements. For example, failure to comply with the registration requirement renders the bill of sale void in respect of the security interest. Failure to use the prescribed form renders the bill of sale totally void both in respect of the debt and the security interest. Priority between competing bills of sale over the same chattel is determined according to the date of registration.

Companies Act

11.4.4 The Companies Act requires a chattel mortgage created by a company to be lodged for registration within 30 days after its creation. Non-compliance renders the security interest void against the liquidator and any other creditor upon the insolvency of the company. The common law priority rules apply to two or more mortgages created over the same chattel. Registration under the Act amounts to notice to the public of the existence of the security interest and has an impact on priority between competing interests in the same property.

Registration of Mortgages of Specific Goods

11.4.5 Mortgages over certain types of goods are regulated by specific statute instead of the abovementioned statutes. For example, mortgages of registered ships must conform to the requirements of the Merchant Shipping Act (Cap 179, 1996 Revised Ed), the provisions of which also determine priority between competing security interests in the same ship.

Fixed and Floating Charge

11.4.6 A fixed charge over goods is similar to a charge over land (see [Section 11.3.13](#) above) and is usually created over 'permanent' goods like office

equipment. A floating charge may also be created over goods. This enables goods subject to a floating charge to be dealt with in the ordinary course of the chargor's business as though they are unencumbered by the charge. Floating charges are appropriate for goods that are used to generate an income, like the inventory of a business.

Crystallisation of Floating Charges

11.4.7 Generally, a floating charge becomes a fixed charge ('crystallises') attaching on specific goods within the class upon the happening of various events: the chargor ceases to carry on business; the chargor goes into liquidation (whether voluntary or otherwise); the chargee appoints a receiver over the chargor's assets; and the chargee exercises rights of intervention in the chargor's management of the assets as authorised by the terms of the charge agreement, for example, to take possession of the assets or sell the asset. Other events triggering crystallisation may be contractually agreed between the parties.

Automatic Crystallisation Clause

11.4.8 'Automatic crystallisation clauses' are clauses inserted into the charge agreement which provide for crystallisation of floating charges to occur automatically without any active act by the chargee upon the happening of events that go beyond the recognised situations at common law (as enumerated in [Section 11.4.7](#) above). The validity of such clauses has yet to be considered by the Singapore courts although it has been generally upheld by most Commonwealth jurisdictions (for example, Australia and New Zealand) including the UK.

Negative Pledge Clause

11.4.9 'Negative pledge clauses' which restrict the chargor's right to create subsequent charges ranking in priority to the floating charge are also often included in the terms of the charge agreement. The restriction is normally upheld as between the chargor and chargee but will only be effective against a third party (purchaser or person who is subsequently granted a security interest over property subject to the original floating charge) if the third party has notice of the restriction. Such a restriction may impact upon priority of competing interests in the same asset.

Charges under the Bills of Sale Act

11.4.10 Written charges over goods created by individuals and unincorporated entities may be considered bills of sale regulated by the Bills of Sale Act (see [Section 11.4.3](#) above).

Fixed and Floating Charges under the Companies Act

11.4.11 Charges over goods created by companies would be subject to the same registration requirements and consequences for non-compliance as chattel mortgages under the Companies Act (see [Section 11.4.4](#) above). Generally, floating charges are disadvantaged under the Act. Fixed charges are usually given priority over floating charges. Upon the insolvency of the chargor, debts due to specific unsecured preferential creditors are paid ahead of the floating chargee if the realised available assets are insufficient to meet those debts. Further, where

a floating charge is created within six months of the commencement of winding up of the chargor, unless it is proved that the chargor was solvent immediately after the creation of the charge, the floating charge will be invalid to secure any existing sum owed to the chargee. The floating charge will only be valid to secure fresh advances made on the day of creation of the charge or subsequently if the chargor was insolvent at the time of its creation.

Pledge

11.4.12 A pledge is created when a debtor ('pledgor') transfers possession of goods owned by him to the creditor ('pledgee') with the intention of using the goods as security for the sum owed. A crucial requirement for the creation of a pledge is the transfer of possession of the goods. This is done through actual physical delivery, or notional or constructive delivery, for example by delivering documents of title to goods to the creditor. The rights and obligations between pledgor and pledgee at common law apply together with any other rights contractually agreed between them.

11.4.13 At common law, a creditor-pledgee has the right to retain possession of the pledged goods and use them until the debt is repaid. If the debt is not repaid within the time specified or if no timeframe is specified, within the lifetime of the pledgor, the pledgee has the right to sell the pledged goods and apply the proceeds of sale in satisfaction of the debt.

Pawnbrokers

11.4.14 Barring some exceptions, pledges of goods with pawnbrokers are governed by the Pawnbrokers Act (Cap 222, 1994 Revised Ed). The Act deems any person who receives goods as security for repayment of any sum(s) advanced not exceeding \$1,000 to be a pawnbroker. Further, persons purchasing or receiving goods who lend a sum(s) not exceeding \$1,000 on the understanding (express or implied) that the goods may later be repurchased or redeemed are also deemed pawnbrokers.

Pawnbrokers Act

11.4.15 Although there is no formality required for the creation of a pledge at common law, pledges with pawnbrokers are strictly regulated by the Pawnbrokers Act. The Pawnbrokers Act regulates the business of pawnbroking through strict licensing and procedural requirements. The rights and obligations of the pawnor and pawnee are governed by the provisions of the Act.

Trust Receipts

11.4.16 The trust receipt is a commercial credit device typically utilised by an importer of goods. An importer of goods who has created a pledge over the consignment in favour of a financier would have given constructive delivery of possession of the consignment by handing over the bill of lading and other shipping documents to the financier. When these documents are required for taking delivery of that consignment upon their arrival, a trust receipt is executed in favour of the financier wherein the importer undertakes that in consideration of the financier releasing the documents to him, he would hold the documents on trust for the financier, use them to obtain the goods as the financier's agent and

hold both the goods and proceeds after sale on trust for the financier. The usual common law and contractual principles apply.

Common Law Lien

11.4.17 When possession of goods are transferred to another for some work to be done upon the goods, and the fees for work done is outstanding, the workman in possession of the goods ('lienee') obtains, by operation of the law, the right to exercise a lien over the goods. At common law, the rights of the lienee are merely to retain possession of the goods until full payment is made. Unless contractually agreed, no other remedy is available. The lien is extinguished upon relinquishing possession of the goods.

Contractual Lien

11.4.18 A lien may arise consensually if expressly provided for by contract.

Statutory Lien

11.4.19 A lien may be imposed by statute. For example, an unpaid seller of goods may retain possession of goods until payment or tender of price under section 41 of the Sale of Goods Act (Cap 393, 1999 Revised Ed).

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SECTION 5 QUASI-SECURITY OVER CHATTELS / GOODS

Hire-Purchase

11.5.1 Hire-purchase is a common consumer credit device that places the creditor in a secured position vis-à-vis sums owed to him although no security interest has been created. A hire-purchase agreement thus confers quasi-security upon the 'original owner' of the goods.

11.5.2 It is a contractual arrangement where the owner of goods lets out the goods to a hirer (who pays rent for the use of the goods) coupled with an irrevocable option to purchase the goods at the end of the hire period.

11.5.3 Finance companies are the usual credit providers by way of hire-purchase. For example, a consumer wishing to purchase a car would enter into a hire-purchase agreement with a finance company after the finance company purchases the car from the car dealer.

Hire-Purchase Act

11.5.4 Hire-purchase transactions involving consumer goods not exceeding \$20,000 (inclusive of any goods and services tax) in value since 1 November 2004; and motor vehicles not exceeding \$55,000 (inclusive of any goods and services tax and import and excise duty but excluding the cost of a Certificate of Entitlement) since 15 July 1994 are regulated by the Hire-Purchase Act (Cap 125, 1999 Revised Ed). The usual contractual principles apply to hire-purchase transactions falling outside the purview of the Hire-Purchase Act.

11.5.5 Generally, the Hire-Purchase Act protects hirers by regulating the form and contents of hire-purchase agreements to ensure full and truthful disclosure to the prospective hirer of financial obligations prior to and after entry into the hire-purchase agreement and specifying the rights and duties of the hirer and the owner under the agreement. Non-compliance may render unenforceable the agreement itself, any security furnished by the hirer or guarantor of the hirer and expose the owner, the dealer or hirer to penal sanctions.

Finance Lease

11.5.6 Another quasi-security device often utilised by businesses (to obtain the use of office or plant equipment) is the finance lease. It is a contractual arrangement where the owner leases goods to usually one hirer (who pays rent for the use of the goods) for the estimated working life of the goods. Unlike a hire-purchase, no option to purchase is conferred upon the hirer by the lease agreement. In practice, the hirer may expect to be able to purchase the goods at the end of the lease. Rentals are computed so that the owner recoups the capital cost of the goods and a margin of profit during the period of the primary lease. The usual contractual principles apply.

11.5.7 Finance companies are the usual providers of “credit” by way of finance lease. Typically, the hirer selects the equipment he needs and requests the finance company to purchase the equipment from the supplier. The finance company would enter into a finance lease with the hirer after purchasing the equipment from the supplier.

Conditional Sales & The Romalpa Clause

11.5.8 A supplier of goods may secure his position vis-à-vis the payment of the purchase price of the goods by contractually providing for title or ownership in the goods to be retained by him until such time that the full purchase price has been paid. This is known as a retention of title or Romalpa clause.

11.5.9 A Romalpa clause over goods that subsequently lose their original identity when mixed in a process of manufacture with other goods to form new goods may be interpreted as a charge over the new goods. Where the buyer is a company, such a charge would attract registration requirements and consequences for non-compliance under the Companies Act (see [Sections 11.4.4](#) and [11.4.11](#) above).

11.5.10 Generally, contracts for the sale of goods containing the Romalpa Clause are known as “conditional sale contracts” and are governed by the Sale of Goods Act (Cap 393, 1999 Revised Ed). However, conditional sale contracts involving consumer goods not exceeding \$20,000 (including any goods and services tax) in value may be subject to the provisions of the Hire-Purchase Act.

11.5.11 Priorities between conflicting or competing interests in goods which are the subject of a contract of sale under the Sales of Goods Act, are determined by common law rules modified by sections 23 to 26 of the Act and sections 8 and 9 of the Factors Act (Cap 386, 1994 Revised Ed).

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SECTION 6 REAL SECURITY OVER CHOSSES-IN-ACTION

Choses-in-action

11.6.1 Choses-in-action are intangible personal assets which are enforceable by legal action. Examples of choses-in-action are trade debts (accounts receivables), stocks and shares, bank deposits, rights under insurance policies and copyright.

Mortgage over Choses-in-action

11.6.2 Mortgages over choses-in-action are created in the same way with generally the same rights and obligations as mortgages over land and goods (see [Sections 11.3.7](#) and [11.4.1](#) above). Mortgages over choses-in-action can also be legal or equitable.

Fixed or Floating Charge over Choses-in-action

11.6.3 Fixed or floating charges may be created over choses-in-action in the same way with generally the same rights and obligations as charges over land and goods (see [Sections 11.3.13](#) , [11.4.6](#) to [11.4.9](#) above).

Applicable Law

11.6.4 Generally, common law and normal contractual principles apply to such mortgages and charges. Specific legislative requirements apply according to the type of chose-in-action. For example, mortgages or charges over scripless shares must comply with the procedure prescribed by section 130N of the Companies Act (Cap 50, 2006 Revised Ed). A legal mortgage over a life insurance policy, effected by a legal assignment of the benefit of the policy to the mortgagee, must comply with the requirements of section 4(8) of the Civil Law Act (Cap 43, 1999 Revised Ed) or with the provisions of the Policies of Assurance Act (Cap 392, 1994 Revised Ed).

Mortgage or Charge over Deposit Accounts

11.6.5 Legal or equitable mortgages and charges over existing customers' bank deposit accounts created in favour of the bank as security for advances to the existing customers are specifically authorised by section 13 of the Civil Law Act.

Companies Act

11.6.6 Where the mortgagor or chargor of the chose-in-action is a company, the registration requirements of the mortgage or charge and consequences for non-compliance under the Companies Act apply (see [Sections 11.4.4](#) and [11.4.11](#) above).

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SECTION 7 QUASI-SECURITY OVER CHOSSES-IN-ACTION

Factoring

11.7.1 Although security interests (mortgage or charge) may be created over trade debts (accounts receivables) they are more popularly sold to factoring houses to obtain immediate liquidity. The trade creditor is thus placed in a 'secured' position vis-à-vis the trade debts, especially if the trade debts were sold to the factoring house on a 'non-recourse' basis, i.e. on the basis that the trade creditor will not be held responsible for any bad debts. This is known as factoring. As implied, trade debts may be factored on a 'with recourse' basis.

Civil Law Act

11.7.2 The outright sale or legal assignment of trade debts must comply with the form and procedure prescribed by section 4(8) of the Civil Law Act (Cap 43, 1999 Revised Ed). Failure to comply, for example, lack of notice of the assignment to the debtor, may render the assignment effective only as an equitable assignment. Lack of notice to the debtor may also cause the assignee to lose priority to other competing assignees or persons with security interest in the same trade debts who gave notice first.

Contractual Set-off or 'Flawed Asset' Arrangement

11.7.3 As mentioned, section 13 of the Civil Law Act allows a mortgage or charge to be created in favour of a bank over their existing customer's bank deposit account. A bank which extends a loan (or a performance bond or bank guarantee) to an existing customer with a deposit account with the bank may 'secure' its position vis-à-vis repayment of the loan (or its contingent liability under the performance bond or bank guarantee) contractually instead. One way is by providing in the loan (or performance bond or bank guarantee) agreement for the bank to be authorised to set off the amounts owed under the agreement against the credit balance in the customer's account until the liability under the agreement is discharged. This is known as a 'contractual set-off'. Alternatively, the loan (or performance bond or bank guarantee) agreement may restrict the customer from withdrawing any amount from its deposit account until the liability under the agreement is discharged. The usual contractual principles apply to these quasi-security devices.

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SECTION 8 PERSONAL SECURITY

Introduction

11.8.1 A person who furnishes real security creates security rights over his asset or property in favour of the financier or creditor. A person who furnishes personal security merely contractually undertakes to pay the debt if the debtor fails to pay.

11.8.2 The most common form of personal security is the guarantee. At common law, the liability of a guarantor is 'collateral' or 'secondary' in the sense that his liability is dependent upon the primary liability of the debtor. The guarantor is liable only as long as the debtor's liability is enforceable against the debtor. The rights and liabilities of parties are governed by the terms of the contract of guarantee. Common law and usual contractual principles apply.

Civil Law Act

11.8.3 Additionally, section 6(b) of the Civil Law Act (Cap 43, 1999 Revised Ed) requires all contracts of guarantees to be evidenced by some note or memorandum in writing and signed by the guarantor or any person authorised by him before it is enforceable against the guarantor.

Moneylenders Act

11.8.4 A guarantee made in respect of repayment of a loan by a moneylender must comply with the requirements of section 20 of the Moneylenders Act 2008.

Hire-purchase Act

11.8.5 A guarantee in respect of payment of rent-charges under a hire-purchase transaction involving consumer goods not exceeding \$20,000 (including goods and services tax) in value must comply with section 21 of the Hire-Purchase Act (Cap 125, 1999 Revised Ed).

Analogous Transactions

11.8.6 Transactions analogous to the guarantee include indemnities, performance bonds and standby letters of credit. (A comfort letter frequently does not create any legally binding undertaking). Like a guarantee, they involve a third party's undertaking to discharge a debtor's liability to a creditor. An important difference is that the promisor's liability is independent of the debtor's liability, i.e., the creditor is able to enforce the undertaking against the promisor even if the debt is not enforceable against the debtor. The common law and usual contractual principles apply to govern the rights and liabilities between the parties.

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SECTION 9 CREDITORS' REMEDIES

Secured Credit & Credit with Quasi-security

11.9.1 A creditor or financier who has obtained real security is entitled to look towards the asset or property in satisfaction of the debt provided the security interest has properly attached to the asset and has been perfected, for example, by registration under the relevant statute. The common law priority rules, modified by statute where relevant, apply to determine priority between conflicting and competing interests over the same property.

11.9.2 A creditor or financier who has obtained personal security in the form of a guarantee or some analogous undertaking may look to the guarantor or promisor for payment of the debt, provided applicable legislative requirements, if any, have been complied with.

11.9.3 A creditor or financier who is 'secured' by quasi-security may enforce the relevant contractual provisions to ensure payment. As mentioned, certain quasi-security arrangements may attract the application of legislative

requirements where non-compliance may affect the enforceability and priority of the creditor's rights (see [Section 11.5.9](#) above).

Solvent Enforcement

11.9.4 All creditors, whether secured or not, whose debt is not fully satisfied (by the security or quasi-security, if any) may sue the debtor for the amount owed while the debtor is still solvent. If the court awards judgement in favour of the creditor, he may enforce the judgement by the methods available under the Rules of Court issued pursuant to section 80 of the Supreme Court of Judicature Act (Cap 322, 2007 Revised Ed) and section 69 of the Subordinate Courts Act (Cap 321, 2007 Revised Ed). These include issuing a Writ of Seizure and Sale, Garnishee Order, Charging Order and Appointment of a Receiver to take charge of enforcing the judgement.

Pre-insolvency Arrangements

11.9.5 An unsecured creditor or one whose security is unenforceable or lacking in priority may prefer to avoid the consequences of insolvency proceedings (where no or minimal recovery of sums owed is possible) and negotiate for some private compromise or arrangement with the debtor. Such private settlements are governed by the usual contractual principles.

11.9.6 Where private negotiations fail, an individual debtor may wish to come up with proposals for a voluntary arrangement between itself and its creditor. The procedure for coming to a voluntary arrangement and the period of moratorium on bankruptcy application, enforcement of security, execution and other legal proceedings against the individual debtor are governed by Part V of the Bankruptcy Act (Cap 20, 2000 Revised Ed).

11.9.7 A corporate debtor may wish to apply for judicial management of its business in order to rehabilitate its business with the purpose of effecting a more beneficial realisation and distribution of its assets to its creditors. The procedure by which this is done and the period of moratorium on winding up application, enforcement of security, execution and other legal proceedings against the corporate debtor is governed by Part VIIIA of the Companies Act. A corporate debtor may also present a scheme of arrangement with its creditors under Section 210 of the Companies Act. Such a scheme of arrangement will become binding on its creditors if it is approved by a majority in number representing at least 75% in value of the creditors present and voting at a meeting and confirmed by the Court.

Insolvency Proceedings

11.9.8 As a final resort, a creditor or financier may wish to commence insolvency proceedings against the debtor. Bankruptcy proceedings against the individual debtor are governed by the Bankruptcy Act. Winding up proceedings against a corporate debtor are commenced pursuant to section 254 of the Companies Act and generally governed by Part X of the Companies Act.

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