CLYDE&CO

**Briefing**

# Security fact sheet

This month's update is a fact sheet recapping on the types of security available for different asset classes when taking security over corporate borrowers, with a more detailed focus on debentures and mortgages.

As we recognise that many clients are already very familiar with these topics, this is intended to serve as a refresher, a reference point or a training tool as required.

## Available forms of security

- mortgages;
- charges (fixed and floating);
- assignment;
- pledges;
- liens; and
- quasi security e.g. guarantees.

## Security by asset class (corporate borrower)

Please refer to Table 1.

## Fixed and floating charges: debentures

### Nature of security

- A charge is a form of security interest that confers on the lender a right to resort to the asset to realise it towards payment of a debt.
- Charges are usually contained in a debenture document which normally contains fixed and floating charges over all a company's assets, and potentially also other types of security such as assignments and sometime mortgages. However a fixed or floating charge can also be created over specified assets only.
- Essentially any assets can be subject to a charge including tangible assets such as machinery or trading stock and intangible assets, contractual rights, goodwill and future assets.
- A fixed charge attaches immediately to a charged asset which is capable of being ascertained or definite. A fixed charge can only be taken where a lender has control over the charged asset. The assets over which a fixed charge are taken should be defined as specifically as possible in the charge document.
- A floating charge hovers over a shifting pool of assets (present and future). It does not require the lender to have control over the assets and is used for assets which the debtor needs to deal with in the ordinary course of its business and can be described generically. It is also used as a '*catch all*' for any other assets of the company which are not caught by a fixed charge.
- A floating charge will crystallise on the occurrence of certain specified events (for example insolvency events and unauthorised dealing with the asset) which should be set out in the charge document. On crystallisation, the floating charge becomes a fixed charge over the assets in question.

### Enforcement

- Charges carry the right to appoint a receiver over the relevant assets.
- On enforcement, a fixed charge holder will have a priority interest in the proceeds of the asset in question, and will be paid from the proceeds of sale before all other creditors. Floating charge holders

will be paid only after fixed charge holders and other preferential creditors and expenses have been paid.
- Enforcement is subject to certain procedural requirements and notifications such as:
  - Written notice of default.
  - Notification of appointment of receiver to Registrar of Companies (BRELA) in prescribed form.
  - Publication of notice of appointment of an administrative receiver.

**Perfection**
- Perfection requirements:
  - The charge document is required to be registered with BRELA within 42 days of creation.
  - It creates a valid agreement between the parties once signed but will become void against a liquidator, administrator or other creditor if not registered within the required time period.
  - Notices should be given to counterparties in relation to any contracts or accounts which have been charged or assigned.

**Practicalities**
- Key procedural requirements for registration:
  - Payment of registration fees and stamp duty.
  - Debenture/charge cannot be executed in counterpart.
  - Must be printed on legal paper
  - At least three copies should be registered.
  - BRELA form to be delivered together with copies of instrument.

## Security over land (mortgages)

**Nature of security**
- A mortgage is an interest in a right of occupancy or a lease securing the payment of money or money's worth or the fulfilment of a condition.
- It acts as security only and not to transfer any interest or right in land.

**Enforcement**
- Gives the mortgagee four key rights on enforcement, to:
  - appoint a receiver;
  - enter into possession of the land;
  - lease of sublease the land; and
  - sell the land by private contract or public auction.
- These enforcement rights are subject to various procedural restrictions including:
  - 60 days notice of default and remedy.
  - Court orders required for agricultural land and where possession cannot be taken peaceably.
  - Publicity requirements for public auction and requirement to obtain best price reasonably available.

**Perfection**
- Perfection requirements:
  - Required to be registered publicly first with BRELA (the Registrar of Companies) within 42 days of creation.
  - Then required to be registered with the local Land Registry.

**Practicalities**
- The key procedural requirements for registration at BRELA are the same as for charges *ie*:
  - Payment of registration fees and stamp duty per instrument.
  - Mortgage cannot be executed in counterpart.
  - Must be printed on legal paper.
  - At least three copies should be registered.
  - BRELA form to be delivered together with copies of instrument.

- The key procedural requirements for registration at Lands Office include:
  - Payment of filing fees at Lands Office per title (rather than per property/instrument) on Form 29 and mortgage deed.
  - Land Registry forms should be delivered together with copies of instrument, also executed on legal paper.
  - Forms must be completed for each land title rather than for each property/mortgage instrument.
  - Lands Office may require valuation reports on the land of not more 3 months/6 months old, but practice varies.
  - Original title deeds must be provided.
  - Original land rent receipts must be provided and any overdue payments must be cleared.
  - If there is any existing security registered against the title, evidence of consent of the existing lender must be provided.

**Table 1: security by asset class (corporate borrower)**

| Asset class | Type of security | Considerations | Perfection |
|---|---|---|---|
| Land rights | Mortgage | | BRELA registration<br>Lands registration |
| Machinery, fixed assets, vehicles | Chattels mortgage<br>Fixed charge | | BRELA registration |
| Trading stock | Floating charge | | BRELA registration |
| Contractual rights and receivables | Fixed charge<br>Floating charge<br>Assignment | Control<br>Blocked accounts<br>Restrictions on assignment | BRELA registration<br>Notice and acknowledgement |
| Bank accounts | Fixed charge<br>Floating charge<br>Assignment | Control<br>Lender / 3rd party account bank<br>Set off | BRELA registration<br>Notice and acknowledgement |
| Shares | Fixed charge<br>Floating charge<br>Pledge | Control<br>Dividends<br>Voting rights<br>Restrictions on share security | BRELA registration<br>Registrar of documents<br>Notice and acknowledgement<br>Certificate delivery |

**Further information**

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Further advice should be taken before relying on the contents of this summary.