



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

Law of Banking and Security

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Introduction

- When credit is extended, risks are inevitably evolved.
- To minimise these risks, B require some form of security.
- Bankers, financiers, creditors, lenders and customers should know the law on lending and securities
- To ensure Banks are protected
- To protect the rights of customers
- Documentation is very important

Lending and Securities

- Credit facilities
 - Securities
- Letter of Offer
- Facilities Agreement
- Security Document
 - Charge
 - Assignment
 - Guarantee
 - Other kinds of securities

Letter of Offer

- Signing the LO is considered as legally binding contract.
- *Lee Chong Lim v Standard Chartered Bank Malaysia Bhd*
(2004) 6 CLJ 447
- The Pt was granted housing loan by the Dt via LO 27/06/01. The Pt accepted the offer and entered into FA and executed MOC. The Dt decided to withdraw the loan facility (false information). The Dt issued LOD and the Pt applied for SJ for SP.
- The Dt is duty bound to disburse the loan. The loan was not repayable on demand but repayable over 240 months.

What is security?

- Taken before the loans and advances are given to the customer
- It can be regarded as insurance against defaults in payment of the loan.
- Possession of the holder of the security holds as against the grantor a right to resort to some property or some fund.
- If the debtor goes bankrupt, a secured creditor takes precedence over unsecured creditor in the distribution.

What is security?

- Security implies something which the creditor could resort to in order to aid him in realising or recovering the debt, in case the debtor failed to pay.
- *Lien Chung Credit & Leasing Sdn Bhd v Chang Chin Choi* [1994] 3 MLJ 488
- The R gave a postdated cheque for RM35K as security for RM35K loan. The said cheque was not mentioned in the memorandum. The appellant claimed for repayment.
- Mohd Ghazali JC:
 - The word security has several meanings, sometimes means the property- land is mortgaged the land.
 - Postdated cheque cannot be termed as security

Persons from whom securities are taken

- Individual- Above 18 years.
- Companies
- Partnerships
- Sole proprietorships

Company

- Separate legal entity. Can sue and be sued.
- S67 of the CA 1965- Cannot deal in its own shares
- S 133- cannot provide any loan or security in connection with its directors or to persons connected with its directors. Penalty RM10K.
- Notwithstanding a breach of s 67 and 133, the company's liability on the loan and security are unaffected by such breach.
 - *Lori M Bhd v Arab Malaysia Finance Bhd* [1993] 3 M;J

Persons connected with its directors S122A

- a member of that director's family; or
 - (b) a body corporate which is associated with that director;
 - (c) a trustee of a trust under which that director or a member of his family is a beneficiary; or
 - (d) a partner of that director or a partner of a person connected with that director.
- (2) "a member of that directors's family" shall include his spouse, parent, child (including adopted child and stepchild), brother, sister and the spouse of his child, brother or sister.
- (3) a body corporate is associated with a director if –
 - (a) the body corporate is accustomed or is under an obligation, to act in accordance with the directions, instructions or wishes of that director;
 - (b) that director has a controlling interest in the body corporate; or
 - (c) that director or persons connected with him, or that director and persons connected with him, are entitled to exercise, or control the exercise of, not less than fifteen per centum of the votes attached to voting shares in the body corporate.

Partnership

- A maximum of 20 members.
- Banks to keep the Partnership agreement
- Register with the ROB, CCM.
- To ensure the authority of a partner to borrow.

Sole Proprietor

- Sole proprietor- company
- To produce a copy of the Certificate of registration issued by the CCM.

Types of Securities

- (1) Land
- (2) Debentures
- (3) Contract moneys and book debts
- (4) Life policies
- (5) Stocks and Shares
- (6) Cash
- (7) Goods
- (8) Ships
- (9) Guarantees

Aspects for consideration

- 1. The value of the security
- 2. Realisability
- 3. Validity of title.
- 4. Indefeasibility of the security
- 5. Cost of stamping

Methods of Taking the security

- Many forms.
- Charge, pledge, lien, legal assignment, set off.
- Assignment is an absolute one not purporting to be way of charge only?
- *BBMB v Syarikat Kejuruteraan Hong Huat Sdn Bhd & Ors* [1988] 3 MLJ 328
 - Whether or not an assignment is an absolute one nor purporting to be by way of charge only is to be gathered only from the four corners of the instrument itself.

Land

- Charge and Lien
- NLC 1965
- Effect of registration-s340- Indefeasibility of title
- Freehold land: in perpetuity
- Leasehold title: for a term of years. S76- cannot exceed 99 years.
- Tenancies: cannot exceed 3 years unless renewed. Not acceptable as security.
- Forms of title: 1. Final Title: Registry title (grant) and Land Office Title (Mukim Grants). 2. Qualified title: Hak Milik Sementara
- RDT: Original copy of the grant (Land Office)
- IDT: Duplicate copy of the original grant (Owner)

Restrictions

- Restriction in interest
- 1. For policy reason.
- 2. Malay reservation land
- 3. Customary land
- 4. Native Land
- Any instrument of dealing registered in contravention of a ROI would be a void instrument.
- Conditions of land use: 1. Agriculture 2. Residential 3. Commercial 4.

Charge

- On land or assets
- Land: Statutory creation. NLC 1965
- confers a right on the secured party to look to a particular asset in the event of the debtor's default, which is enforceable by either power of sale or appointment of a receiver
- Land with the IDT- Memorandum of charge
- Land without the IDT- Deed of Assignment.

Charge

- First party charge: Both the borrower and the chargor are the same
- Third party charge: Where the chargor and the borrower are different.
- First legal charge and second legal charge: S 241 NLC- It is permissible to create more than one charge on the same property. The rights of the subsequent chargee shall rank after the first chargee.

Land search

- To ascertain the ownership of the land, the existence of any encumbrances, any ROI and etc.
- Land searches- land office. The land office will issue certificate of search.

Documentation of a charge

- The MOC- Form 16A
- Execution: If company, common seal and in the presence of directors or company secretary. It depends on the board resolution
- attestation- attestation by magistrate, AA, notary public, land administrator

Stamping

- A charge is an instruments that attracts ad volerum stamp duty
- Stamp Act 1949- RM5 for every RM5000
- Must be paid within 30 days from the date of execution of the charge. If not, the charge is impounded.
- The charge will be inadmissible in evidence in a court unless the penalty is paid. RM25 or 4x the amount of the deficient duty.
- Eg. RM1M- RM5K. If impounded: RM20000+RM5K.

Documentation of an Assignment

- Land without title.
- A loan agreement cum assignment: both the purchaser and borrower are the same
- A Loan agreement and a deed of assignment: the purchaser and the borrower are different
- Power of attorney.

Lien-holder's caveat

- Right to hold the property of another as security for the performance of an obligation
- Banker's lien is the banker's right to enforce his claim upon the land until the debt is repaid.
- Lienholder's caveat: The B can enter LC which is a notice to third parties that the land is encumbered by that lien.

Lien on Fixed Deposit

- Monies kept under a fixed deposit account can be pledged as security for the repayment of a loan.
- Documentation: The Memorandum of Deposit-Ad valorem or Letter of Set-Off-nominal

Assignment of contract proceeds

- Transfer to an assignee of the right to receive a benefit from a debtor.
- Assignment of contract rights
- BBMB V Sykt Kejuruteraan Hong Huat Sdn Bhd & Ors (1988) 3 MLJ 328
 - OD facility RM2.8m- loan agreement. Security-Charge under the NLC and guarantee + deed of assignment of all the proceeds under the project undertaken known as Malacca Seafront Reclamation.
 - Upon default, the Pt claimed the loan sum.
 - The pt has right to take legal action against assignor for the loan recovery even without having to enforce the securities.

Debentures

- An instrument evidencing a debt by a company.
- As a security for credit facilities granted to companies.
- Debentures are secured by a fixed and a floating charge over the assets of the company.
- Document: Debenture agreement

Guarantees

- Guarantor to guarantee the repayment
- Additional personal obligations on the part of the principal debtor.
- Joint and several guarantee: the B has the luxury of either suing all of them jointly or choosing from any of the guarantors. Eg directors.
- Documentation: Guarantees and Indemnities
- Stamp duty: RM10

Life Assurance Policy

- By way of an assignment of the policy.
- The proceeds under the policy will be paid directly to the B by the insurer upon the death of the assured provided the death occurred during the tenure of the loan.
- Documentation: An endorsement on the policy and deed of assignment

Pledge

- Transfer of possession of a chattel eg stocks and shares.
- a form of possessor security
- power of sale in the event of a default on the secured obligations

Goods

- Goods can be a security for loan and credit facilities.
- A security over goods by way of a pledge
- A pledge requires delivery of possession of the goods to the bank.
- A security over goods by way of the Bill of Sale Ordinance 1950-possession of the goods remains with the borrower.