

SESSION 5
PERSONAL PROPERTY SECURITIES REGISTRATION FRAMEWORK :
EMERGENCE OF INTERNATIONAL STANDARDS FOR ACCESS TO
FINANCING AND ECONOMIC GROWTH

Wong Tat Chung
Partner
Wong Beh & Toh

INTRODUCTION - MALAYSIA



Malaysia

- Ranked no. 20 in the world for ease of getting credit in the World Bank's Doing Business Report 2018.

INTRODUCTION - MALAYSIA



Legal framework

“An integrated or unified legal framework for secured transactions that extends to the creation, publicity and enforcement of functional equivalents to security interests in movable assets does not exist in the economy.”

(Source: The World Bank’s Doing Business Report 2018.
Economy Profile: Malaysia)

INTRODUCTION - MALAYSIA



Collateral registry

“A collateral registry is not in operation for both incorporated and non-incorporated entities, that is unified geographically and by asset type, with an electronic database indexed by debtor's name.”

(Source: The World Bank's Doing Business Report 2018. Economy Profile: Malaysia)

INTRODUCTION - MALAYSIA



- Companies are required to lodge particulars of certain charges with the Registrar under s352 of the Companies Act 2016 (“CA 2016”).

INTRODUCTION - MALAYSIA



- The charges are listed in s353 CA 2016 and are basically charges to secure debentures, charges on uncalled share capital, shares of a subsidiary of a company owned by the company, land, book debts, calls made but not paid, ships or aircrafts or any share in them, goodwill, patents, trademarks, copyright, licences under them, credit balances, floating charges and charges or assignments which with an individual would have required filing or registration under the Bills of Sale Act 1950.

INTRODUCTION - MALAYSIA



- In addition, security over assets of a company may require registration with other registries, e.g. land offices and land registries, intellectual property registries, road transport registries.
- Some forms of security may not require registration.

INTRODUCTION - MALAYSIA



- With individuals and unincorporated bodies, e.g. partnerships and sole proprietorships, it is difficult to obtain security over movable assets. Security over movable assets is subject to the Bills of Sale Act 1950. It provides for a cumbersome and archaic way of obtaining security. Security may only be provided to secure fixed loans and must track a fixed statutory form. It must also be filed and registered with the Registrar and renewed every year. This discourages the use of movable assets as collateral for individuals and unincorporated bodies.

COMPARISON WITH OTHER JURISDICTIONS - NZ



Legal framework

- The Personal Property Securities Act 1999 (“PPSA”) came into effect on 1 May 2002.
- The Act governs the priority of security interests in personal property. Priority is determined generally by the ‘first-to-register’ rule - s66.

COMPARISON WITH OTHER JURISDICTIONS - NZ



Registration

- The Personal Property Securities Register (“PPSR”) is an electronic internet register.
- The secured party will register details of the security interest (known as a “financing statement”).
- Registration of financing statements is voluntary.
- Registration of the financing statement perfects the creditors’ security interest.

COMPARISON WITH OTHER JURISDICTIONS - AUS



Legal framework

- The Personal Property Securities Act 2009 (“PPSA”) came into effect on 30 January 2012.
- The Personal Property Securities Regulations 2010 supplements the PPSA.
- PPSA sets out the creation, enforcement and legal effect of security interests in personal property.

COMPARISON WITH OTHER JURISDICTIONS - AUS



Registration

- The Personal Property Securities Register (“PPSR”) is an electronic internet register.
- To perfect the security interest, the secured party needs to register the financing statement in accordance with the procedures set out in the PPSA.

COMPARISON WITH OTHER JURISDICTIONS - SG



Legal Framework

- Bills of Sale Act (Chapter 24), enacted on 1st November 1886.
- A statutory form of bill of sale was prescribed under the Act to protect debtors.
- Registration requirement is under s4 of the Bills of Sale Act – Bill of sale to be duly attested and registered under the Act within 3 clear days after the execution.

COMPARISON WITH OTHER JURISDICTIONS - SG



Criticisms of Act

- Prescription of a statutory bill of sale is an impediment in facilitation and development of secured credit.
- Whether transaction falls within Bills of Sale Act more a matter of form than substance.
- Act unable to accommodate more modern security transfers.

(Source: Report of the Law Reform Committee on Reform of the Bills of Sale Act)

COMPARISON WITH OTHER JURISDICTIONS - SG



Proposals

- Replacement of the Bills of Sale Act with a comprehensive personal property security law.
- The law should define what is a 'security interest' - have a list of interests which are/are not security interests.
- To lay down uniform requirements for creation of a security interest.

(Source: Report of the Law Reform Committee on Reform of the Bills of Sale Act)

COMPARISON WITH OTHER JURISDICTIONS - SG



Proposals

- Purchase money security interests to be given super-priority.
- Security interests in consumer goods which are less than a specified value should be excluded.
- Have a computerised Register of Personal Property Security - financing statements to be filed on real time basis.

(Source: Report of the Law Reform Committee on Reform of the Bills of Sale Act)

COMPARISON WITH OTHER JURISDICTIONS - UK



Legal Framework

- Bills of Sale Act 1878 and Bills of Sale Amendment Act 1882.
- The Acts are meant to regulate the use of bills of sale.
- Bills of sale used as security for loans are “security bills”.
- Security bills are often used in the form of “logbook loans”.

COMPARISON WITH OTHER JURISDICTIONS - UK



Problems of the Bills of Sale Acts

- (1) they are unduly complex;
- (2) they require highly technical documentation;
- (3) the registration regime is in need of modernisation;
- (4) they offer little protection to borrowers; and
- (5) they offer no protection to purchasers.

(Source: Law Commission Report, LAW COM No 369)

COMPARISON WITH OTHER JURISDICTIONS - UK



Proposals made by the Law Commission

- Bills of Sale Acts to be repealed and replaced with a new Goods Mortgages Act.
- Simplifying document requirements.
- Modernising the registration regime.
- Protection for borrowers and private purchasers.
- Abolishment of registration requirement for absolute bills of sale.
- Deregulation of the use of absolute bills.

(Source: Law Commission Report, LAW COM No 369)

INTRODUCTION - MALAYSIA



- The most common collateral provided by individuals would be land. A charge over land would commonly require registration with the land office or land registry. However, it is possible that security over certain rights over land may not require registration, e.g. an assignment in respect of rights to a property which does not have a separate title.

INTRODUCTION - MALAYSIA



- A secured transaction law would provide a registration system for all forms of security given. It would enable persons dealing with the security provider to know whether another person could have priority over the asset secured. It would help protect creditors who have obtained security.
- It could allow for security to be provided in circumstances not currently allowed, e.g. security created by individuals over movables without being subject to the highly restrictive requirements of the Bills of Sale Act 1950. This could enhance the availability of credit.

FLOATING CHARGES



How is the floating charge affected?

- The floating charge is the creation of lawyers in Victorian England which allowed for flexibility in security over assets. **In re Panama, New Zealand, and Australian Royal Mail Co** (1870) 5 Ch App 318 is the first case under English law to recognise a floating charge.

FLOATING CHARGES



- In essence, assets could be dealt with in the ordinary course of business without the charge attaching to assets acquired by a third party. In certain circumstances, the charge could crystallise into a fixed charge which would then more fully protect the interest of the creditor. The concept allowed entities to secure their assets but not be subject to the strictures of a fixed charge which could affect their day to day business.

FLOATING CHARGES



- A floating charge could be approached in secured transaction law in a number of ways.
 - It could just be a matter of the law requiring or allowing for registration of a floating charge (regardless of whether it is an incorporated entity or an unincorporated entity or individual).
 - It could also be that the position on the priorities of a floating charge is changed, e.g. to the point of registration.

FLOATING CHARGES



- The new legislation might not deal with floating charges at all.
- Various jurisdictions have approached or are approaching the point of floating charges differently. Malaysian lawyers are likely to take a pragmatic approach to the matter having regard to the way the legislation is framed.

FLOATING CHARGES – OTHER JURISDICTIONS



UK:

- Incorporated businesses can use fixed and floating charges registered at Companies House but unincorporated businesses must use the Bills of Sale Acts.
- Unincorporated businesses cannot grant floating charges.

FLOATING CHARGES – OTHER JURISDICTIONS



UK:

- The introduction of floating charges for unincorporated businesses requires a separate project and was not recommended by the Law Commission in its Consultation Paper.
(Source: Law Commission Consultation Paper on Bills of Sale No 225)

FLOATING CHARGES – OTHER JURISDICTIONS



Singapore:

“The priority of the floating charge will no longer depend on the date of crystallization but on the date of filing of a financing statement”

(Source: Report of the Law Reform Committee on Reform of the Bills of Sale Act)

FLOATING CHARGES – OTHER JURISDICTIONS



Australia:

- Personal Property Securities Act 2009 (“PPSA”) has done away with the distinction between fixed and floating charges.
- PPSA has created the concept of a “circulating asset”.
- Corporations Act has been amended to use that term in a new definition, a “circulating security interest”.

(Source: Review of the Personal Property Securities Act 2009 – Final Report)

FLOATING CHARGES – OTHER JURISDICTIONS



- s51C Corporations Act 2001 - Meaning of circulating security interest:
 - a security interest that is:
 - (a) a PPSA security interest, if:
 - (i) the security interest has attached to a circulating asset within the meaning of the Personal Property Securities Act 2009; and

FLOATING CHARGES – OTHER JURISDICTIONS



(ii) the grantor (within the meaning of that Act) has title to the asset; or

(b) a floating charge.

Note:

Security interests are either PPSA security interests, or charges, liens or pledges (see section 51A).

FLOATING CHARGES – OTHER JURISDICTIONS



- PPSA s340 - Meaning of circulating asset:

General definition

- (1) For the purposes of this Act, if a grantor grants a security interest in personal property to a secured party, the personal property is a circulating asset if:
 - (a) the personal property is covered by subsection (5) (unless subsection (2) or (3) applies); or

FLOATING CHARGES – OTHER JURISDICTIONS



(b) in any other case—the secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of the grantor’s business, free of the security interest.

Note: Subsection (4):

personal property is not a circulating asset merely because the secured party has given express authority to transfer specific personal property, or a specific class of personal property, free of a security interest.

FLOATING CHARGES – OTHER JURISDICTIONS



Note: Subsection (4A):

if a grantor grants a security interest provided for by a transfer of an account or chattel paper, the account or chattel paper is not a circulating asset in relation to the security interest.

FLOATING CHARGES – OTHER JURISDICTIONS



Under subsection (2) and (3), personal property covered by subsection (5) is not a circulating asset if:

- an effective registration with respect to the property, in relation to the grantor, discloses, in accordance with the regulations, that the secured party has control of the personal property;
- the secured party has control of the personal property;
- the personal property is goods; and
- the security interest is perfected by possession.

FLOATING CHARGES – OTHER JURISDICTIONS



Subsection (5) covers the following personal property:

- an account that arises from granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind (whether or not the account debtor is the person to whom the right is granted or the services are provided); (*note: an example is an account that is a credit card receivable.)
- an account that is the proceeds of inventory;
- an ADI account (other than a term deposit);

FLOATING CHARGES – OTHER JURISDICTIONS



Subsection (5) covers the following personal property:

- currency;
- inventory;
- a negotiable instrument.

POTENTIAL ISSUES



Potential implementation issues? What will be the practice issues that may arise and how do you think such issues could be resolved?

POTENTIAL ISSUES



- Would it change creditors' attitudes to collateral? Also, collateral over things like intellectual property?
- How would the new law interact with existing registration requirements e.g. under s352 CA 2016 and under other registration regimes? Also, would the registration requirements in s352 CA 2016 be merged into the new law or would there be some cross-linkage between the two, among others?

POTENTIAL ISSUES



Further examples of the new law interacting with existing legislation in other jurisdictions:

- Cross-linkage in Singapore. In Singapore, it was thought to be too costly.
- The proposed Personal Property Security Register would be organised according to each property listed.

POTENTIAL ISSUES



- The computerised Register of Charges is organised around registration numbers and names of entities with charges registered against their assets. The description of the property subject to the charge is not included. (Source: Review of the Bills of Sale Act, submission by the Registry of Companies and Businesses to the Law Reform Committee)
- However, are the circumstances in Malaysia different?

POTENTIAL ISSUES



- In Australia, the PPSA has removed the distinction between fixed and floating charges and replaced it with the concept of a circulating asset. The Corporations Act has consequently been amended to utilise the concept of a circulating asset in its new definition of a circulating security interest.

(Source: Review of the Personal Property Securities Act 2009 Final Report)

POTENTIAL ISSUES



- Concerns over privacy? Who can access the information? Parties might not wish private arrangements to be disclosable, e.g. a private loan from a friend. On the other hand, information may be necessary to protect creditors.
 - E.g. in Australia, a preliminary view expressed that:
 - § a registration does not need to indicate whether the collateral is consumer property or commercial property;

POTENTIAL ISSUES



§ all registrations against individuals have a maximum term of 7 years; and

§ a registration against serial-numbered property may not identify the grantor, if the grantor is an individual.

(Source: Review of the Personal Property Securities Act 2009 Consultation Paper 4: The Register)

- Would it really enhance enforcement and determination of priorities over security? More clarity through the new law.

POTENTIAL ISSUES



- Would registration be compulsory? Also, if registration is compulsory, would people realise that this is needed. Even if not compulsory, would people realise that there is a need e.g. to perfect the security. Unlike registration of charges under s352 CA 2016 where charges are commonly created in the context of financing arrangements involving financial institutions where lawyers are involved, the scope of a new secured transaction law could be all encompassing and include, day to day commercial transactions where lawyers are not commonly involved.

POTENTIAL ISSUES



- Also, secured transaction law may cover areas like retention of title and conditional agreements which currently may not be subject to registration requirements.

POTENTIAL ISSUES



- Would this be too costly?
 - E.g.: in Singapore, the proposed cross-linkage between the Companies Register and the Proposed Personal Property Security Register may not be feasible in terms of cost.
(Source: Review of the Bills of Sale Act, submission by the Registry of Companies and Businesses to the Law Reform Committee)

POTENTIAL ISSUES



- The need for education. People need to understand as the new law could be all encompassing.
- The need for real time information and a reliable infrastructure.
- Others.



THANK YOU