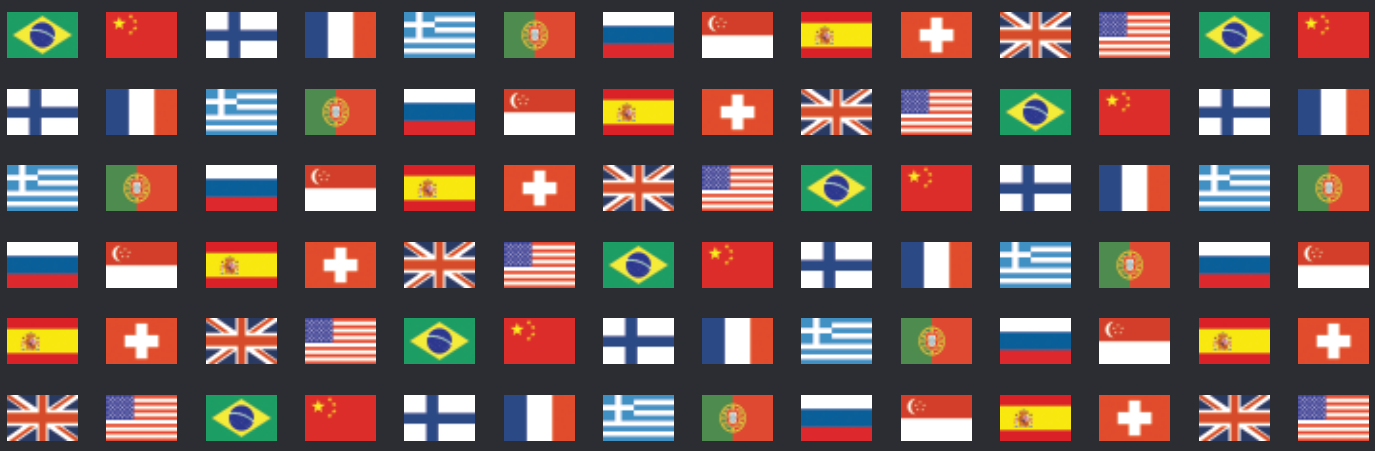
High-Yield Debt 2020

Contributing editors
Arthur D Robinson, Mark Brod and David Azarkh



LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *High-Yield Debt*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Singapore.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur D Robinson, Mark Brod and David Azarkh, of Simpson Thatcher & Barlett LLP, for their continued assistance with this volume.

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For further information please contact editorial@gettingthedealthrough.com

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Singapore

Naomi Ishikawa, Giles Kennedy and James McFarlane
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MARKET OVERVIEW

High-yield debt securities versus bank loans

1 | Discuss the major differences between high-yield debt securities and bank loans in your jurisdiction. What are some of the critical advantages and disadvantages?

As Singapore does not have an active high-yield bond market in its own right, this chapter focuses on the significance of Singapore as a hub for the South and South East Asian high-yield bond market.

In South and South East Asia, high-yield debt securities are generally governed by New York law and issued under New York law-governed indentures. The debt securities contain negotiated high-yield covenants that are tailored to issuers from these jurisdictions but are largely consistent with US high-yield practice. High-yield debt securities are most commonly issued in US dollars.

Offerings of high-yield debt securities must comply with the securities laws in the countries in which the securities are being offered, including anti-fraud statutes. As such, a detailed offering memorandum is typically prepared in connection with high-yield debt securities offerings. Offerings are generally unregistered and made to sophisticated investors. Offerings made into the United States are most often made in reliance on the exemption from registration under Rule 144A.

On the other hand, bank loans are typically governed by English law or local law and follow the format recommended by the Asia Pacific Loan Market Association. Bank loans are often structured with restrictive covenants, including maintenance covenants, that require frequent lender interaction and consent. Bank loans are denominated in local currency or US dollars.

Similar to other jurisdictions, the covenants in high-yield debt securities are designed to permit a company to operate in accordance with its business plans without seeking consent and waivers from investors.

Regulation

2 | Are you seeing increased regulation regarding either high-yield debt securities or bank loans in your jurisdiction?

While these types of indebtedness are not a target of specific regulation, in the United States, and based on our experience working with qualified local counsel, in these South and South-East Asian jurisdictions, global regulatory developments and trends impacting the offering of securities have a direct effect on high-yield debt security offerings in these jurisdictions. Our discussion is not focused on local bank regulatory issues but on the nature and covenants of the instruments themselves and the laws regarding the offering of securities based on the laws of the United States, and our experience working with qualified local counsel in these jurisdictions. This includes evolving US disclosure standards (as the forms applicable to registered offerings in the United States are generally used as disclosure guides in high-yield offerings), some of which are liberalising, and the implementation of regimes similar to packaged retail investment and insurance-based products, such as section 309(B) of the Singapore Securities and Futures Act. Capital controls constrain all forms of offshore borrowings in some jurisdictions, such as India. However, those have been gradually loosening over time and, interestingly, we have seen a number of jurisdictions enable offshore borrowing in local currencies (through the use of masala bonds in India and Komodo bonds in Indonesia – these are largely constrained to investment grade issuers but we have seen some interest in the high-yield space). These types of offshore, local currency-denominated securities enable issuers to shift foreign exchange fluctuation risk to investors while still complying with domestic regulations that prohibit the transfer of local currency offshore. This is accomplished through a mechanism that provides for the delivery of dollars on each interest payment date and at maturity, the amount of which is calculated using an agreed reference rate at the time the payment is made.

Current market activity

3 | Describe the current market activity and trends in your jurisdiction relating to high-yield debt securities financings.

The most active market in South East Asia for high-yield debt issuances is Indonesia. In terms of industry, the most frequent high-yield issuers from Indonesia tend to be in the area of natural resources (where Indonesia has a well-developed mining and oil and gas sector), property development (supporting the urbanisation and development of Indonesia's growing population) and infrastructure (including telecoms).

The first high-yield debt securities issued by Indonesian issuers took place in the 1990s before the first Asian financial crisis of 1997. Subsequent to these issuances and with the severe devaluation of the Indonesian currency against the US dollar during the Asian financial crisis, there were a number of high-profile defaults and court cases between issuers, investors and the other participants in the debt issuances, including the underwriters and the trustees. In certain of these cases, claims were made that these transactions were illegal under Indonesian law. Following the crisis, the uncertainty of the legal system in Indonesia had a chilling effect on new issuances. In addition to including detailed disclosure about the uncertainty of the Indonesian legal system in all disclosure documents for high-yield debt issuances from Indonesia, market participants worked to construct structures and covenants that would assure investors that similar claims would not be brought successfully by future issuers. These additional protections include the execution of additional documentation, such as an Indonesian law guarantee to supplement the New York law guarantees given under the indenture and a deed of acknowledgement under Indonesian law whereby the issuer confirms to the underwriters that it has been advised and is aware of the obligations it is undertaking under the high-yield debt securities and the indenture. These are intended to support any enforcement action brought against an issuer in Indonesia through the

Indonesian courts and to counter challenges in the Indonesian courts by the issuer that it should not be bound by its obligations under the indenture. This is particularly important in Indonesia as Indonesian courts do not recognise decisions by New York courts. As the market has evolved, investors gained familiarity with the unique legal considerations as well as the industries and businesses of frequent issuers. While the 'belt and braces' of incorporating these Indonesian legal documents into the transaction documentation is helpful, there are still examples of issuers using novel arguments in negotiations with investors, especially in distressed situations.

In terms of the types of investors that participate in high-yield offerings, as with offerings in the United States and Europe, there is generally a focus on marketing to institutional investors, though Asian regional institutional investors play a significant role in the book-building process. Depending on the issuer, private banking clients may also comprise a meaningful portion of the investor base in certain offerings.

Main participants

4 | Identify the main participants in a high-yield debt financing in your jurisdiction and outline their roles and fees.

Most high-yield debt securities are issued under New York law-governed indentures. As such, in addition to the issuer (and any guarantors from the issuer group), the main participants in an offering include the underwriters, ratings agencies, trustee and paying agent, US counsels for the issuer, the underwriters and the trustee and local counsel for the issuer and the underwriters. These roles are similar to those in a typical securities offering. The underwriters manage the marketing and sales of the securities on behalf of the issuer, assist the issuer with the ratings process, negotiate the terms of the securities and the collateral package, participate in the preparation of the disclosure document and legal agreements, conduct due diligence, settle the securities at closing and are typically paid a fee based on a percentage of the principal amount of the securities. The trustee and paying agent that administers the securities issued under the indenture is paid a fixed fee. The local counsel's role is to advise on local law requirements and prepare disclosure on them, negotiate and document any agreements and the collateral governed by the laws of the local jurisdiction and provide legal opinions. The US counsels' role is to prepare the disclosure document, negotiate and document the legal agreements governed by New York law (or English law, where applicable) and provide legal opinions.

New trends

5 | Please describe any new trends as they relate to the covenant package, structure, regulatory review or other aspects of high-yield debt securities.

In terms of general trends, the South and South East Asian high-yield markets have generally been followers as opposed to leaders, meaning that new covenant concepts are usually only introduced after they have gained traction in markets such as the United States or Europe. However, one area of covenant flexibility in the market has been related to structuring around regulatory requirements and restrictions. This includes, for example, the high-yield covenant packages for the airport concessionaires in India, where the concession arrangements with the government require that the issuers undertake all capital expenditure necessary to meet certain capacity and service standards at the airports. In these circumstances, the covenants provide for uncapped borrowing baskets (subject to certain other limitations). Similarly, as more jurisdictions in South and South East Asia implement real estate investment trust (REIT) regulations, high-yield REIT issuers have been able to negotiate covenant packages that provide the issuers with the flexibility that they need to meet these regulations and to take advantage of structural benefits.

DOCUMENTATION TERMS

Issuance

6 | How are high-yield debt securities issued in your jurisdiction? Are there particular precedents or models that companies and investors tend to review prior to issuing the securities?

High-yield debt securities are issued from New York law-governed indentures. For jurisdictions or industries in South East Asia, where high-yield debt securities are a relatively new product, covenants are initially drafted by referring to the more liquid markets in the United States and Europe and the covenants then evolve and are replicated across similar issuers (in terms of industry, jurisdiction and ratings). Underwriters, ratings agencies and, ultimately, investors typically look to close precedents in evaluating the strength and desirability of the covenant and security packages of new issuances.

Maturity and call structure

7 | What is the typical maturity and call structure of a high-yield debt security? Are high-yield securities frequently issued with original issue discount? Describe any yield protection provisions typically included in the high-yield debt securities documentation.

Typical tenors for high-yield securities throughout the region vary, though for debut issuers a five-year tenor (with a non-call period) is the most common. Seven- and ten-year tenors are also seen, more often from repeat and higher rated high-yield issuers. It is standard to have a non-call period that varies with the tenor, such as a five-year non-call three or a seven-year non-call four or five. The call pricing is typically a half coupon of premium in the first call year, stepping down by half for each year closer to maturity. Prior to the non-call period, issuers can redeem on a make-whole basis, at a price equal to the present value of the first call date payment plus all interest payable between the redemption date and the first call date, plus accrued and unpaid interest. A standard high-yield debt security in South and South East Asia will also have an equity claw, typically priced at par plus one coupon and limited to 35 per cent of the total amount outstanding.

It is uncommon to see initial issuances done with original issue discount in excess of the de minimis levels permitted by the US Internal Revenue Service, even for Regulation S only issuances. For further issuances (ie, 'tap' issuances), original issue discount in excess of de minimis levels is occasionally seen for Regulation S only issuances. Most 144A covenant packages will prohibit further issuances unless the additional notes are fungible with the existing notes from a tax perspective (ie, no original issue discount in excess of de minimis levels); otherwise the additional notes would require a separate securities identifier, which would often render the additional notes unattractive to investors from a liquidity perspective.

Yield protection provisions, such as coupon step-ups, are not common in these jurisdictions.

Offerings

8 | How are high-yield debt securities offerings launched, priced and closed? How are coupons determined? Do you typically see fixed or floating rates?

Almost all high-yield debt securities are priced with fixed interest rates, on an overall yield basis as opposed to a spread over a benchmark. In terms of launching, pricing and closing, these generally follow the practices used in markets such as the United States and Europe. Rule 144A offerings typically price during the morning in the United States, following the book-building that commenced in the morning in Asia. This

means that the deal teams in Asia are often working through the night to finalise related documentation, though the market standard is for all of the pricing documentation to be dated with the date of pricing in the United States.

As with Western markets, offerings typically settle through the issuance of global notes that are held by a nominee of a depositary, including the Depository Trust Company (DTC) in the United States and Euroclear and Clearstream in Europe. Depending on whether offerings are closing through the DTC or through the clearing systems in Europe, the transfers of funds and the delivery of securities occurs in the afternoon or late evening in Asia. This means that issuers whose US-dollar bank accounts are in Asia will, at times, receive the issuance proceeds with a value date of the following day.

Covenants

9 Describe the main covenants restricting the operation of the debtor's business in a typical high-yield debt securities transaction. Have you been seeing a convergence of covenants between the high-yield and bank markets?

The covenant packages in the South and South East Asian markets are similar to those in other markets and are triggered by incurrence-based tests. The key covenants that may restrict an issuer's business, and are therefore subject to the most scrutiny and negotiation, are the restrictions on the incurrence on indebtedness (and the ratios and tests included in this covenant) and the restrictions on the ability to make certain restricted payments, such as the payment of dividends, prepayment of subordinated indebtedness, and investments in joint ventures and unrestricted subsidiaries. The asset sale covenant is also important to certain types of issuers.

In terms of a convergence between high-yield and bank market covenants, the packages generally tend to stay within their own parameters and, therefore, are still largely dissimilar. However, there is a limited trend with issuers whose primary source of debt capital is from the issuance of high-yield debt securities. In these circumstances, we have seen issuers successfully 'port over' their high-yield covenants to their bank financing agreements.

10 Are you seeing any tightening of covenants or are you seeing investor protections being eroded? Are terms of covenants often changed between the launch and pricing of an offering?

The market practice in South and South East Asia typically follows, with a certain amount of time lag, the US and European high-yield markets. While we are seeing covenants becoming more flexible over time, we would not view that necessarily as an erosion of protection but an evolution to a more thoughtful approach to negotiating and addressing the business requirements and the strategy of individual issuers, rather than a strict market-based approach. In this market we rarely see covenants being amended between launch and pricing. For debut issuers, the underwriters typically advise the issuer to agree to the more conservative approach on a covenant, rather than risk investor push back. We also often see additional flexibility offered to repeat issuers with reliable track records.

11 Are there particular covenants that are looser or tighter, based on a particular industry sector?

For the incurrence of indebtedness covenant, we do see some additional flexibility provided for regulated industries, especially those with predictable cash flows or utility-like returns. In the case of regulated projects or concessions with fixed development requirements, there may also be flexibility offered to fund capital expenditures to meet these requirements that may not require strict satisfaction of ratio tests but will otherwise provide checks on the incurrence of debt. For publicly listed companies, we often see some basket flexibility for the ability to pay nominal dividends to satisfy listing requirements or meet shareholder expectations.

Change of control

12 Do changes of control, asset sales or similar typically trigger any prepayment requirements?

Typically, high-yield covenants for South East Asian issuers require an issuer to make an offer to purchase the securities upon the occurrence of a change of control or an asset sale.

In the case of a change of control, the offer to purchase is priced at 101 per cent (plus accrued and unpaid interest) and a change of control is typically triggered if the controlling shareholder (or group of controlling shareholders) in place at the time of issuance of the securities ceases to be the largest shareholder or its shareholding otherwise falls below a certain level, which is usually set by reference to actual control for private companies and minimum control for public companies. Participation in a change of control offer is not mandatory and it is up to each security holder to determine whether it wishes to continue to hold the securities or to tender its security for purchase. Many South East Asian issuers are effectively controlled by family groups and in these cases the change of control covenant is linked to a group of 'permitted holders' that typically includes the members of the extended family. The concept has been successful because it provides shareholders of issuers the opportunity to divest, subject to the minimum threshold, and also allows movements of equity among the shareholders and their affiliates (including extended family members), all while providing continuity of ownership and management. A change of control may also be triggered by the sale of all or substantially all of the assets of the issuer.

Asset sales are generally permitted under indentures. However, the use of the proceeds from asset sales are typically limited in the covenants to reinvestment in the business of the issuer or repayment of the senior debt of the issuer. For secured issuances, the sale of assets subject to security may require a pro rata offer to noteholders. Regardless of whether the asset sold was subject to security, if the asset sale proceeds are not utilised within a certain period of time (usually one year) then the issuer is required to make an offer to purchase securities at par (plus accrued interest) on a pro rata basis with the proceeds of the asset sale.

13 Do you see the inclusion of 'double trigger' change of control provisions tied to a ratings downgrade?

In South and South East Asia, 'double trigger' change of control provisions, where the requirement to make a change of control offer requires both a change of control and a downgrade by at least one notch by one or more rating agencies, is not necessarily standard and can be a heavily negotiated part of the covenant package. This reflects the importance that underwriters and investors place on continued ownership by sponsors, especially with respect to family-run companies or companies that are part of a well-regarded group. Exceptions are seen with respect to financial sponsors and are sometimes included in follow-on offerings by issuers as the market becomes more familiar with the issuer's credit.

Crossover covenants

14 | Is there the concept of a 'crossover' covenant package in your jurisdiction for issuers who are on the verge of being investment grade? And if so, what are some of the key covenant differences?

As countries in South East Asia have witnessed sovereign ratings achieving investment grade ratings, highly rated private issuers are also seeing their credit ratings improving to investment grade or close to investment grade status. In these cases, issuers are able to negotiate for several possible outcomes.

Generally, the best outcome for issuers with crossover credit is to remove the more significant restrictive covenants, including the restricted payments test, from the time of the initial issuance. As an alternative, most underwriters are willing to include a fall away provision that permits the typical high-yield covenants to fall away once an issuer receives an investment grade rating from at least one rating agency. In these circumstances, more standard investment grade covenants, such as the limitation on liens and the reporting covenant, will remain in effect while the balance of the covenants is suspended.

An additional, but small sub-category of issuers, are those that are members of well-known corporate groups and that have a long track record of borrowing in the global credit markets. These issuers, while rated sub-investment grade, have been treated more like a cross-over credit from a covenant perspective and have, therefore, benefited from 'high-yield lite' covenant packages, with far less restrictive covenants relating to the borrowing and use of funds within and outside of the credit group.

REGULATION

Disclosure requirements

15 | Describe the disclosure requirements applicable to high-yield debt securities financings. Is there a particular regulatory body that reviews or approves such disclosure requirements?

High-yield debt securities offerings from South East Asia are made internationally pursuant to exemptions from registration under the securities laws of the various jurisdictions into which the securities are being offered and sold. When a transaction includes offers and sales into the United States, these offers and sales are limited to sophisticated investors under an exemption from registration from the US Securities Act, typically Rule 144A. For Rule 144A offerings and most Regulation S only offerings, the disclosure documents are prepared with reference to the US securities disclosure requirements for foreign private issuers as best practice. In these offerings, underwriters will require disclosure letters to be delivered by US counsel.

In certain offerings made outside of the US, there is a push by some issuers and underwriters to reduce the scope of due diligence and disclosure included in the offering document. Owing to competitive pressures faced by underwriters, this is often a negotiated outcome in certain transactions. As most high-yield offerings in South East Asia are not registered in any jurisdiction, there are no reviewing regulatory bodies that monitor and approve these choices in disclosure. Most of the preferred listing venues for offerings from the region also do not subject the disclosure to regulatory review.

Use of proceeds

16 | Are there any limitations on the use of proceeds from an issuance of high-yield securities by an issuer?

For underwritten offerings, the disclosure document will set out in reasonable detail the proposed use of the proceeds. Typically, a change in use of the proceeds will be a breach of the corresponding covenant in the terms of the indenture. In certain jurisdictions, such as India, there are regulatory restrictions as to how proceeds can be used. This includes restrictions on the use on funds onshore if raised in an offshore entity and restrictions on the types of expenditure that can be funded with proceeds that are raised onshore.

Restrictions on investment

17 | On what grounds, if any, could an investor be precluded from investing in high-yield securities?

Typically, high-yield debt offerings by South East Asian issuers are made without registration and by relying on exemptions from registration in the various jurisdictions into which the securities are offered and sold. This typically means that only those investors that meet the criteria in the relevant jurisdiction will be permitted to participate in the offering. These criteria usually have criteria encompassing both minimal financial status and sophistication in investing in risky financial instruments; for example, qualified institutional buyers in the United States and accredited investors in Singapore.

In addition, local counsel in the jurisdiction of the issuer should provide guidance on the ability to offer and sell unregistered securities in the home jurisdiction of the issuer. It is common to exclude local investors from high-yield offerings (regardless of the levels of sophistication), though there are jurisdictions, such as Indonesia, that permit very limited offerings to local investors.

Closing mechanics

18 | Are there any particular closing mechanics in your jurisdiction that an issuer of high-yield debt securities should be aware of?

Transactions typically close through well-known clearing systems, depending on the offering format – the Depository Trust Company (DTC) for Rule 144A transactions and Euroclear and Clearstream for Regulation S transactions. The Central Depository (Pte) Limited clearing system is also used in capital markets offerings by issuers in Singapore, but not typically in high-yield transactions. As the DTC, Euroclear and Clearstream are all located outside of South East Asia, the timing of closing must be arranged to work with these systems. High-yield offerings by South East Asian issuers are typically listed on the Singapore Stock Exchange (with fewer issuers electing to list on the Hong Kong Stock Exchange or European exchanges). Listing approval must be sought from the SG-ST before the closing of the relevant issue and notification is provided to the SGX-ST immediately after closing, with listing occurring immediately thereafter.

GUARANTEES AND SECURITY

Guarantees

19 | Outline how guarantees among companies in a group typically operate in a high-yield deal in your jurisdiction. Are there limitations on guarantees?

The guarantee package is typically structured to best enhance the credit ratings of the relevant issue and, therefore, can vary. The optimal structure is when the parent company is the issuer of the high-yield debt securities and all of its subsidiaries are deemed 'restricted subsidiaries' (and are therefore subject to compliance with the covenants of the high-yield debt securities). All such restricted subsidiaries provide direct guarantees of the high-yield debt securities. Where a finance subsidiary structure is utilised, either with one or two special purpose vehicles, then the parent company will typically provide a direct guarantee (a

parent guarantee) and the subsidiaries provide subsidiary guarantees. In certain transactions, not all subsidiaries are required to provide subsidiary guarantees, typically because not all such guarantees are required to support the credit or, more commonly, because of local law restrictions that prohibit the granting of guarantees, an example of which is in the Republic of Indonesia where a publicly listed subsidiary cannot guarantee the debt obligations of a listed parent company, or in India where a subsidiary (listed or not) is generally not permitted to guarantee the securities of its parent.

Collateral package

20 What is the typical collateral package for high-yield debt securities in your jurisdiction?

Potential issuers of high-yield debt securities in South East Asia are sometimes attracted to this type of indebtedness because many transactions are completed without security being required. This is in contrast to direct lending, where banks generally require loan facilities to be secured by a collateral package. Collateral packages, when provided, range from fully secured all asset type packages (more commonly seen in bank lending type transactions or in bank or bond transactions) to offerings secured by limited assets.

Certain issuers in South East Asia, especially debut issuers or issuers below a certain rating level, will include either an interest reserve account or a debt service accrual account as collateral in favour of the noteholders. These accounts are typically offshore (such as in Singapore or New York) and hold one coupon's worth of interest. In addition, when an offshore issuance structure is used, it is common to see the shares of the issuer and the related inter-company loans pledged in favour of the noteholders. In these circumstances and when the only collateral is the offshore interest reserve account, the high-yield debt securities are not marketed as secured instruments.

Limitations

21 Are there any limitations on security that can be granted to secure high-yield securities in your jurisdiction? Are there any limitations on types of assets that can be pledged as collateral? Are there any limitations on which entities can provide security?

The granting and enforcement of security is governed by the law of the jurisdiction where the collateral is located. As a general matter, most 'standard' types of security are available in these jurisdictions in varying forms, though there are certain applicable restrictions. For example, entities with government- or state-owned enterprise concessions (including, in most cases, long-term power purchase agreements) will generally need counterparty consent prior to providing credit support in the form of collateral or a guarantee. Where these entities are part of a larger group, they are generally excluded from the guarantor or collateral provider group (though they may still be a restricted subsidiary). Where these entities are the primary credit, there is a significant focus on these restrictions (though many such issuers have enabling provisions included in their concession documents).

Other issues that arise in connection with the provision of security relate to the nexus between local law regulations and restrictions and enforcement actions. For example, while obtaining security over real property can be a relatively straightforward exercise, most jurisdictions in South and South East Asia have restrictions on the foreign ownership of real property, which creates an additional level of complications when anticipating (and disclosing) potential enforcement actions. Foreign ownership restrictions also extend to the ownership of shares of entities involved in certain closed or restricted industries, which is implicated when subsidiary share pledges are part of a collateral package. Similarly, some jurisdictions require that property subject to security enforcement be auctioned as opposed to having title transfer to the creditors or their agent. This is less of an issue when the collateral is, for example, a vacant piece of land, but it is a more complex matter when the subject of the security is part of an integrated business or supply chain.

Collateral structure

22 Describe the typical collateral structure in your jurisdiction. For example, is it common to see crossing lien deals between high-yield debt securities and bank agreements?

Collateral packages vary across jurisdictions and transactions. Most commonly, the terms of the high-yield debt securities limit the extent of other liens that the issuer and the guarantors are subject to. Entering into liens in excess of the permitted liens is a default of the terms of the securities. Further, the terms of the high-yield debt securities include extensive events of default, one of which is any default of other indebtedness (usually with a de minimis threshold) and any enforcement of security granted to this other indebtedness. In circumstances where the high-yield debt securities share collateral with other indebtedness, intercreditor arrangements can be set out in an intercreditor agreement that provides for how the shared or crossed liens are to be administered.

Legal expenses

23 Who typically bears the costs of legal expenses related to security interests?

Issuers typically are expected to bear the costs of both the issuer and underwriter counsels, including in relation to the preparation, execution and perfection of any security interests. This includes any stamp duty and other taxes that may be incurred.

Security interests

24 How are security interests recorded? Is there a public register?

Owing to the different legal systems in South East Asia and the technological sophistication of each of these jurisdictions, the method of recording security interests varies considerably from jurisdiction to jurisdiction and varies within jurisdictions by asset type (eg, real property registers). Singapore has an online, publicly available recording system, which records liens attaching to the relevant company. Other jurisdictions require issuers granting securities to record in their own corporate record books the details of the collateral. These corporate record books are typically not publicly available and, therefore, the corporate records of these issuers need to be subject to a careful due diligence review to ensure any collateral issues are identified.

25 How are security interests typically enforced in the high-yield context?

Collateral created in connection with the issue of high-yield debt securities is typically created in the name of the trustee or security agent on behalf of the noteholders. Enforcement thereof is undertaken by the trustee or security agent, typically on the approval of 25 per cent or more of the noteholders. The enforcement of security is jurisdiction-specific and the mechanics, timing and process for the enforcement of security, and the risks attendant therein, are a significant part of the diligence and disclosure process in high-yield offerings in South and South East Asia.

DEBT SENIORITY AND INTERCREDITOR ARRANGEMENTS

Ranking of high-yield debt

26 How does high-yield debt rank in relation to other creditor interests?

Unless expressly subordinated, high-yield debt typically ranks as senior debt of the issuer, with the guarantees also ranking as senior debt obligations of the parties providing these guarantees. Where collateral is provided, the debt securities will be described as senior secured and will therefore rank accordingly. An interesting situation can occur where partial security (as opposed to all asset security) is provided.

Regulation of voting and control

27 Describe how intercreditor arrangements entered into by companies in your jurisdiction typically regulate voting and control between holders of high-yield debt securities and bank lenders?

There is a wide range of examples of intercreditor agreements and voting agreements that have been used in transactions in South East Asia. Most commonly, and particularly where high-yield debt securities are issued simultaneously as a bank loan is issued into and where both are secured by shared collateral, the high-yield debt securities will follow decisions made by the bank lenders. This reflects the need for decisions to be made quickly in certain situations to protect creditors and the practical and timing difficulties of marshalling noteholders to respond and take a view on enforcement matters. In certain circumstances, the intercreditor arrangements will provide an extended window for high-yield debt securities trustees to participate in certain decisions, though these windows are still relatively short and therefore are potentially of limited value.

In all-asset secured high-yield packages, it is common to permit certain types of additional indebtedness to share the security package (known as permitted pari passu secured indebtedness (PPPSI)). In circumstances where the high-yield debt securities are the only form of secured indebtedness upon issuance, it is prudent to agree and annex a form of intercreditor agreement to the high-yield debt securities indenture to ensure that the trustee is willing to sign it at the time that the new PPPSI is incurred.

Regardless of the decision-making structure, noteholders will typically benefit from the proceeds from enforcement on a pro rata basis with all other secured creditors.

TAX CONSIDERATIONS

Offsetting of interest payments

28 May issuers set off interest payments on their securities against their tax liability? Are there any special considerations for the high-yield market?

The ability of issuers to set off interest payments on their securities against their tax liabilities varies by jurisdiction. In many jurisdictions in South and South East Asia, separate tax advisers are engaged to assist the issuers with tax compliance and tax structuring for the offering itself.

Issuers in certain South East Asian jurisdictions have looked to manage their interest payment withholding tax costs through the use of offshore offering structures, whereby a special purpose finance vehicle acts as the issuer and on-lends the proceeds of the securities offering to the parent company or subsidiaries. These structures are regularly evolving and are well established in the market. There are no special considerations for the high-yield market; although, the subsidiaries' shares and the intercompany funds flow documents in these structures are sometimes subject to security interests in favour of high-yield debt security investors.

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Tax rulings

29 Is it common for issuers to obtain a tax ruling from the competent authority in your jurisdiction in connection with the issuance of high-yield bonds?

It is not common for issuers to seek tax rulings from the relevant competent authority either prior to or post the issuance of high-yield debt securities. However, issuers commonly seek tax opinions on the applicability or availability of tax relief or tax treaties prior to or in connection with the issuance of high-yield debt securities. This is particularly the case where an offshore financing vehicle is being utilised.

UPDATE AND TRENDS

Recent developments

30 Are there any emerging trends or hot topics regarding high-yield debt in your jurisdiction?

Decisions in local courts relating to the treatment of offshore creditors have always been a point of focus in South and South East Asia, most notably in Indonesia. Recently in the context of an Indonesia restructuring where partial security, in the form of a secured offshore interest reserve account was provided as collateral, the Indonesian courts decided that this security was enough to determine that the debt securities be classed as senior secured for the purposes of the restructuring and, therefore, the creditor voting classes. This is despite the fact that most of the other creditors in this class are what would be more traditionally seen as secured creditors, holding security interests over significant portions of the operating assets of the borrower.

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