



Legal Insights

Practical Considerations on the Transfer of a Loan Portfolio and Security Interests where a BVI or a Cayman Islands entity is involved

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In the context of a reported increasing number of bond defaults by property developers in the People's Republic of China¹ and also the reported growing prevalence of non-performing debt due to rising interest rates across Asia², lenders have progressively been managing their risks by restructuring or divesting their bad debts. The ongoing economic fallout from the COVID-19 pandemic and related restrictive measures have contributed to this trend.

In this article, we consider the British Virgin Islands (“**BVI**”) and the Cayman Islands law aspects of a transfer by a financial institution of an existing loan portfolio and the relevant security package. We anticipate that this is a point of interest to many lenders across the Asian market in the current distressed environment and we expect that the volume of refinancing and restructuring activity with respect to non-performing loans that are supported by an offshore security package will continue to grow.

Transferability of the loan portfolio

The starting point to assessing the transferability of a loan portfolio is to review the loan agreement to identify any restrictions on the ability of a lender to effectuate a transfer of the relevant loan(s). For example, the borrower's prior written consent may be required to the transfer of the loan(s) and the loan agreement may prescribe the circumstances under which the borrower may refuse to provide that consent. Furthermore, there may be restrictions on the transferability of certain

¹ <https://www.scmp.com/business/china-business/article/3185718/china-bond-defaults-hit-us20-billion-2022-more-double-last>

² <https://www.ft.com/content/ccbe2b80-0c3e-4d58-a182-8728b443df9a>
<https://www.flow-tech.ai/non-performing-loans-npl-outlook-for-asian-economies-in-q3q4-2021/>

types of loan portfolios, such as those including mortgages or consumer loans, and the transferor may also be subject to onerous internal confidentiality rules and data protection requirements. Although these are principally points of onshore law to be determined under the governing law of the loan agreement, to the extent that the borrower is incorporated in the BVI or the Cayman Islands and is a party to the transfer agreement(s), it is customary for offshore legal counsel to the lender to issue a legal opinion to confirm (among other things) that the relevant company has the requisite capacity and power to enter into the transfer agreement(s).

Offshore security package

Most cross-border loans in Asia are supported by an offshore security package. A potential purchaser of a loan portfolio should therefore keep the following points in mind.

- Careful consideration must be given to the method by which the outgoing secured party's security interests are transferred to the purchaser or its nominee. For example, there is generally no way to assign legal title to a chose in action or other property right under BVI law. Therefore, if a party wishes to transfer legal title to a right in action under BVI law, this can normally only be accomplished by way of novation. However, it is possible for choses in action to be assigned in the BVI in equity, and this is the normal mechanism by which this is done.
- Until the security provider is notified of the assignment, it may discharge any of its obligations for the benefit of (or making payment to, as the case may be) the original assignor. However, the assignment itself is valid between the assignor and the assignee, and the assignor may need to account to the assignee under the terms of the assignment. There is no requirement that notice to the security provider must be given in writing or that the security provider acknowledge receipt of the notice, although this is customarily done for evidential reasons.
- If the security provider is a BVI company and has registered details of the security in its register of registered charges maintained by the BVI Registrar of Corporate Affairs (the "**Registrar**"), it must register a variation of charge with the Registrar to comply with BVI law. The Registrar will issue a certification of variation of charge and stamp the particulars of the variation of security as evidence that the variation has been duly registered.
- If the security provider is a BVI or a Cayman Islands company, its register of charges or register of mortgages and charges (as applicable) must be updated to reflect the name and the address of the new secured party. Failure to do so will not invalidate the underlying security interests but may result in the imposition of a financial penalty.

In practice, a well-drafted assignment agreement will impose an express obligation on the relevant parties to complete all of the local law filings and register updates within a mutually acceptable timeframe. Offshore legal counsel should be retained to ensure that all such filings are correctly completed and that the transfer mechanics comply with BVI or Cayman Islands law (as applicable).

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SERVING CLIENTS GLOBALLY

Peter Vas
Partner
Loeb Smith Attorneys
Hong Kong
T: +852 5225 4920
E: peter.vas@loebsmith.com
www.loebsmith.com



Peter is recognized as a leading offshore lawyer in the Asia Business Law Journal A-List 2022 and Asian Legal Business Offshore Client Choice List 2022

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Loeb Smith is an offshore corporate law firm, with offices in the British Virgin Islands, the Cayman Islands, and Hong Kong, whose Attorneys have an outstanding record of advising on the Cayman Islands' law aspects and BVI law aspects of international corporate, investment, and finance transactions. Our team delivers high quality Partner-led professional legal services at competitive rates and has an excellent track record of advising investment fund managers, in-house counsels, financial institutions, onshore counsels, banks, companies, and private clients to find successful outcomes and solutions to their day-to-day issues and complex, strategic matters

