

# South Korea

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## SECTION 1 – Collateral/security

### 1.1 What types of collateral/security are available?

Under Korean law, security and collateral can only be established and effected in a manner provided by the law. Real property, plant and machinery, movable property, shares, deposit claims, contractual rights, receivables, and insurance claims can be used as collateral.

Types of security interest that can be created are: (a) mortgage; (b) pledge; and (c) *yangdo dambo* (a security assignment), depending on the type of the asset. *Yangdo dambo* is a security right created by transferring the legal title of the collateral to the creditor. It is a non-statutory right which has been developed through customary practice and is now recognised by Korean courts as a valid form of security.

There is also a newly-legislated security regime under the Act on Security Over Movables and Receivables (Movables Security Act) which came into force in June 2012. The Movables Security Act provides for an alternative means of creating security interests in movable properties and receivables (other than intellectual property).

## SECTION 2 – Perfection and priority

### 2.1 How is a security interest in each type of collateral perfected and how is its priority established?

To create and perfect a mortgage, the mortgagor and the mortgagee must execute a mortgage agreement and register the mortgage with the relevant registry.

To create and perfect a pledge, the pledgor and the pledgee must enter into a pledge agreement. For a pledge over machinery, movable properties, or shares, the pledgee must also have actual (or deemed) possession of the collateral. In the case of shares, the name of the pledgee can be recorded in the shareholders' registry to reinforce the level of security interest in addition to taking possession of such shares. For a pledge over the rights against a third party (including insurance claims, deposit claims, contractual rights, or receivables) a notice of pledge is given to, or the consent to pledge is obtained from, the obligor and such notice or consent must be affixed with a fixed-date stamp. There is no registration requirement for the creation or the perfection of a pledge.

To create and perfect a *yangdo dambo*, the transferor and the transferee must enter into a *yangdo dambo* agreement and the legal title to the relevant collateral must be transferred from the transferor to the transferee.

Security interests under Movables Security Act can be created and perfected over movables and receivables (present and future) by registering a security interest with the relevant registry.

The priority of competing security interests is determined by the order of perfection. For mortgages, the date of registration will be the date of perfection and for a pledge over the rights against a third party, the date on which a notice or consent with fixed date stamp is given or obtained is the date of perfection. The Movables Security Act does not affect security interests created by other methods such as a pledge or *yangdo dambo*. Priority of security interests created under the Movables Security Act and the existing security methods will be determined in the chronological order of their perfection.

### 2.2 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

A creditor can search the relevant registry for any mortgage or security under the Movables Security Act or ask a third party whether there is a notice for any pledge over the rights against a third party.

### 2.3 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

Fees and taxes associated with the registration depend on the type of asset being provided as security. For instance, a major cost for establishing a mortgage over a real property is the registration tax, which is 0.2% of the maximum secured amount.

### 2.4 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

No. However, the generally accepted view in Korea is that a parallel debt structure may be used for such arrangement. Under this structure, the debt owing to the security agent or trustee must be established as an independent obligation of the debtor to such person, separate from its obligations to the creditor.

## SECTION 3 – Foreign investment and ownership restrictions

### 3.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

The principal laws on foreign exchange transactions in Korea are the Foreign Exchange Transaction Act (FETA) and the enforcement decree and rules. According to these laws and rules, most large-scale investment related to a foreign national or foreign currencies (including loans, guarantees, bonds, issuance or offering of securities, acquisition of domestic real estate or rights over it) is subject to reporting requirements to the Ministry of Strategy and Finance (or, in certain cases, to a designated foreign exchange bank or the Bank of Korea). The Minister of Strategy and Finance may suspend or restrict foreign exchange transactions commenced without the relevant reports being made.

If a foreign national intends to invest by acquiring stocks of a Korean corporation or by providing five-year or longer term loans to the same corporation, such foreign national must report to the Minister of Ministry of Trade, Industry and Energy before the investment to be entitled to the benefits provided under the Foreign Investment Promotion Act (FIPA).

However, in certain industries, foreign investment is prohibited or restricted. For example, foreign investment in nuclear plants and postal services is prohibited, and investment in power plants (other than nuclear plants), power transmission and supply, passenger service or freight transport, air transportation, and communication services for example, is only permitted if certain conditions are met or the investment falls below a certain investment ratio.

Under the Foreigner's Land Acquisition Act, a foreign national acquiring land is required to report to the relevant governmental agency.

**3.2 Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?**

No.

**3.3 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic/national security or other reasons?**

Under FETA, if the Korean Government decides, due to certain emergency circumstances (such as natural calamities, war or grave and sudden changes in economic situations in or outside Korea), that a serious difficulty in the international balance of payments and international finance, or serious obstacles in implementing currency policies, exchange rate policies or other macroeconomic policies due to capital movement in and out of Korea has occurred or is likely to occur, the Ministry of Strategy and Finance may impose certain restrictions on foreign exchange transactions. This would not invalidate the transaction documents.

## SECTION 4 – Documentation formalities and government approvals

**4.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?**

The clauses under the relevant agreements providing for the submission by a Korean party to a foreign jurisdiction is valid and binding on that Korean party under Korean law. This applies when: (a) the relevant court has jurisdiction over the matter under laws of a foreign jurisdiction; (b) the matter is reasonably related to such court's jurisdiction; (c) the jurisdiction of such court is not so manifestly unfair or unreasonable as to be against the public policy of Korea; and (d) a Korean court has no exclusive jurisdiction over the matter under Korean law

**4.2 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority?**

The Ministry of Land, Infrastructure and Transport and the Minister of Trade, Industry and Energy have the relevant authority to issue business licences and relevant permits. Depending on the project, the local government has the authority to issue a construction permit.

**4.3 What government approvals are required in relation to environmental concerns for typical project finance transactions? What fees and other charges apply?**

The Environmental Impact Assessment Act requires: (a) government agencies to assess the environmental impact at the government development planning stage to reflect any environmental issues in their project plans; and (b) any sponsor to conduct an environment impact assessment. The relevant government agency must consult with the Minister of Environment regarding the environment impact assessment before granting a licence or an approval with respect to the project. The Minister of Environment may also request improvements or adjustments to be made to the environment assessment or the project plan.

## SECTION 5 – Bankruptcy proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?**

The Debtor Rehabilitation and Bankruptcy Act regulates bankruptcy and rehabilitation proceedings. The purpose of a bankruptcy proceeding is to enable the debtor facing financial difficulties to suspend the creditor's operation and liquidate and distribute its assets. The purposes of a rehabilitation proceeding is to rehabilitate a company by reconciling the interests of its creditors, shareholders and other interested parties.

In bankruptcy proceedings, if either the creditor or the debtor submits a petition for bankruptcy, the court declares the debtor bankrupt based on the debtor's inability to pay debts or the excess of the debtor's indebtedness over its total assets, and the trustee will be appointed by the court to administer and liquidate the bankruptcy estate. Under bankruptcy proceedings, the bankruptcy estate will be distributed to creditors in the following priority order of claim: (1) secured creditors (who have a right of separation as discussed below); (2) creditors with estate claims (including claims for costs of judicial proceedings, tax claims, wage and severance claims, management expenses incurred in connection with management, liquidation and distribution of the bankruptcy estate, and other claims arising from the administration of the bankruptcy estate); (3) creditors with other statutorily preferred claims; and (4) other unsecured creditors.

Unlike rehabilitation proceedings, a secured creditor who has a lien, pledge, mortgage, chattel mortgage, bonds, intellectual property mortgage in the bankruptcy estate or leasehold rights is given the right of separation with respect to the relevant estate. A secured creditor is not bound by bankruptcy procedures and may enforce its security interest outside the bankruptcy proceedings and have priority in any proceeds resulting from the enforcement of its security interest. However, if the proceeds from the enforcement of security are insufficient to satisfy the claims of the secured creditor, the remaining amount of the claims will be treated as an unsecured claim, which is subject to bankruptcy proceedings.

Unlike bankruptcy proceedings, secured claims in rehabilitation proceedings are not recognised and cannot be enforced outside the rehabilitation proceedings. For rehabilitation proceedings, creditors have a right to vote on whether to approve or disapprove the rehabilitation plan, and distribution to creditors is made in accordance with the approved rehabilitation plan.

If the debtor engages in any acts that may harm the interests of its bankruptcy creditor or rehabilitation creditor before the commencement of a bankruptcy or rehabilitation proceeding, the trustee or the receiver can exercise the right to nullify such acts and recover the asset of the debtor's estate. Accordingly, the project company's provision of collateral which is deemed to harm the interests of other creditors may be subject to nullification.

In bankruptcy and rehabilitation proceedings, foreign individuals and corporations are treated the same as Korean nationals and corporations.

**5.2 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?**

None.

**5.3 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?**

Please see 5.1

## SECTION 6 – Foreign exchange, remittances and repatriation

**6.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?**

FETA regulates the exchange rate system, foreign exchange operation and payments and receipt of foreign exchange and accordingly remittances of principal, interests or premiums. If the relevant investment involving such remittance was conducted under FETA or FIPA, there are no limitations on such remittance of principal, interest or premiums.

If the Korean government deems that: (a) it is inevitable due to certain emergency circumstances, such as natural calamities, war or grave and sudden changes in economic situations in or outside Korea; or (a) a serious difficulty in international balance of payments and international finance, or serious obstacles in implementing currency policies, exchange rate policies or other macroeconomic policies due to capital movement in and out of Korea have occurred or are likely to occur, the Ministry of Strategy and Finance may impose certain restrictions on foreign exchange transactions, such as employing a permit system for foreign exchange transactions, or requiring deposits of a certain portion acquired from the capital transaction.

However, foreign investment made under FIPA is not subject to any restrictions under FETA, and repatriation of amounts invested are guaranteed regardless of the Minister's decision to impose the above restrictions.

**6.2 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?**

No.

**6.3 What, if any, tax or other incentives are provided preferentially to foreign investors or creditors? What, if any, taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There is a tax incentive to foreign investors subject to satisfying certain requirements under relevant tax related laws.

## SECTION 7 – Public private partnerships

**7.1 Is there a public private partnership act or similar statute authorizing PPPs and are both greenfield and brownfield PPP projects permitted?**

PPP infrastructure projects may be implemented under the Korea Public and Private Partnership Act on infrastructure (KPPP Act). The KPPP Act lists 49 target businesses including roads, railways, ports, telecommunications, energy, environment, airports, and cultural facilities. It provides for several procurement schemes, including: build-transfer-operate (BTO); build-transfer-lease (BTL); build-operate-transfer (BOT); and build-own-operate (BOO).

For PPP infrastructure projects that are not implemented under the KPPA Act and not subject to laws applicable to government-led projects, the project owner, depending on the characteristics of the project facilities, may either transfer ownership of the facilities to the government and secure the right to use the facilities for a certain period of time (usually for sports facilities, including baseball or soccer fields), or directly own and operate such facilities (usually for power plants and solar power plants).

The KPPP Act does not contain any provision related to brownfield PPP projects.

**7.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?**

Under the KPPP Act, any mortgage over the operation and management rights of the project company under the concession agreement is permitted. For PPP infrastructure projects that are not implemented under the KPPA Act and not subject to other applicable laws, consent of the government or contracting authority is required to grant security.

**7.3 Are government guaranties or other payment obligations of the government or contracting authority subject to appropriations or other periodic authorisations?**

No.

**7.4 May the government or contracting authority unilaterally amend or terminate a concession?**

Under the KPPP Act, competent authorities can revoke a project related licence if it is necessary to address any infrastructure related changes to operate the project more efficiently to serve public interest. In such case, any loss suffered by the project company will be compensated.

The competent authorities can amend a project related licence after consultation with the project company if there are no other practical methods to achieve public interest in the operation of the project. In such case, any loss suffered by the project company is to be compensated. Further, the government can expropriate the project's facility for legitimate reasons and compensate the project company under the applicable law.

## SECTION 8 – National update

**8.1 In no more than 250 words, please describe any relevant project finance developments within your jurisdiction. This can include noteworthy projects, new structures or techniques.**

Due to a combination of factors such as a decline in real estate prices and a slowdown in the volume of transactions in South Korea, the local construction and project market is relatively slow. Some large-scale civil projects such as redevelopment projects, new town construction projects and other privately led projects have been postponed and some high-rise building projects have also been cancelled or terminated.

The main reason for such slowdown is the shortage of domestic investment funds and foreign investors' withdrawal of funds from their co-investment projects in South Korea. In order to stabilise the construction and projects market, the South Korean Government has proceeded with its early budget execution plan and placed a number of government-funded construction orders. The major projects focus primarily on thermoelectric power plants, new renewable energy development facilities, hotels, shopping malls, railways and roads.


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