

Security and asset classes in India

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Asset classes used as collateral for security

Real estate

Can security be granted over real estate? If so, what are the most common forms of security granted over real estate and what is the procedure?

Yes, security interest can be created over real estate in India. Security interest over real estate is created by way of mortgage. The Transfer of Property Act 1882 is the main statute which deals with mortgages and prescribes the various types mortgages.

The two most common forms of mortgage in India are:

1. the English mortgage – interest in the mortgaged property is transferred absolutely to the mortgagee (entity in favour of whom the mortgage is created), subject to the mortgagee reconveying the mortgaged property to the mortgagor (entity creating the mortgage) upon discharge of all payment obligations; and
2. the equitable mortgage – the mortgagor deposits the title deeds of the immovable property with the mortgagee with the express intention to create a security interest over the property.

Procedures *English mortgage* An English mortgage must be recorded in an indenture of mortgage, which must be:

- attested by at least two witnesses; and
- registered with the relevant land registry where the mortgaged immovable property is situated, within the statutory prescribed period.

Equitable mortgage The act of depositing the title deeds by the mortgagor with the mortgagee creates the security interest over the immovable property. This creation is evidenced by:

- a declaration executed by the mortgagor, specifying the intent of creating the equitable mortgage; and
- a memorandum of entry executed by the mortgagee, which records the act of the mortgagor depositing the title deeds.

Other common procedures are as follows:

- Applicable stamp duty and registration fees must be paid. Only a few states mandate the registration of an equitable mortgage.
- If the mortgagor is a company, requisite filings with the company registry and information utility under the Insolvency and Bankruptcy Code are required to record the mortgage.
- Certain lenders are required to register their mortgages with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI).
- Corporate authorisations of the mortgagor should be in place.

- No objection certificates should be obtained from entities which have a prior charge over the property or from the lessor if the mortgagor is mortgaging its leasehold rights over the property.

Machinery and equipment

Can security be granted over machinery and equipment? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

Yes, security interest can be created over machinery and equipment. Security interest over machinery and equipment can be created by way of a mortgage or hypothecation in India:

- Mortgage – machinery and equipment are usually clubbed along with immovable properties when an English mortgage is being created.
- Hypothecation – hypothecation means a charge, floating or fixed, in or upon any movable property, existing or future, without delivery of possession of the movable property to the secured party.

Procedures Mortgage The procedure for the English mortgage for real estate also applies to machinery and equipment.

Hypothecation The hypothecation is created by entering into a deed of hypothecation. The terms of the security are purely contractual and the deed of hypothecation needs to capture all the rights of the secured party on enforcement, including the right to crystallise the charge and take possession of the secured assets. Other procedures are as follows:

- Stamp duty and registration fees (wherever applicable) need to be paid within the statutory period in the state where the deed of hypothecation is being executed.
- If the security provider is a company, filings with the company registry and information utility under the Insolvency and Bankruptcy Code are required to record the hypothecation.
- Certain lenders are required to register their charge with the CERSAI.
- Corporate authorisations of the security provider should be in place.
- No objection certificates should be obtained from entities which have a prior charge over the secured assets.

Receivables

Can security be granted over receivables? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

Yes, security interest can be created over receivables. Security interest over receivables can be created by way of an English mortgage, hypothecation or assignment. Restrictions in the underlying contract must be studied carefully to ensure due creation over receivables. Notice to the third party is usually provided upfront on the lender's security interest over the receivables of the security provider.

The procedures for English mortgage and hypothecation also apply to receivables.

An assignment is evidenced by way of an instrument in writing. Usually, security by way of assignment is done under the deed of hypothecation. Assignments are not popular in India due to high stamp duty charges. The stamp duty is mostly *ad valorem*, ranging from 2% to 5% across different states in India.

Factoring transactions in India are governed by the Factoring Regulation Act 2011.

Financial instruments and cash

Can security be granted over financial instruments? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

Yes, security interest can be created over financial instruments in India. Security interest over financial instruments is created by way of a pledge.

Pledge The bailment of goods as security for payment of a debt or performance of a promise is known as a 'pledge'. A pledge is primarily governed by the Contract Act 1872.

Procedures which entail a pledge are as follows:

- Execution of a pledge agreement between the pledgor (entity creating the pledge) and pledgee (entity in favour of whom the pledge is created).
- Delivery (actual or constructive) of the secured asset. In case of shares, physical share certificates must be deposited with the pledgee. If the shares are in dematerialised form, specific forms must be filed with the depository participant of the pledgor to ensure that possession of shares is transferred to the pledgee.
- Stamp duty and registration fees (wherever applicable) would need to be paid within the statutory period, in the state where the pledge agreement is being executed.
- If the pledgor is a company, filings with the company registry and information utility under the Insolvency and Bankruptcy Code are required to record the pledge.
- Certain lenders are required to register their charge with the CERSAI.
- Corporate authorisations of the pledgor should be in place.

Lenders in India do not usually include the value of shares pledged while calculating the security cover due to the volatile valuation of these instruments.

Can security be granted over cash deposits? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

Yes, security interest over cash deposits can be created in India. Security interest over cash deposits can be created by way of an English mortgage or hypothecation. The procedures for an English mortgage and hypothecation outlined above also apply to cash deposits.

Intellectual property

Can security be granted over intellectual property? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

Yes, security interest can be created over intellectual property in India. Intellectual property in India mostly includes patents, copyright, trademark and designs. Security interests over IP rights can be created by way of hypothecation, assignment or mortgage.

Procedures Patents Patents are governed by the Patents Act 1970. The following procedures must be complied with:

- The instrument must be in writing.
- The document creating the assignment, mortgage, licence or creation of any other interest needs to be registered with the relevant authority along with necessary prescribed forms.

Copyrights Copyrights are governed by the Copyright Act 1957. The following procedures must be complied with:

- An instrument in writing should record the assignment of copyright.
- Registration of the assignment instrument is not mandatory, but advisable. The assignment of copyright needs to be recorded with the relevant authority on enforcement.

Trademarks Trademarks are governed by the Trademark Act 1999. The following procedures must be complied with:

- The instrument must be in writing.
- The document creating assignment must be registered with the relevant authority.

Designs Designs are governed by the Designs Act 2000. The following procedures must be complied with:

- The instrument must be in writing.
- The document creating the assignment, mortgage, licence or any other interest needs to be registered with the relevant authority along with necessary prescribed forms.

Other procedures include the registration of the charge with the company registry. Certain lenders are required to register their charge with the CERSAI and corporate authorisations should be in place.

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