

《动产担保法》与资源类合资企业
The Personal Property Securities Act
and resources joint ventures



盛冕
Michael Sheng
博雷道盛
上海代表处
合伙人
Partner
Blake Dawson

Lionel Meehan
博雷道盛
墨尔本办公室
高级律师
Senior Associate
Blake Dawson

—— 零零九年《动产担保法》(PPSA) 是将对澳大利亚金融和商业领域的今后发展产生深远影响的立法改革之一。PPSA 将于今年 10 月开始实施, 从而在澳大利亚引入全国性的动产担保权益登记制度。

“动产”的英文为“personal property”, 直译作“个人财产”。然而与其字面意思不同, “动产”并非仅指个人所有的财产, 而是指区别于“不动产”(土地)的财产。除土地及其他特定财产外, 动产包括公司及个人拥有的全部财产。

PPSA 对动产担保权益的设立、同一动产上存在竞争关系的多个担保权益的优先顺序以及破产时担保权益的处理等问题作出了规定。鉴于 PPSA 的适用范围广泛, 它将对澳大利亚的矿业及资源类项目产生深远影响。对于那些已经投资或正在考虑投资澳大利亚资源类合资企业及其他项目的投资者而言, 有必要根据 PPSA 考虑其交易方式和步骤, 以保障自身的投资及担保权益。

当评估某项交易是否适用 PPSA 及其影响时, 应当考虑下列四个要素(1) 什么是动产;(2) 什么是担保权益;(3) 如何合法设立担保权益;(4) 担保权益的优先顺序。下面将结合澳大利亚矿业合资投资项目, 逐一讨论上述四点。

动产

动产概念极为宽泛, 指除土地及其他特定财产之外的一切财产。举例而言, 动产包括股份、债券、衍生资产、特许权、合同权利、知识产权、货物(包括矿物)、车辆以及其他众多权益。为 PPSA 之目的, 澳大利亚大多数州将采矿权及矿权(许可) 排除在动产范围之外。然而, 大型机械(如载重卡车, 挖掘机, 推土机)、可移动的采矿工具(如破碎机、发电机、简易住房) 以及矿物(一经开采) 都属于动产。

Blake Dawson

博雷道盛上海代表处
上海市南京西路1168号中信泰富广场3408-10
Blake Dawson Shanghai office
Suites 3408-10, CITIC Square
1168 Nanjing Road West, Shanghai
邮编 Postal code: 200041
电话 Tel: 86 21 5100 1796
传真 Fax: 86 21 5292 5161

电子信箱 E-mail:
michael.sheng@blakedawson.com
lionel.meehan@blakedawson.com

www.blakedawson.com

担保权益

所有在动产上设置担保性权益以担保债务履行的交易均可构成担保权益。根据 PPSA, 属于担保权益的常见交易包括抵押及负担、质押、租约、保留所有权的买卖、寄售、应收账款(账面债务) 转让、有担保债务功能的信托, 以及在动产上设置担保权益以担保债务履行的其他交易。

与采矿相关的合资协议可能包含多种担保权益。例如, 下列合资协议的常见条款可能构成担保权益:

- 交叉抵押: 指合资各方将各自在合资企业的权益互相抵押给对方, 以互相担保各方对合资企业的义务和承诺;
- “待售信托”违约机制: 指合资企业用来纠正合资一方违约行为的机制。如果合资一方违约(如未按约定出资), 那么其矿产份额将由合资企业经营者信托持有并出售, 所得款项用以纠正该违约行为。
- “开垦”期权权利: 指合资一方从事探矿作业或为合资项目投资和支付费用, 作为回报, 取得合资对方所持矿权的一定比例。
- 租约: 大型机械及其他采矿工具和设备的租约。

合法设立

担保权益必须合法设立, 否则:

- 在担保人(即提供担保权益的个人或公司) 撤销或清算时, 该担保权益可能会无效;
- 同一担保物(即设有担保权益的动产) 上, 该担保权益的优先顺序可能次于其他合法设立的担保权益的优先顺序;
- 担保物转让后, 该担保权益可能会消灭。

担保权益可通过以下方式合法设立:

- 在动产担保物权登记系统上登记;
- 占有该担保物(若可行);
- 控制该担保物(主要适用于金融资产);
- 采取临时设立方式。特定担保权益可先临时设立, 担保权人从而有时间完成对该担保权益的合法设立手续。

优先顺序

一般情况下, 同一担保物上存在竞争关系的多个担保权益, 以设立时间的先后确定其优先顺序的先后。

但是也有例外情形, 例如, PPSA 规定了一类重要的“价款担保权益”(PMSIs)。PMSIs 设立在新取得的资产上, 以保障用于取得该财产的贷款能够得到清偿。在矿业合资企业中, 如果合资企业租赁卡车用于其采矿作业, 则该卡车租约很可能构成 PMSIs。

PMSIs 的重要之处在于, 它优先于许多(但非一切) 先于它设立的担保权益。例如, 如果公司第一天登记设立一项针对公司全部资产的担保权益, 第二天以租赁方式获得一台设备(构成一项 PMSI), 如果该 PMSI 依法正确登记, 则它将优先于先前的担保权益。

评估担保权益是关键

对公司和投资者至关重要, 对现有文件和交易及其格式合同文本进行审查和评估, 以确认哪些交易根据 PPSA 将属于担保权益交易。然后, 对现有及新的担保权益及时通过登记或其他方式依法设立, 以确保其担保权益得到最大程度的保障。未设立或未依法设立的担保权益在担保人撤销或清算时可能会失去其优先顺序和 / 或无效。■

The Personal Property Securities Act 2009 (PPSA) is one of the most significant legislative reforms to affect the Australian finance and commercial sectors for many years.

The PPSA is scheduled to come into force in October. It will introduce a nationwide register for security interests in personal property in Australia.

Personal property is not merely property owned by individuals as the name suggests. The term “personal property” is used to distinguish the concept from “real property” (land). Personal property includes all property of both companies and individuals, except land and certain other limited exclusions.

The PPSA will regulate how security interests in personal property are created, the priority of competing security interests in the same personal property, and how security interests in personal property will be treated upon insolvency.

Given the breadth of application of the PPSA, it will have a profound impact upon Australian mining and resources projects. It will be important for businesses participating or considering participating in Australian resources joint ventures and other projects to consider their practices and procedures in order to protect their security interests and investments.

There are four key considerations when assessing the application and impact of the PPSA in relation to any transaction. These are (i) what is personal property, (ii) what is a security interest, (iii) how are security interests perfected, and (iv) what is the priority of security interests. Each of these considerations is discussed in turn below by reference to the example of an Australian mining joint venture (JV) investment.

Personal property

Personal property is an extremely broad concept which refers to all property except land and certain other excluded rights. Examples of personal property include shares, bonds, derivative assets, licences, contractual rights, intellectual property, goods (including minerals), vehicles and many other rights and interests.

Mining rights and tenements (licences) are excluded in most Australian states from being personal property for PPSA purposes. However, yellow goods (for example, trucks, excavators and bulldozers), mining-related (removable) plant such as crushers, generators and portable

housing equipment, and minerals (once extracted) are all personal property.

Security interests

Security interests are all transactions which grant an interest in personal property and which secure an obligation.

Common examples of transactions which will be regulated as security interests under the PPSA include mortgages, charges, pledges, many leases, sales by retention of title, consignments, transfers of accounts (book debts), many trusts which secure obligations, and any other transaction which grants an interest in personal property to secure obligations.

Mining-related JV agreements can include many security interests. For example, the following common features of JV agreements could be security interests:

- **cross-charges.** These involve each JV party granting security to the other over their interests in the joint venture to secure their ongoing obligations and commitments to the JV;
- **“trust-for-sale”** default mechanisms. Trusts-for-sale are often used in JVs as a mechanism to cure defaults by one JV party. If a party to the JV defaults on its obligations (e.g. does not contribute equity as required), then that defaulting party’s share of minerals is held by the JV operator on trust, sold, and the proceeds used to cure the default;
- **“farm-in”** option entitlements. Farm-ins involve one JV party conducting exploration work or spending money on the JV project, in return for a percentage share in a mining tenement held by another JV party; and
- **leases** of yellow goods and other mining plant and equipment.

Perfecting interests

Security interests must be perfected, otherwise they:

- are likely to be void upon the administration or liquidation of the grantor (i.e. the person or company giving the security interest);
- may lose to other perfected security interests in the same collateral (i.e. personal property in which the security interest is granted); and
- may be extinguished upon transfers of collateral.

A security interest may be perfected by:

- registration on the PPS Register;
- taking possession of the collateral (if this is practical);
- taking control of the collateral (control relates mainly to financial assets); and
- relying on temporary perfection. Temporary perfection is extended to certain security interests to allow the secured party time to perfect.

Priority

The general rule is that the priority of competing security interests in the same collateral is determined by the time of perfection. The earlier the time of perfection, the higher the priority accorded to the security interest.

There are exceptions. For example, the PPSA provides for an important class of security interest called purchase money security interests (PMSIs). PMSIs are security interests granted over new assets acquired, to secure a loan or credit to fund the acquisition cost.

In the context of a mining JV, if the JV leases a truck for use in its mining operations, the truck lease is likely to be a PMSI.

PMSIs are significant because they defeat many (but not all) security interests which are perfected before them. For example, if a company grants an all-assets security interest which is registered on day one, and then acquires an item of equipment on lease (a PMSI) on day two, then the PMSI will win provided it is registered correctly.

Assessment crucial

It will be crucial for companies and investors to review and audit both existing documentation and transactions, and standard trade terms, to identify transactions which will be treated as security interests under the PPSA. All existing and new security interest transactions should be assessed for registration or other perfection without delay to ensure maximum protection. Unperfected or incorrectly perfected security interests may lose their priority and/or be void upon administration or liquidation of the grantor. ■

盛冕是博雷道盛上海代表处合伙人, Lionel Meehan 是博雷道盛墨尔本办公室高级律师 Michael Sheng is a partner in the Shanghai office, and Lionel Meehan is a senior associate in the Melbourne office, of Blake Dawson