

CROSS-BORDER FINANCE

ISSUES AND STRATEGIES FOR CHINESE FINANCIAL INSTITUTIONS AND INVESTORS

CILACEC / LAW AND ECONOMY:
MANAGEMENT OF LEGAL RISK FOR INTERNATIONAL BUSINESS

5 September 2014

Presented by:

Joel H. Rothstein

Paul Hastings LLP

PAUL

HASTINGS

TOPIC

Cross-Border Finance:

Issues and Strategies for Chinese Financial Institutions and Investors

GOALS OF PRESENTATION

1. Understand the reasons why cross-border finance is of growing importance?
2. Identify key issues facing lenders and borrowers in cross-border finance deals.
3. Assess how recent Chinese governmental policies support cross-border finance.
4. Provide practical strategies for minimizing risk in cross-border financings

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AGENDA

Understanding Cross-Border Finance



New Opportunities in Cross-Border Security



Risk Mitigation Strategies



Discussion

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Risk Mitigation Strategies



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Risk Mitigation Strategies



Discussion

UNDERSTANDING CROSS-BORDER FINANCE

- ❖ The Motivation
- ❖ Key Issues

Understanding Cross-Border Finance

China Capital Flows Around the World - Examples



US\$375 Million
Canada
Takeover Bid Oil/Gas



US\$44.25 Million
Mozambique/Africa
Agribusiness



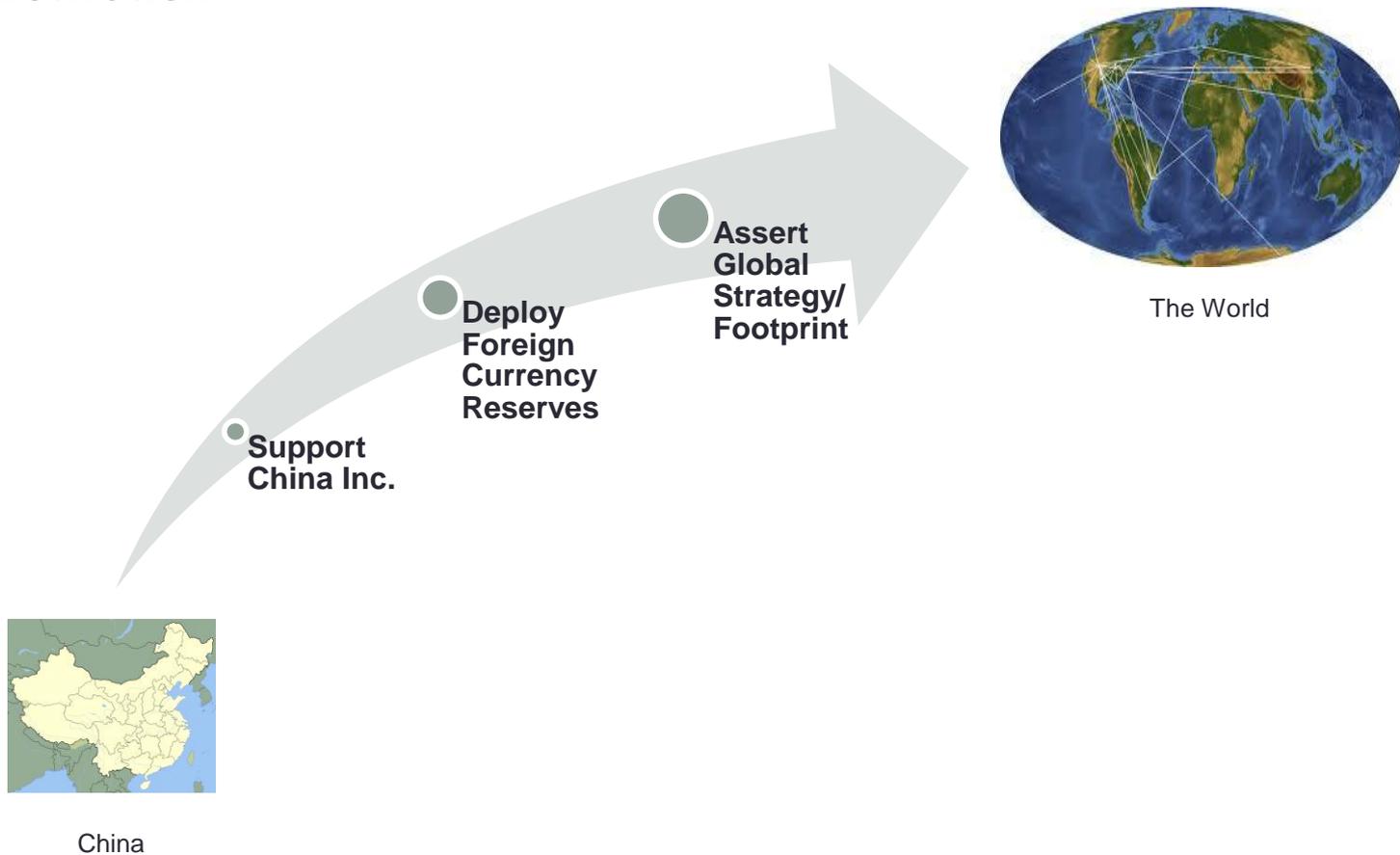
US\$640 Million
Sweden
Auto Manufacturing

US\$2.4 Billion
Bahamas
Real Estate /
Infrastructure



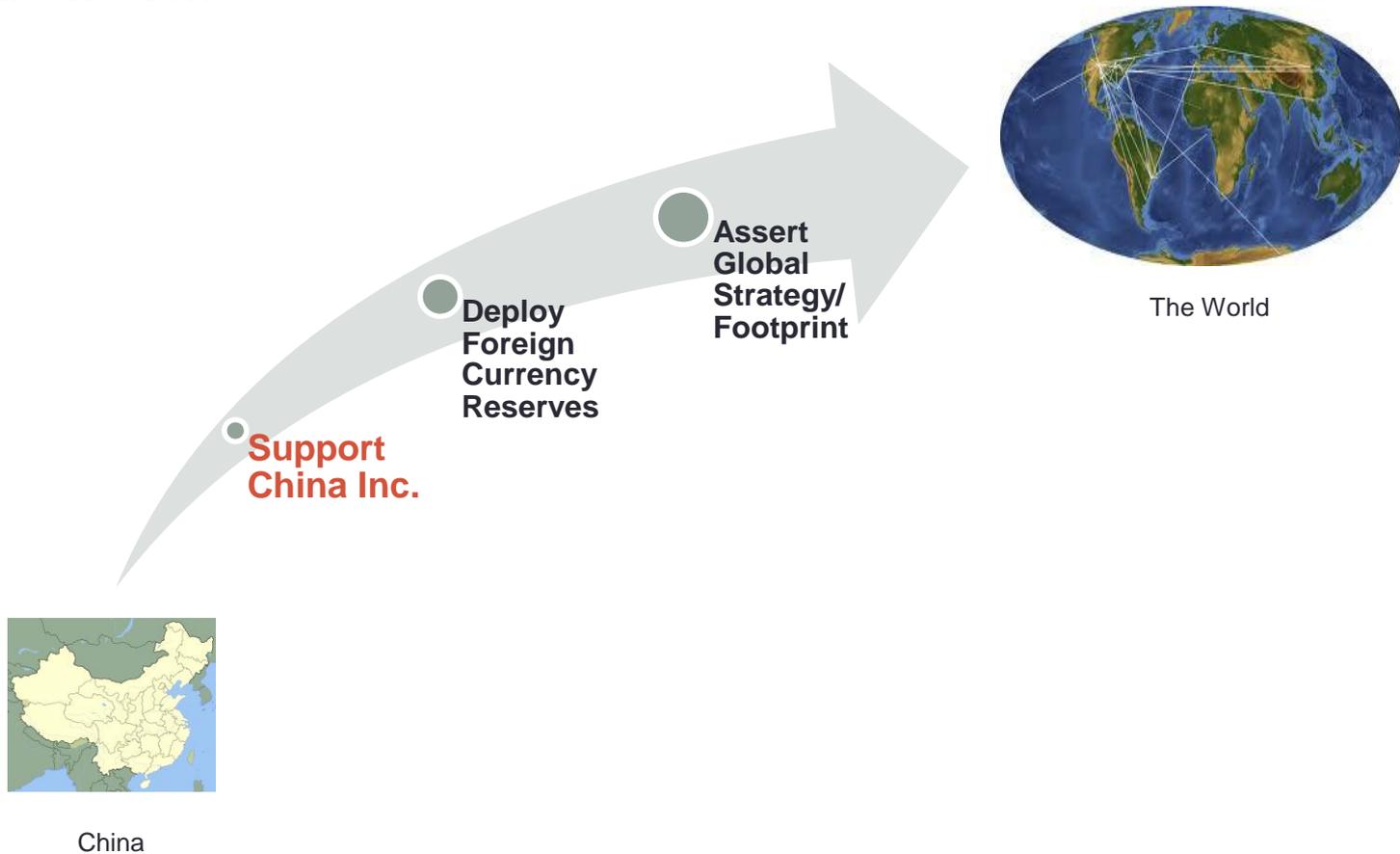
Understanding Cross-Border Finance

The Motivation



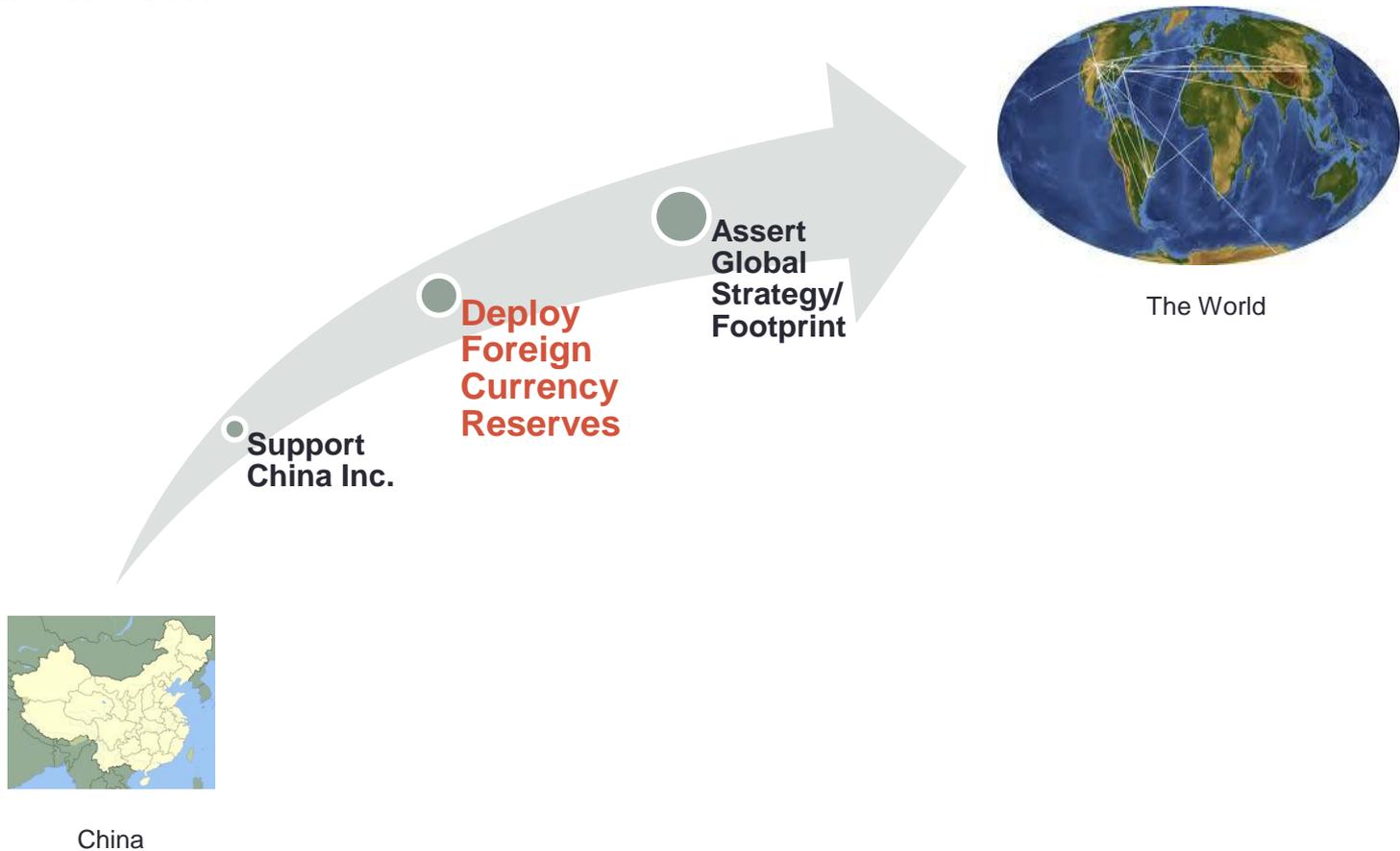
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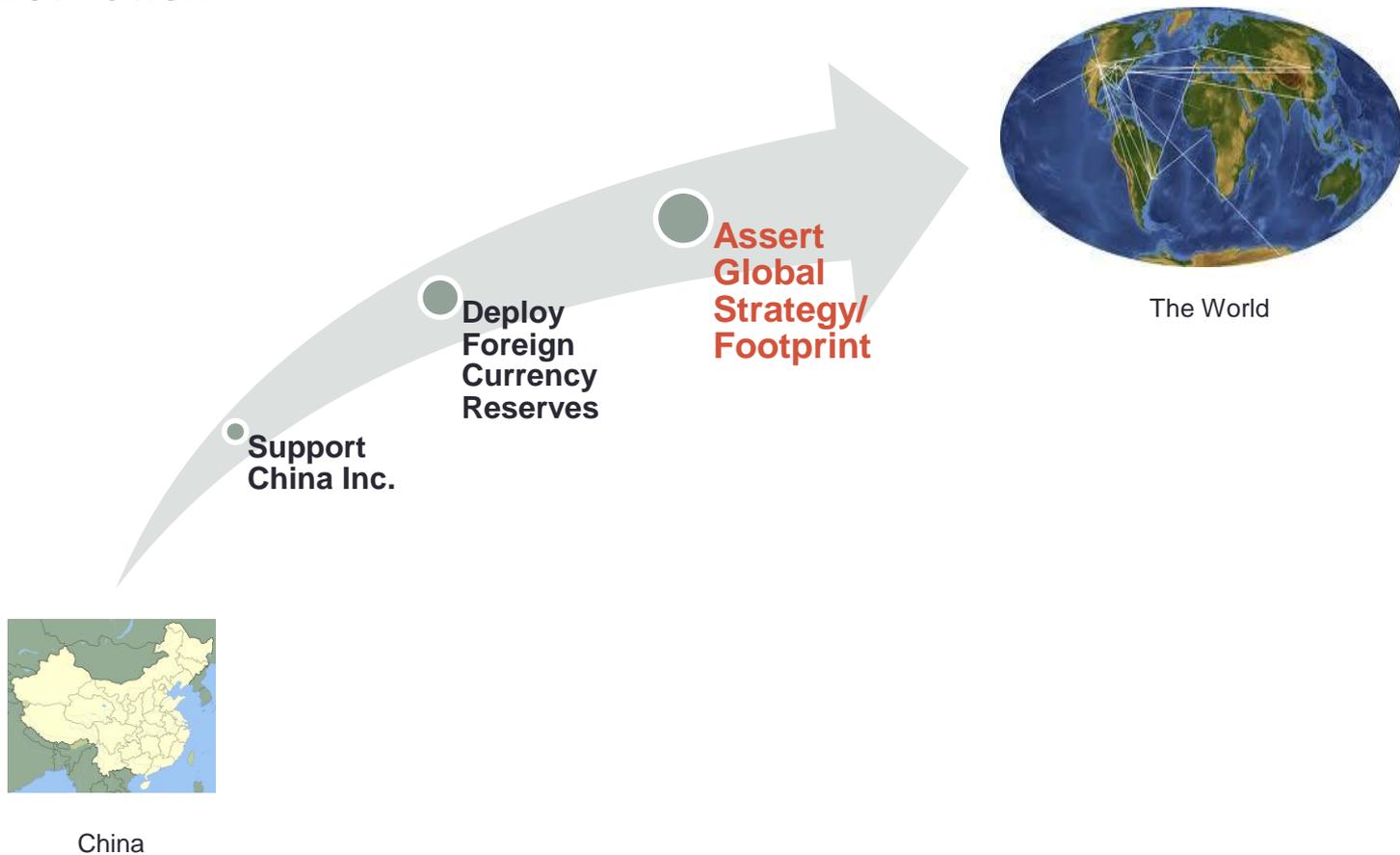
Understanding Cross-Border Finance

The Motivation



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Understanding Cross-Border Finance

Key Issues

Loan Document Forms

Governing Law

Recourse vs. Nonrecourse Debt

Collateral Package

Enforcement of Rights and Remedies

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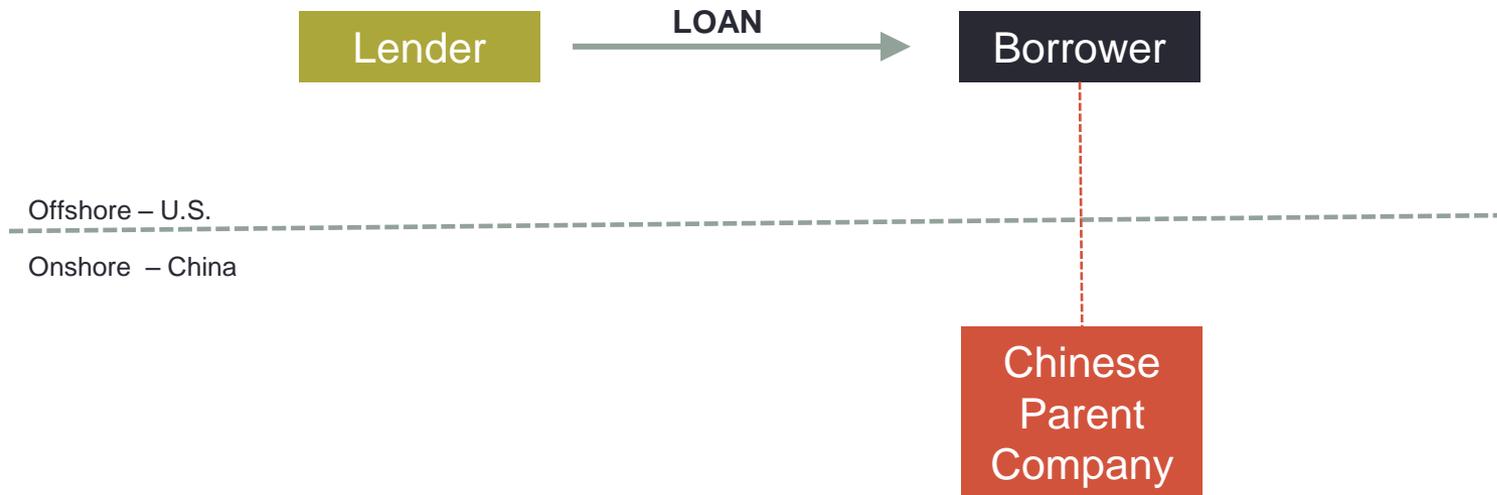
NEW OPPORTUNITIES IN CROSS-BORDER SECURITY

- ❖ Issuing Guarantees and Granting Security for Outbound Deals

New Opportunities in Cross-Border Security

The Scenario

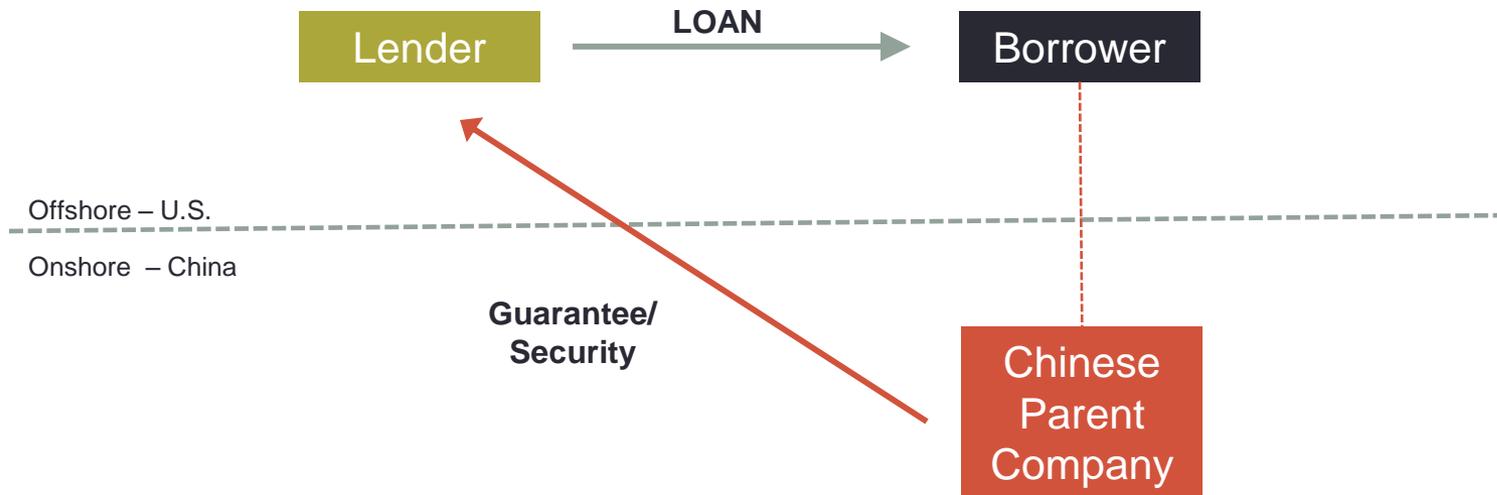
Subsidiary of Chinese company seeks financing offshore in U.S.



New Opportunities in Cross-Border Security

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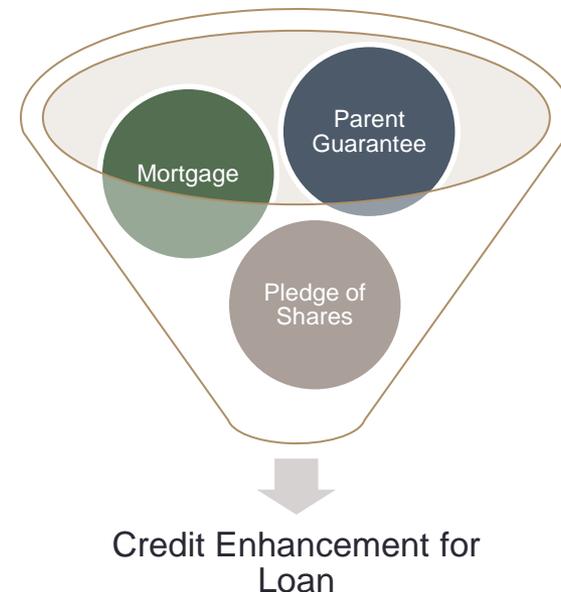


New Opportunities in Cross-Border Security

Issue

Finance transactions often require *CREDIT ENHANCEMENT* in the form of guarantees or the granting of security interests over collateral.

- **Question:**
 - Can a domestic Chinese company issue a guaranty or grant a security interest over some property in China to provide security for an offshore loan to an offshore subsidiary of the Chinese company?



New Opportunities in Cross-Border Security

- **The Old Answer: Before June 1, 2014**
 - **CAUTION: Yes – but access very limited**
 - Burdensome governmental regulations and procedures require pre-approval from the State Administration of Foreign Exchange (SAFE) and potential quota restrictions.
 - SAFE approval rare.
 - Enforcement of security also required SAFE approval-oversight.



New Opportunities in Cross Border Security

- **The New Answer: After June 1, 2014**
 - **Yes!**
 - New State Administration of Foreign Exchange regulations substantially relax restrictions on granting cross-border security.
 - Easier for Chinese companies to go global by making it easier to obtain offshore financing.



New Opportunities in Cross-Border Security

Recent Legislative Developments

- SAFE Circular 39:
 - *Provisions on the Administration of Foreign Exchange for Cross Border Security*
- Implementation Guidelines
 - *Administration of Foreign Exchange for Cross-Border Security Implementation Guidelines*
- Effective Date: June 1, 2014

New Opportunities in Cross Border Security

Key Features of Circular 39 and Implementation Guidelines

Outbound Cross-Border Security (*Nei Bao Wai Dai*)

- **No SAFE Pre-Approval Required**
 - Onshore security provider registers with local SAFE, within 15 days from the date of execution of the security agreement/guarantee.
 - Failure to register with SAFE will not invalidate the outbound security – but it may delay enforcement.
- **Elimination of Qualification Requirements**
 - Elimination of strict qualification requirements for non-financial institutions providing guarantees – no more financial status tests, minimum shareholdings etc. Individuals now permitted to provide.
- **Simplified Enforcement**
 - Proceeds of enforcement of outbound security can be remitted to the offshore lender through an onshore bank. All that is required to process with bank is SAFE registration certificate.



New Opportunities in Cross Border Security

Limitations of Circular 39 and Implementation Guidelines

Outbound Cross-Border Security (*Nei Bao Wai Dai*)

- **Purpose Restrictions**
 - Proceeds of loan supported by outbound security may only be used for “ordinary business transactions”.
 - No false trading transactions, or disguised mechanism to move cash offshore.
- **No Flow-Back to China**
 - Proceeds of loan supported by outbound security cannot be used to:
 - Invest in a PRC entity or make a loan to a PRC entity; or
 - Acquire an offshore target whose assets in the PRC account for more than 50% of its total assets.
- **Negative Perception of PRC Security – Practical Reality**
 - Foreign lenders reluctant to have to enforce remedies in PRC.

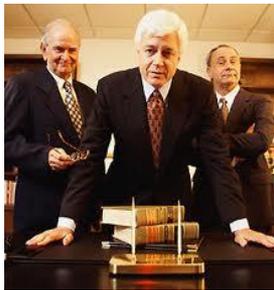


LEGAL RISK MITIGATION

❖ A Lawyer's Recommendations

Legal Risk Mitigation Strategies

Top Eight Strategies: A Lawyer's Recommendations



Legal Risk Mitigation Strategies

Top Eight Strategies: A Lawyer's Recommendations

1

- Conduct Comprehensive Due Diligence

Legal Risk Mitigation Strategies

Top Eight Strategies: A Lawyer's Recommendations

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- Conduct Comprehensive Due Diligence

2

- **Pay Close Attention to Deal Documents**

Legal Risk Mitigation Strategies

Top Eight Strategies: A Lawyer's Recommendations

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- Conduct Comprehensive Due Diligence

2

- Pay Close Attention to Deal Documents

3

- **Complete Tax Planning - Deal Structuring Analysis Before Closing Deal**

Legal Risk Mitigation Strategies

Top Eight Strategies: A Lawyer's Recommendations

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- Complete Tax Planning - Deal Structuring Analysis Before Closing Deal

4

- **Obtain Relevant Insurance Coverages (title, property and liability)**

Legal Risk Mitigation Strategies

Top Eight Strategies: A Lawyer's Recommendations

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- 5 • **Assume that Laws will be Enforced (employment, IP, environmental, FCPA etc.)**

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- 7 • **Select the Right Partners**

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- 6 • Plan in Advance for Litigation
- 7 • Select the Right Employees and Partners
- 8 • **Engage Experienced and Qualified Advisors**

THANK YOU

PRESENTER

Joel H. Rothstein Partner

Paul Hastings LLP

19/F Yintai Center office Tower
2 Jianguomenwai Avenue
Chaoyang District
Beijing 100022
PRC

t: +86.10.8567.5380

f: +86.10.8567.5400

joelrothstein@paulhastings.com

Joel H. Rothstein is a partner with the international law firm of Paul Hastings LLP and is based in the firm's Beijing and Los Angeles offices. His practice focuses on real estate, banking and structured finance. He formerly served as Chair of the Beijing office and head of the firm's Asia real estate practice.

With over sixteen years' experience serving clients in Asia, Mr. Rothstein is the firm's longest serving attorney in Asia where he has played a leading role in the establishment and expansion of the firm's market leading real estate and structured finance practices in the region. In his practice, he routinely advises and assists international and domestic investment banks, financial institutions, private equity funds, and real estate developers and investors in Asian as well as in other global markets in the following areas:

- ❑ asset based lending;
- ❑ asset securitization and secondary market trading of loan assets;
- ❑ real estate estate venture formation and fund vehicle formation and management;
- ❑ real estate debt and equity capital market transactions, including REITS;
- ❑ NPL and hard asset portfolio acquisitions and dispositions;
- ❑ distressed asset and company restructuring and workouts;
- ❑ property acquisitions and dispositions;
- ❑ construction and development; and
- ❑ hotel and resort finance, development and management.

Mr. Rothstein has participated in structuring, documenting and implementing a number of landmark transactions and investment programs in both the United States and in Asia, including the first NPL securitization transactions completed both in the United States and Japan, cross-border joint ventures, and innovative conduit lending and non-recourse real estate financing programs in the United States, China, Japan and Korea.

In addition to being a lawyer, Mr. Rothstein is also an architect and urban designer and a graduate of Columbia University's Graduate School of Architecture. He has previously worked on a number of architecture and urban design projects in diverse locations ranging from Cartagena, Colombia, South America, New York City and Los Angeles. Mr. Rothstein received his J.D. degree from New York University School of Law and was the editor of the publication *New York University Review of Law and Social Change*. Mr. Rothstein is a frequent lecturer and author on real estate finance and Asia real estate investment.



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