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The Legal 500
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Ireland

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Ireland.

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IRELAND
LENDING & SECURED FINANCE

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Generally speaking, no. Neither lending to (larger) corporate borrowers nor taking the benefit of security over assets located in Ireland requires a foreign lender to be licenced in Ireland, provided the lender is not carrying on other regulated activities in Ireland. However, lending to "consumers" is a regulated activity; while the definition of "consumer" varies, one commonly cited definition defines a "consumer" as: (i) an individual acting otherwise than in the course of their business; and (ii) micro enterprises within the meaning of European Union ("**EU**") Commission Recommendation 2003/361/EC of 6 May 2003. A micro enterprise is one which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed €2,000,000. Only appropriately authorised lenders may lend to natural persons in Ireland.

All lenders are required to consider the extent to which they are obliged to comply with anti-money laundering/counter-terrorist financing ("**AML/CTF**") requirements under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended). Lenders with an Irish base which are not otherwise regulated by the Central Bank of Ireland (the "**CBI**") may need to regiser as a so-called "Schedule 2" firm with the CBI for AML/CTF purposes. The CBI also maintains the Central Credit Register to facilitate the credit scoring of borrowers. Currently, non-EU lenders are not obliged to register and report under the Credit Reporting Act 2013 as long as they are outside of Ireland.

Banks licensed in another European Economic Area ("**EEA**") may be required to passport into Ireland in order to carry on their activities in Ireland. A bank authorised in another EEA member state (the home state) can passport its services through establishing a branch in Ireland (subject to the CBI's notification requirements), or by providing its services in Ireland (the host state) on a cross-border basis (e.g. services are provided in Ireland without establishing a physical presence in Ireland) (again, this is subject to the CBI's notification requirements). From 1 January 2021, UK-regulated lenders can no longer offer their services on a cross-border basis using passporting arrangements.

A foreign lender lending to persons in Ireland would generally be subject to the same conduct of business rules as an Irish lender, and are also required to hold the appropriate licence/authorisation if carrying on a regulated activity (albeit their regulatory status in their home country may have a bearing on the latter, for example passporting rights – if carrying on passportable activities).

Lenders should be aware that under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (the "**2018 Act**"), unregulated entities (other than securitisation special purpose vehicles) which acquire legal title either to loans to consumers or to loans to small or medium-sized enterprises ("**SMEs**") which were originated by a regulated entity, are required to be authorised and regulated by the CBI. However, the law in this area is subject to change with the implementation of so-called "Non-Performing Loans" Directive (EU Directive 2021/2167 on credit servicers and credit purchasers).

In addition to the above, there are certain other laws and codes that apply in the context of lending to consumers and/or SMEs (and the enforcement of such loans), many of which must be adhered to by foreign lenders lending into Ireland such as in relation to data protection.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

Generally, no, there are no laws or regulations in Ireland applicable to corporate (as opposed to consumer) lending transactions. However, there are potential restrictions on a lender's ability to charge interest at an increased rate where the borrower is in default

("**Default Interest**").

In two judgments in July 2018 (*Sheehan v Breccia [2018] IECA 286 / Flynn and Benray v Breccia [2018] IECA 273*), the Court of Appeal addressed the issue of whether, under Irish law, an obligor's agreement to pay Default Interest was unenforceable because it was not a "*genuine pre-estimate of loss caused by such default*". Essentially, the court held that if a Default Interest provision is contained in the lender's standard terms and conditions, it will be considered to be a penalty and therefore unenforceable.

Accordingly, it would be prudent for lenders to include a tailored / negotiated term in the loan agreement relating to Default Interest (rather than relying on the Default Interest provisions contained in the standard terms and conditions) to avoid the relevant provision being considered to be a penalty (and potentially unenforceable).

From a consumer lending perspective, protection against excessive interest rates is afforded to consumers in Ireland by the Consumer Credit Act 1995 (as amended).

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Generally speaking, no as there are no foreign exchange or currency restrictions in Ireland which restrict loans being made or repaid in a foreign currency.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

i) Real property (land), plant and machinery;

Yes. Security over plant, machinery and equipment is most commonly taken by way of a fixed charge and, since the enactment of the Land and Conveyancing Law Reform Act 2009 (as amended) f(the "**2009 Act**") security over Irish real estate must be taken by way of charge. A charge represents an agreement between a creditor (chargee) and a debtor (chargor) to appropriate and look to an asset and its proceeds to discharge indebtedness. The principle difference between a mortgage (as discussed below) and a charge is that a charge need not involve the transfer of ownership in the asset. A charge may be fixed (e.g. security attaches to a specific asset) or floating (e.g. security floats over the asset (or a class of assets) leaving the chargor free to deal with it until, upon the occurrence of certain defined events, the charge crystallises into a fixed charge) in nature. A fixed charge over land essentially precludes the chargor from disposing of the land without the chargee's prior consent or the discharge of liabilities owed to the chargee. Where security is created over real estate which is registered in the Property Registration Authority of Ireland ("**PRAI**"), an additional prescribed form is also required to validly create the security (discussed at question 8 below). In addition, the following forms of security were taken historically over real estate:

- **Legal Mortgage**: A legal mortgage involved the transfer of legal title to an asset by a debtor, by way of security, upon the express or implied condition that legal title would be transferred back to the debtor upon the discharge of its obligation; and
- **Equitable Mortgage**: Equitable mortgages were created in situations where a chargor only had an equitable interest in the land. The beneficial interest in the asset was transferred to the chargee with legal title remaining with the chargor and, as such, only an equitable security interest was created.

A floating charge over land is quite rare, and is more suitable in respect of other assets such as inventory (discussed at (iii) below).

ii) Equipment;

Yes. Security may be created over equipment by way of either a fixed charge or floating charge.

iii) Inventory;

Yes. Security over inventory typically takes the form of a floating charge given that the chargor trading company needs to retain sufficient freedom to deal with inventory in the ordinary course of business. The security "floats" over the asset and remains dormant until some further step is taken by or on behalf of the chargee, at which point the floating charge crystallises into a fixed charge.

The crystallisation of a floating charge into a fixed charge may occur on the happening of a specified event (that is, an event of default) or on the insolvency of the borrower.

iv) Receivables;

Yes. Security over receivables most commonly takes the form of a legal assignment and is permitted so long as the underlying contract creating the receivable does not contain a prohibition on assignment. A legal assignment is similar to a mortgage in that it transfers the legal or beneficial ownership in an asset to the creditor, upon the understanding that ownership will be assigned back to the debtor upon discharge of the secured obligations owing to the creditor.

In order to be a valid legal assignment, as opposed to an equitable assignment, certain requirements must be adhered to, including, inter alia, the provision of written notice to the third party from whom the assignor would have been entitled to receive or claim the assigned right (the "**Underlying Debtor**"). It is important to note that one of the disadvantages of an equitable assignment is that the rights of the assignee will be subject to any equity (such as rights of set-off) already vested in the Underlying Debtor. In addition, should the Underlying Debtor pay off a debt due to the assignor and claim a good discharge of this debt, in circumstances where no notice of the assignment was given to the Underlying Debtor, then the assignee would be solely reliant on the assignor passing this payment on.

v) Shares in companies incorporated in your jurisdiction;

Yes. Security can be granted over shares in a company incorporated in Ireland. There are two key types of security over shares: a legal mortgage and an equitable mortgage. An equitable mortgage – which does not transfer legal ownership and as such does not require the chargee to be recorded in the company's share register as the owner of the shares – is the most common. This is effected by the delivery of share certificate(s) together with signed (but undated) share transfer forms, irrevocable proxies and various other deliverables which authorise the chargee to complete the undated stock transfer form and any formalities required to become legal holder of the shares if the security becomes enforceable. Prior to the security becoming enforceable, all voting rights, dividends and any communication in connection with the shares will remain with the chargor.

It is also common for a chargee to take a fixed charge over shares issued by an Irish company, which is commonly taken alongside an equitable mortgage.

Although Irish law does not strictly require that share security be granted under an Irish law governed document, it is frequently the case that Irish law-governed security is taken over shares in an Irish incorporated company, on the basis that Irish law is likely to govern the validity and perfection requirements of the security.

vi) Can such security be created under a foreign law governed document?

As a general comment, all Irish assets (assets located/deemed to be held in Ireland) can and should be charged under an Irish-law governed document whether by an Irish chargor (individual or corporate entity) or a non-Irish chargor. It is possible, but not advisable, to create security over Irish assets under a non-Irish law governed document. All non-Irish assets can be charged under an Irish-law governed document by a chargor (individual or corporate entity). How effective that charge will be will depend on the nature of the asset charged and its location. It is more prudent to charge non-Irish assets under the laws of the place where they are located/deemed to be held.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Yes. The floating charge element of an "all-assets" debenture will normally encompass the existing assets of the company and any assets which may be acquired by the company at some point in the future. In addition, it is also possible for a fixed charge or mortgage to cover future assets to the extent that these assets are sufficiently identified in the relevant security document. In this regard, the charge will be "equitable" rather than "legal" in nature until the assets come into being and come into the ownership of the relevant borrower.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Security over all, or substantially all, of a company's assets usually takes the form of an "all-assets" debenture. This is a single security document entered into by a company in favour of the secured part(y/ies) to create security (e.g. a combination of mortgages, assignments and/or fixed and floating charges) over all of the assets of the borrower. Accordingly, the debenture will typically include: (i) a fixed charge over specific assets which are identifiable and can be controlled by the lender (e.g. buildings, restricted accounts, intellectual property assets); (ii) a floating charge over fluctuating and less identifiable assets (e.g. inventory, agricultural stock, goods, plant and machinery); (iii) an assignment of any interest in receivables, contracts, insurance policies and bank accounts; and (iv) a mortgage and/or charges over real estate and shares.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

There are no specific notarisation requirements for security documents under Irish law. It is prudent for security to be executed as a deed. This means that there can be no disputes as to identifying consideration for the security and also that the relevant statute of limitations for claims will be 12 years instead of 6 years.

8. Are there any security registration requirements in your jurisdiction?

Subject to certain exceptions set out in the Companies Act 2014 (as amended) (the "**2014 Act**"), particulars of any charge created by an Irish company over its assets must be registered at the Irish Companies Registration Office ("**CRO**") using either a Form C1 or Forms C1A and C1B within 21 days of its creation and similar requirements apply to foreign companies which are registered as external companies with the CRO. This does not apply to security over certain financial assets, such as cash and shares. Failure to register the charge with the CRO will render the charge void against any liquidator or creditor of the company. A filing fee of €40 is payable to the CRO in respect of each security registration.

In addition, where security comprises a fixed charge over book debts, a notification should be made to the Irish Revenue Commissioners within 21 days of the creation of the charge. No fee is incurred in respect of such notification.

Security over real property must be registered with the PRAI. The specific formalities in relation to real estate depends on whether the land is registered or unregistered. Security interests in registered land must be registered with the Land Registry together with any ancillary documentation and a Land Registry Form 17. Different rules apply in respect of fixed and floating charges. Fixed charges must comply with the requirements prescribed under the Land Registry Rules and the 2009 Act, and must be registered at the Land Registry. Conversely, a floating charge over registered land would not be registered until it crystallises. A Form 52 relating to a "*specific charge for present and future advances arising on the creation of a commercial mortgage or debenture*" should also be filed with the Land Registry where security is being created over property. Security granted over unregistered land must be registered with the Registry of Deeds.

Security over certain other assets, such as IP, ships and aircraft, should be registered with the applicable registries.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

In relation to registration costs, the filing at the CRO of either a Form C1 or Forms C1A and C1B must be completed online and the filing fee is €40. In the case of registered external companies, the cost of registering either a Form F8 or Forms F8A and F8B is also €40.

The registration of a Form C6 (Declaration of Satisfaction of a Charge) or Form C7 (Declaration of Partial Satisfaction of a Charge) with the CRO costs €15 and there is no e-filing option available for these forms.

In relation to intellectual property, as trade mark attorneys are sometimes engaged to deal with registrations, their costs differ quite substantially depending on whether local as well as international filings are to be made.

The cost of registering the security in the Registry of Deeds is €50 in respect of each deed registered.

Irish stamp duty is not payable on the creation of security. Stamp duty may be payable by the purchaser of assets being liquidated on an enforcement event. As outlined above, documents are not required to be notarised under Irish law.

In terms of material costs to lenders upon enforcement, if a lender proceeds with a judgment application to court against a debtor there will be court stamp duty on the summons of €190 (High Court) and €20 on any affidavit. There will also be the legal fees of the solicitors acting for the lender in making the court application.

If a secured lender looks to appoint a receiver over the assets the subject of its security then the lender will have to agree fees with the receiver for that engagement.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

Yes. A company can guarantee and secure the obligations of another group company. However, this is subject to the corporate benefit rule (discussed below), to certain provisions of the 2014 Act relating to the provision of financial assistance (discussed below and at question 11) and to transactions with directors and/or other connected persons which require, among other things, that both the guarantor and the borrower fall within the concept of "group" companies for the purposes of the 2014 Act (discussed below).

In this regard, lenders should be aware of the following limitations:

- **Corporate Benefit:**

Although not specifically addressed in the 2014 Act, it is generally accepted that Irish companies must derive some form of corporate benefit from transactions into which they enter. Accordingly, prior to authorising the provision of a guarantee/security to a third party, directors should consider, and document such considerations of the commercial benefit that will accrue to the company as a result of providing such a guarantee or security. Directors who authorise a transaction which does not benefit the company may be liable for breach of their statutory and fiduciary duties. In the context of providing a guarantee in respect of the borrowings of another group company, it is often possible to establish sufficient corporate benefit if the provision of the guarantee or security would benefit the group as a whole. For example, a holding company that guarantees the obligations of its subsidiary could feasibly expect to benefit from the success of that subsidiary through increased dividends.

- **Financial Assistance:**

Under Irish law, it is not lawful for a company to give any financial assistance for the purpose of an acquisition made or to be made by any person of any shares in that company, or, where the company is a subsidiary, in its holding company (section 82 of the 2014 Act) (discussed at question 11 below). Financial assistance may only be given in limited circumstances (discussed at question 11 below) or where a "Summary Approval Procedure" ("**SAP**") has been followed under section 202 of the 2014 Act.

- **Loans to Directors:**

A company is prohibited from providing security in favour of a person who makes a loan (or a quasi-loan) to, or enters into a credit transaction with, a director of that company or its holding company, or a person connected to that director (section 239 of the 2014 Act). There are a number of exemptions, including where the loan (or quasi-loan) is made to, or credit transaction is entered into with, a member of the same group for the purposes of the 2014 Act or where a SAP is carried out.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

i) Shares of the company

Yes. Section 82(2) of the 2014 Act creates a general prohibition on the provision by a company (either directly or indirectly) of financial assistance – whether in the form of loans, guarantees, the provision of security or otherwise – for the purpose of the acquisition of its own shares or the shares in its holding company. However, there are exceptions to this rule and section 82(5) of the 2014 Act allows such financial assistance where the company's principal purpose in giving the assistance is not for the purpose of the acquisition or where it is incidental in relation to some larger purpose and the assistance is given in good faith. Section 82(6) also provides a list of exemptions to the prohibition which includes the carrying out of a SAP which allows an otherwise prohibited transaction to proceed.

ii) Shares of any company which directly or indirectly owns shares in the company

Yes. Section 82 of the 2014 Act applies in respect of the acquisition by a company of shares in its holding company.

iii) Shares in a related company.

No. This is not applicable so long as the related company is not a holding company.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes. Syndicated lending arrangements involving the appointment of a security agent to hold any security on trust for the benefit of all lenders and any other parties entitled to benefit from the security are common in the Irish lending market. However, it is worth noting that under Irish law it is usually the receiver appointed by the lender/security agent over the secured assets who realises same on behalf of the secured parties. The Irish security document will usually provide for the appointment of a receiver and will usually provide that the receiver is the agent of the borrower rather than the lender(s)/security agent. This is noteworthy as it means that the lender/security agent is protected against any potential claims arising from the actions of the receiver as part of the enforcement.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

This is not applicable in Ireland.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

The Irish courts will, as a general rule, respect and recognise the governing law chosen by parties. EU Regulation 593/2008 ("**Rome I**") governs the position with respect to contracts relating to civil and commercial matters involving EU Member States and provides that, subject to certain limitations, a contract will be governed by the law chosen by the parties. Under Rome I Ireland recognises choice of law clauses, regardless of whether the applicable law is that of another EU Member State or of a 'third country' such as the US and now the UK having left the EU. The choice of law in contract disputes falling outside of Rome I will be determined by common law, unless there is a specific law or convention which deals with the particular contract in question. The common law recognises and enforces the choice of governing law provided for in the contract, subject to certain qualifications such as where there are public policy issues. The Irish courts can enforce a contract that has a foreign governing law. However, the party seeking to rely on the foreign law will need to prove to the satisfaction of the Irish courts what the foreign law is. Generally speaking the Irish courts will not research the foreign law.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Yes, where certain criteria are met. The recognition and enforcement of foreign judgments in Ireland is determined by international conventions and treaties. Foreign judgments fall broadly within one of three categories, being; (a) judgments from courts of EU Member States, (b) judgments from countries which are party to the Lugano and/or Hague Conventions and (c) judgments from all other countries to which (a) and (b) do not apply. Irrespective of which category of jurisdiction a judgment falls within, an application can be made to the Irish courts to have the foreign judgment recognised in Ireland without having to re-litigate the facts of the case.

As New York falls within category (c), an application can be made to have the New York foreign judgment recognised in Ireland. In order for the judgment to be recognised and enforceable in Ireland, the Irish courts will have to be satisfied that; (i) the court in which the judgment is made had competent jurisdiction, (ii) the judgment is for a definite sum of money, (iii) the judgment is final and conclusive, and (iv) it is not contrary to public policy in Ireland.

Recognition and enforcement of non-final or non-money judgments (e.g. declaratory orders) are not facilitated at common law. Accordingly. it will be necessary to bring fresh proceedings in Ireland in which the foreign judgment or order forms the basis of the action.

As regards the Irish courts recognition of a judgment of the English courts, given the terms of the UK's departure from the EU on 31 December 2020 the position has become less clear. The future mutual recognition and enforcement of judgments as between Ireland (as a remaining EU Member State) and the UK has ended.

For judgments given in proceedings which began in the UK courts by 31 December 2020, Regulation (EU) No. 1215/2012 ("**Brussels I Recast**") will apply and those judgments will, in effect, fall within category (a) above and by virtue of Brussels I Recast should be treated as a judgment made by a court in Ireland. Similarly it will only be possible for UK judgment creditors to continue to use the European Enforcement Order relating to uncontested money judgments where an EEO certificate was applied for by 31 December 2020. For judgments obtained in English proceedings commenced after 1 January 2021, the recognition and enforcement in Ireland, as within the other remaining EU Member States, has become more complicated.

The UK had applied to join the Lugano Convention in April 2020; however, its accession was blocked by the EU in June 2021. The UK and EU are signatories to the Hague Convention. Under the Hague Convention Ireland should, subject to certain exceptions, recognise and enforce judgments made in the English courts where those judgments were made pursuant to an agreement that contains a choice of court provision granting the English courts exclusive jurisdiction. The protections afforded by the Hague Convention to a UK judgment creditor before the Irish courts are much more limited than under Brussels I Recast. There are also a number of uncertainties regarding the protections of UK judgment creditors under the Hague Convention, particularly whether the Hague Convention applies to contracts entered into before 1 January 2021, when the UK rejoined independently of the EU. Ultimately, these uncertainties may not be resolved until such time as applications for recognition by English creditors on this basis come before the Irish courts for determination.

For judgments granted by the English courts that do not fall within the ambit of Brussels I Recast or the Hague Convention (or the Lugano Convention if it does come into force with respect to the UK) then the recognition and enforcement of judgment of the English courts by the Irish courts will be considered in the same way as a judgment of, for example, the New York courts and the four criteria to enforcement referred to above will apply.

The Arbitration Act 2010 (the "**2010 Act**") adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law for all arbitrations, both domestic and international, which are seated in Ireland. The Model Law is not a treaty and it has no legislative force on its own. In general, the Model Law provides the substantive law governing arbitration in Ireland, while the 2010 Act supplements its provisions by clarifying or modifying their effect. The provisions of the 2010 Act are mostly technical in nature, while the broad framework for arbitration is set out by the Model Law.

Ireland is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which means that awards granted in Ireland will be directly enforceable and have reciprocal recognition in other states. The EU and the UK are also signatories to this Convention.

16. What (briefly) is the insolvency process in your jurisdiction?

Ireland has two insolvency procedures applicable to companies generally, being liquidation and receivership. Ireland also has now three statutory restructuring processes, being examinership, schemes of arrangement and a rescue process for small and micro companies, commonly referred to as the Small Company Administrative Rescue Process or "**SCARP**", which was introduced in 2021. Examinership and SCARP are available to companies that are insolvent or likely to become insolvent. Schemes of arrangement can be use by a company to restructure without a requirement to be insolvent.

Liquidation (or 'winding up') is a terminal process. The objective of the process is to realise the insolvent company's assets and distribute the proceeds to the creditors in accordance with the statutory rules of priority. Once all distributions have been made and the liquidation completed, the company will be dissolved. Liquidation, on an insolvent basis, can be commenced by court order on foot of a petition, which, in most circumstances will have been filed by a creditor (referred to as a 'compulsory' or 'court' liquidation). The insolvent company can also voluntarily resolving to put itself into liquidation by resolution of its shareholders (known as a 'creditors' voluntary liquidation').

On appointment, the powers of the board cede to the liquidator. The liquidator owes his duty to the body of creditors as a whole. A provisional liquidator (in relation to compulsory or court liquidation) can be appointed at any time after presentation of a winding-up petition and before the winding-up order is made. Provisional liquidators are usually appointed by creditors in order to preserve the assets of the company until the petition hearing.

A receiver is a person appointed by a security holder to realise the secured asset(s) in discharge or part discharge of the company's liability to the secured creditor. The receiver's function is to realise the secured assets and pay down or discharge any unpaid indebtedness from the proceeds. The circumstances of a receiver's appointment depend to a large extent on the provisions of the particular security document and loan agreement. The terms of the security document may provide for the appointment of a receiver and manager, in which case the receiver can continue to operate the business during the course of the receivership with a view to maximising the value of the secured assets. It would be common in such circumstances for the debenture or other security document to confer a range of specific powers on the receiver, such as the power to carry on business, to borrow, to sell and to compromise. A receiver appointed over the assets of a company will be granted such statutory powers as are contained in Irish company law in addition to any contractual powers contained in a security document.

Examinership is a court procedure available under the Irish company law to facilitate the survival of companies in financial difficulties. Examinership is a rescue mechanism which can be used by a company in financial difficulty where that company has a reasonable prospect of survival, if restructured. It allows a company a period of protection from its creditors within which time the examiner will endeavor to put together a survival plan. During this period of protection no holders of security may take any steps to enforce such security against the company.

The duration of the protection of the court is 70 days from the date of the presentation of the petition, which period may be extended by a further 30 days upon application to the court. The time period to finalise a restructuring in examinership has been temporarily extended to 150 days as part of a range of Covid-19 emergency measures currently in place until April 2022 (and which may be further extended). During this time the examiner will compile proposals for a restructuring plan, to assist the survival of the company or the whole or any part of its undertaking as a going concern. In order for the examiner's restructuring plan to be approved the examiner must persuade at least one class of creditors whose interests are impaired under the proposals to accept the scheme before it can be brought before the court for sanction. To approve the proposals a court will look to be satisfied that all classes of creditors will be treated fairly and equitably and the proposals are not unfairly prejudicial to any interested party.

Small and micro companies, as defined in the 2014 Act, may also avail of SCARP as established by the Companies (Rescue Process for Small and Micro Companies) Act 2021. The SCARP takes heavy influence from the examinership process, however it is primarily conducted as an administrative process which seeks to bypass the courts to the greatest extent possible. SCARP was enacted with the aim of offering a cost-efficient method of restructuring for small and micro companies, i.e., companies which satisfy two or more of the following requirements in a single financial year: (i) turnover does not exceed EUR12 million; (ii) balance sheet total not exceeding EUR6 million; and (iii) the average number of employees not exceeding 50.

SCARP involves the appointed insolvency practitioner, called the process advisor, producing a rescue plan for the company which may provide for a writing-down of the company's debt and/ or a cross-class cram down. Whilst such a rescue plan is prepared, it is possible for eligible companies to obtain a temporary moratorium on proceedings from creditors or to restrain further proceedings against the eligible company for a certain period. There is no automatic stay on enforcement action, the designated process advisor must apply to the court for a protection order and the relevant court must deem such an order necessary for the survival of the company.

A scheme of arrangement is a process which can be used by a company in financial difficulty to reach a binding agreement with its creditors to restructure. The company draws up the proposal and convenes a meeting of its creditors to vote on the scheme. If the requisite threshold of creditors vote for the scheme it can go forward for court approval and, where approved by the court, becomes binding on all creditors who had notice of the meeting and were entitled to vote. A company can continue trading during the process.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The capacity of a lender to enforce its rights as a secured party is not affected by liquidation proceedings entered into by a company. Should the realisations of the assets the subject of a lender's security fail to discharge the total debt owed to the lender, the secured creditor may claim the balance may be an unsecured claim in the liquidation process. However, the rights of a secured lender will be affected where the company has entered examinership proceedings in that it will not be in a position to enforce its security during the moratorium period. The value of a secured party's debt may also be written down as part of the examinership process.

Once a company has been put into liquidation, whether by order of a court or voluntarily, and a liquidator stands appointed, there is an automatic stay on taking or continuing with litigation against the company unless with leave of the court and subject to such terms as the court may direct.

18. Please comment on transactions voidable upon insolvency.

Certain transactions entered into by a company prior to its entering liquidation may be challenged under the provisions of Irish company law.

A liquidator can apply to the court for an order to set aside a security interest or a guarantee (or for the court to grant other relief) granted by a company on the grounds a security or guarantee constituted an unfair preference. The grant of a security or a guarantee can be found to be an unfair preference if it has the effect of placing a creditor (or a surety or guarantor of the company) in a better position in the event of the company's insolvent liquidation than if the security or guarantee had not been granted. For a challenge to be made, the decision to prefer must be made within the period of six months ending with the commencement of the liquidation if the beneficiary of the security interest or the guarantee is not a connected person. The look back period is two years if the beneficiary is a connected person. In addition, the company must have been insolvent at the time it gave the preference or become unable to pay its debts as a result. Any transfer of company property to a creditor can also be invalidated where such transfer was made with the dominant intention of securing a preference over other creditors in the company and was made within six months of the insolvency of the company (the period will be extended to two years where the transfer was made to a connected person).

If a company is shown to have been insolvent at the time of (or as a result of) granting a floating charge then a floating charge can be avoided on the action of a liquidator if it was granted in the period of one year ending with the commencement of the insolvency process. This period will be extended to two years where the floating charge has been created in favour of a connected person. The floating charge, however, will be validated to the extent of the value of the consideration provided for the creation of the charge in the form of money paid to, or goods or services supplied to, or any discharge or reduction of any debt of, the relevant company at the same time as or after the creation of the floating charge plus interest payable on such amounts

When a winding-up petition has been presented, any disposition of a company's property after the presentation of a winding-up petition in respect of that company, and not made by the liquidator once appointed, will be void unless court order is obtained to validate that transaction.

Details of charges over most categories of assets of a company are required to be registered with the CRO within 21 days of the creation of a charge. Where such registration is not made, that security is void as against any liquidator appointed to that company and the assets the subject of the security are available to the general body of creditors in the statutory order of priorities under Irish law.

Transactions in breach of the prohibitions on financial assistance and connected party transactions (see questions 10 and 11 above) are voidable, including at the instance of a liquidator.

19. Is set off recognised on insolvency?

Mutual debts can be set off in the event of insolvency. The rules in relation to set-off on insolvency are applicable whether a company is put into liquidation voluntarily or by order of the court. Insolvency does not affect the right of creditors to exercise their right of set-off against the claims of a debtor.

Contractual set-off arrangements are generally enforceable on insolvency insofar as they are consistent with the statutory set-off regime.

Where a debtor company is placed into examinership that is not a bar to the company's creditors exercising such rights of set-off as they may possess.

Whether statutory rules of set-off on insolvency can be contracted out of or waived under Irish law has not been decided conclusively to date. The position in Ireland, unlike in other common law jurisdictions, appears to be that a creditor can commute its right of set-off on insolvency for sufficient consideration.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

The order of priority of claims in an insolvent liquidation can be a complicated area. As a general rule, the order of priority of claims that can take priority to secured lenders holding fixed charge security are; (i) payments in respect of certain social welfare payments (often referred to as 'super-preferential' claims and (ii) the court-sanctioned remuneration, costs and expenses of an examiner if the examinership fails. If a lender's security is a floating charge, then, in addition to (i) and (ii), additional claims that will take priority are; (iii) fixed charge creditors, (iv) expenses certified by an examiner in an examinership, (v) liquidation costs and expenses and (vi) preferential claims of employees and to the Irish tax authority (certain rates and taxes, wages and salaries).

Assets that are the subject of a valid trust or retention of title clause will not be deemed to be assets of an insolvent company to be available for realisation and distribution to the creditors of the insolvent company.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

Trends in the Irish lending market are heavily influenced by ongoing political developments in Europe and especially in the UK. The impact that Brexit will have on the Irish economy remains to be seen although the hope is that the implementation of the Windsor Framework will address the most significant concerns regarding trade involving Northern Ireland and across the island of Ireladn more generally . It remains the case that that Irish companies appear to have adjusted well, generally speaking, to the post-Brexit environment and companies trading with and through the UK do not appear to have been adversely affected to any material extent.

Although the EU-UK Trade and Co-operation Agreement was signed in December 2020, the position regarding trade in services, and financial services in particular, is subject to further agreement between the EU and UK. Therefore, from 1 January 2021 UK-regulated lenders have been unable to make use of the European Single Market and can no longer offer their services on a cross-border basis using passporting arrangements.

However, the EU and the UK Joint Declaration on Financial Services Regulatory Cooperation ("**Joint Declaration**") agreed to establish a structured regulatory co-operation on financial services and reiterated their shared commitment to preserve financial stability, market integrity and the protection of investors and consumers. In this regard, the EU and the UK aim to finalise a Memorandum of Understanding ("**MoU**") establishing a framework for this proposed co-operation which will also provide for arrangements on how to deal with equivalence determinations.

On 26 March 2021, the EU and the UK confirmed that technical discussions on the text of the MoU referred to in Joint Declaration had concluded. At that time, both the UK and EU confirmed that a text of the MOU had been agreed in principle, but this has not yet been formally agreed or published. The agreement on the Windsor Framework may pave the way for further progress on this issue.

The impact of Brexit has yet to be fully quantified and has no doubt resulted in a level of uncertainty for foreign lenders within the industry. However, Ireland's relatively stable political platform has provided a degree of assurance to lenders and borrowers. This is particularly true given Ireland's common law system and its geographic location, being close to the UK and mainland Europe, which make it an attractive destination for international banks, currently operating out of the UK, looking to maintain an EU presence post-Brexit.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Over the past 10 years, Ireland has seen a substantial change in its debt funding landscape with the emergence of a large number of non-bank lenders in the Irish market, varying from funds to smaller private equity lenders. Consequently, the Irish lending market is more diverse than ever before and has led to a range of blended finance solutions for Irish companies.

For alternative lenders in Ireland who have already secured capital, Brexit could create additional lending opportunities, if banks adopt a more cautious approach to lending, particularly with regard to sectors that are heavily reliant on UK markets. However, traditional bank lending is still an important and material component in the Irish market.

Green finance remains to be an area of significant interest for lenders and this is only likely to grow in importance following the publication of the Irish Government's Climate Action Plan in November 2021.

As outlined above, the impact of Brexit and the extent to which it will affect the Irish lending market is currently unknown. However, Ireland's relatively steady political platform has provided much needed certainty to lenders and borrowers. Given that UK entities no longer have automatic access to the European Union Single Market in financial services, Ireland, as the most important remaining common law and English-speaking EU member is likely to be appealing to new market entrants. In addition, it has become apparent that Irish law is beginning to be used more regularly as the governing law for international finance transactions.

Levels of , lending activity in the Irish market remained strong through 2022 and a number of sectors performed strongly again, particularly real estate finance, leveraged/acquisition finance and fund finance. In the real estate finance space, residential development, especially for social and affordable housing, was also very busy.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

As set out above, the longer term implication of Brexit remain to be seen but it has not thus far resulted in any wide-spread amendment to secured lending documents or structures. While COVID-19, and particularly the termination of the Irish Government's financial supports for impacted businesses, has given rise to increased restructuring activity, the impact on documentation and structures has been minimal. Changes to documentation to take account of the LIBOR transition are a feature of the Irish market, but Irish loans are predominately denominated in euro in any event. The Irish lending market is largely following the lead of the Loan Market Association as regards changes necessitated by the LIBOR transition.

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