Lending and taking security in Ireland: overview

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OVERVIEW OF THE LENDING MARKET

1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

There have been a number of important developments in the Irish lending market in the last 12 months. One of the most significant developments is the divestment of loan portfolios by Irish banks, which are under pressure to deleverage their loan books.

There is growth in lending to certain sectors, notably commercial property. The National Asset Management Agency (NAMA) “bad bank” created to hold non-performing financial assets after the 2008 financial crisis continues to work through the various loan books it has acquired and it has reached a new stage in its development, post loan acquisition. Non-Irish banks continue to lend to Irish-based borrowers.

FORMS OF SECURITY OVER ASSETS

Real estate

2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

Real estate

Real estate consists of real property, as opposed to personal property, and includes any piece of land and the buildings on it. Real estate also includes the airspace above the land, the ground below it and any natural resources on it. Anything fixed, immovable or permanently attached to land is also included in the real estate.

Title to land can be freehold or leasehold in nature and can be registered or unregistered.

Common forms of security

The following forms of security can be taken over real estate:

- **Legal mortgage.** Before the implementation of the Land and Conveyancing Law Reform Act 2009 (2009 Act), the mechanism for creating a legal mortgage over land varied between registered and unregistered land. However, legal mortgages after 1 December 2009 are now covered by the same rules, irrespective of whether the land is registered or unregistered.

- **Equitable mortgage.** The 2009 Act did not affect the creation of equitable mortgages. An equitable mortgage may be created in Ireland in a number of ways:
  - where money is advanced on the assumption that a mortgage has been created;
  - where the mortgagor holds only an equitable interest in the land at the time of creating the mortgage;
  - where there is an agreement for a legal mortgage;
  - the deposit of title deeds.

If a mortgagor only has an equitable interest in the land, only an equitable mortgage can be created.

- **Fixed charge.** A fixed charge is a specific charge on specific property, such as on the land and buildings of a company, as security for a loan. A fixed charge can be contrasted with a floating charge. A fixed charge involves the vesting of a legal interest in the vendor of the loan at the time of the transaction. A fixed charge over land prevents the borrower from disposing of the land without the lender’s consent or without the discharge of liabilities owed to the lender.

- **Floating charge.** A floating charge over land is quite unusual, and is more appropriate or usual in respect of other assets such as stock (see Question 3).

Formalities

Registration is required to perfect security interests in land. The specific formalities in relation to real estate depend on whether the land is registered or unregistered. There are no specific time limits in respect of registration in the Registry of Deeds or Land Registry.

Registered land

Security interests in registered land must be registered with the Land Registry 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.

Where security is being created over property by a commercial mortgage or debenture, a Form 115 should also be filed with the Land Registry. This should technically be registered with the CRO within 21 days, although this is an unsettled practice in Ireland at present and there are differing views on the requirement to register with the CRO.

Unregistered land

Security interests in unregistered land must be registered with the Registry of Deeds.

Registration requirements

If a company creates a mortgage or charge over real estate, this must be filed with the Irish Companies Registration Office (CRO)
Tangible movable property

3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?

Tangible movable property

Tangible movable property can include trading stock (inventory), agricultural stock, goods, plant, machinery and vessels such as aircraft or ships.

Common forms of security

The following forms of security can be taken over tangible movable property:

- Fixed charge. A fixed charge attaches to a specific asset or class of assets on creation.
- Floating charge. The security will “float” over the asset and remains dormant until some further step is taken by or on behalf of the lender. This enables the borrower to deal with the asset over which the charge is created in the ordinary course of business, until the floating charge crystallises into a fixed charge. Crystallisation of a floating charge into a fixed charge takes place on the occurrence of an event specified in an automatic crystallisation clause or the borrower’s insolvency. Such specified events may include the:
  - appointment of a receiver;
  - start of a winding-up;
  - intervention of the chargee, when entitled so to do.

Floating charges have certain weaknesses, including:

- They have weak priority against purchasers (who are not on notice of any negative pledge contained in the floating charge) and chargees of the assets concerned, and against lien holders, execution creditors and creditors with rights of set-off.
- They rank after certain preferential creditors, such as claims of employees and certain taxes on a winding-up.
- They rank after certain insolvency remuneration expenses and liabilities.
- The examiner of a company has certain rights to deal with the property covered by the floating charge.
- They are affected by section 288 of the Companies Act 1963, which provides that a charge may be held to be invalid if created by the company within the period of 12 months before the commencement of a winding-up, unless it is proved that the company was solvent immediately after the execution of the charge. This is extended to a period of two years where a floating charge on the undertaking or property of a company is created in favour of a connected person.
- They rank after fixed charges.

Formalities

The same CRO registration requirements apply. Specific formalities apply in relation to different categories of assets:

- Agricultural stock. A fixed or floating mortgage can be created over agricultural stock, provided the chattels in question comply with the terms of the Agricultural Credit Act 1978 and are the absolute property of the mortgagor. Specific rules apply in relation to registration. If capable of being registered, and in order to be effective, the security interest must be registered in accordance with the terms of the Agricultural Credit Act 1978. The security must be registered within one month of creation with each Circuit Court in each district where the chattels are situated.
- Aircraft. A mortgage or fixed charge can be created over aircraft. Typically, registration is required under the terms of the Cape Town Convention in addition to the regular CRO filings (see Question 2), to ensure that the security is perfected. Registrations are made on a priority basis. Notice of the security interest may also be affixed to the aircraft, in accordance with the terms of the security document.
- Ships. Security over a ship can only be created by a statutory ship mortgage. Any security created over a vessel must be registered with the appropriate Registrar for Shipping. The Registrar for Shipping registers statutory ship mortgages on a priority basis. Notice of the security interest may also be affixed to the vessel.
- Movable plant and machinery. Security over movable plant and machinery is typically created by a fixed or floating charge. Registration should be made at the CRO (see Question 2) and notified by affixing notice of the security interest to plant or machinery.

Financial instruments

4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?

Financial instruments

Financial instruments are defined in the Directive 2009/44/EC on settlement finality and financial collateral arrangements (Settlement Finality and Collateral Arrangements Directive) (amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims). These include:

- Shares in companies and other securities equivalent to shares in companies.
- Bonds and other forms of instruments giving rise to or acknowledging indebtedness, if these are tradable on the capital market.

There are certain advantages (and disadvantages) of creating a legal mortgage as opposed to an equitable mortgage in the creation of security.
Common forms of security

Common forms of security over financial instruments include:

- Legal mortgage.
- Equitable mortgage.
- Fixed charge.
- Floating charge.

Formalities

Ancillary documentation should generally be sought in connection with any security over shares. This may include share transfer forms and the original share certificates. It is market practice to register the creation of security over shares at the CRO. An affidavit and stop notice should also be served on the company whose shares are being charged to put them on notice that the shares have been charged.

Legal mortgage. For a legal mortgage over shares to be effective, it must assign ownership in the shares to the lender. The transfer of the share certificate alone is not an effective means of transferring ownership. A share transfer form must accompany the assignment and the shares must be registered in the register of members in the name of the mortgagee. Further registration requirements may apply where the company uses the CREST system (the UK and Ireland central securities depository and electronic trade confirmation system). If so, the entry in the CREST register effects the transfer of legal title. A mortgage over shares must always make provision for the mortgagor’s equity of redemption.

Equitable mortgage. An equitable mortgage over shares may be created in a number of ways. This can include the deposit of the share certificate or an agreement to create security over the shares. Specific rules apply where an equitable mortgage is created by depositing the share certificate, such as the inclusion of a memorandum of deposit setting out particular details in relation to the security and the mortgagee’s rights. There are a number of potential risks associated with an equitable mortgage over shares, particularly in relation to priority, as equitable mortgages rank in priority in the order in which they are made.

The existence of the Financial Collateral Directive, provides for the integration of EU financial markets by removing administrative burdens and formalities in relation to the creation, validity, perfection and enforcement of security interests in cash and financial instruments. Reduced perfection requirements may apply, in particular the registration requirements under section 99 of the Companies Act 1963.

Claims and receivables

5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?

Claims and receivables

The most common types of claims and receivables over which security is granted are bank accounts and rent.

Common forms of security

It is uncommon to take security over receivables except by way of floating charge. However, security can also be created in the following ways:

- A mortgage in the form of a security assignment.
- A fixed charge.

Formalities

The first formality that parties should comply with, is to ensure that the contract creating the trade receivable does not contain a prohibition on assignment.

A security assignment over receivables is registerable as a fixed charge over book debts and must be registered with the CRO within 21 days (see Question 2). A section 1001 filing should be made with the Irish Revenue Commissioners within this 21-day period.

Cash deposits

6. What are the most common forms of security over cash deposits? How are they created and perfected?

Common forms of security

Common forms of security over cash deposits include:

- Security assignment.
- Fixed charge.
- Floating charge.

Formalities

Where a fixed charge or assignment has been created by a company, a Section 1001 notice in relation to book debts should also be filed with the Revenue Commissioners, under section 1001(3) of the Taxes Consolidation Act 1997. The Revenue Commissioners must be notified of the creation of the charge over book debts within the same 21-day period, and acknowledgement received from the Revenue Commissioners that they have received the notification and updated their records accordingly.

For a security assignment, in order to create a legal as opposed to equitable security interest, a notice of the assignment of the bank account must be served on the account-holding bank informing them that the account has been assigned. There is no time frame within which this notice must be served. It is not necessary to require the bank to acknowledge the notice.

Fixed charges on bank accounts can be re-characterised as floating charges if the requisite prohibition on dealing with the account and the monies in the account is not adequately provided for in the security document notice.
Country Q&A Ireland

Intellectual property

7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?

**Intellectual property**

The most common types of intellectual property over which security is granted include:

- Patents.
- Trade marks.
- Copyright.

**Common forms of security**

The most common form of security granted include:

- Legal mortgage.
- Equitable mortgage.
- Fixed or floating charge (depending on the notion of intellectual property). For example, in relation to patents, a mortgage and/or charge may be taken. A charge may also be taken over trade marks.

**Formalities**

Registration will be required at the CRO within 21 days of creation (see Question 2). Registration may also be required with the following entities, where relevant:

- Irish Patent or Trade Marks Office.
- European Patent Organization.
- Patent Cooperation Treaty.
- The Patents Office.

Certain local laws may take precedence over Irish law when it comes to fulfilling registration requirements. Both patents and trade marks can be registered, while copyright arises automatically and is not registrable.

**Problem assets**

8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?

**Future assets**

Security can be granted over future assets in Ireland, usually by way of an equitable interest over such assets. The borrower is often required by the lender to enter a further assurance clause that requires the borrower to create a legal interest once the future asset is acquired.

**Fungible assets**

Security can be granted over fungible assets. Fungible assets can include commodities, options and securities. As these kinds of assets are interchangeable in nature, it is more usual to create security over the account in which they are held as opposed to security over the assets themselves.

**RELEASE OF SECURITY OVER ASSETS**

9. How are common forms of security released? Are any formalities required?

In the case of fixed security, the security holder executes a deed of release. In the case of floating security, the security giver may deal with the secured assets in the ordinary course of business until the floating security crystallises.

A form C6 should also be registered with the CRO. On receipt of this, the CRO practice is to notify the person(s) entitled to the charge that a memorandum of satisfaction has been received for registration. The person(s) entitled to the charge then has 21 days to lodge an objection to the registration of the memorandum of satisfaction. If no objection is received, the satisfaction is registered and the security released.

**SPECIAL PURPOSE VEHICLES (SPVs) IN SECURED LENDING**

10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower’s assets, rather than to take direct security over those assets?

It is common to take security over both the shares of an SPV holding the assets (by means of a share charge) and the assets themselves (usually by means of a debenture). Where a lender fails to take security directly over the assets and a liquidator is then appointed, the lender runs the risk of losing control over how such assets are distributed.

**QUASI-SECURITY**

11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

While guarantees also constitute a form of quasi-security, these are dealt with separately in Question 12.

**Sale and leaseback**

A sale and leaseback arrangement is not characterised as taking security. This is typically where a company wishes to acquire and make full use of an asset but has insufficient capital to do so. If so, the owner of the asset sells the asset to a bank or a financier for the purpose of raising funds and then takes back possession of the goods by way of a lease.

**Factoring**

Factoring refers to the practice where a business sells its receivables at a discount to a factoring firm who then seek to recover the debt and secure a profit. There are a number of various forms of factoring, some of which are essentially debt collection services, and others that are similar in nature to security. Factoring is not commonly used in Ireland.
Hire purchase

Hire purchase agreements are agreements where a person hires goods for a fixed period by paying instalments, and can own the goods at the end of the agreement if all instalments are paid. The defining characteristic of a hire purchase agreement is that property in the asset does not pass until the final payment is made. While ownership does not pass until the last instalment has been paid, the goods can be used throughout the repayment period.

Retention of title

Retention of title clauses can also be described as conditional sale clauses. Generally, on an agreement for sale, title to property passes at the time at which the parties agree. The practice is often adopted where physical possession of property is transferred to purchasers on the agreement that title will not pass until some condition is met, typically that payment is received and the vendor retains title to the goods sold until payment is received in full. In order to be effective, retention of title clauses must be properly incorporated into the contract.

Other structures

Other forms of security include:
- **Negative pledges.** These are a form of covenant or restriction on a borrower. They are often set out in separate clauses and seek to prevent the borrower from transferring the benefits of its assets to another creditor, which would effectively reduce the assets available to the lender if the borrower becomes insolvent. When phrased correctly, a negative pledge clause can prevent the borrower from borrowing further money or creating any further security over its assets. A correctly drafted negative pledge clause also ensures that the anticipated proceeds from a pool of assets being charged are not diluted through subsequent charges.
- **Liens.** These allow a lienholder lender to retain possession of property (usually goods or documents) until debts in respect of goods or services have been discharged. There are various types of liens including contractual liens, statutory liens and liens arising by operation of law.

**GUARANTEES**

**12. Are guarantees commonly used in your jurisdiction? How are they created?**

Guarantees are commonly used in Ireland. The guarantor enters a written agreement to answer for the debt of another person (the borrower). A guarantee is a contract and is therefore subject to the general principles of contract law. In particular, a guarantee must be in writing and signed by the guarantor to be enforceable. Guarantees should always be executed as a deed to remove any concerns about the adequacy of the consideration passing to the guarantor.

The liability of the guarantor is contingent on the principal/borrower failing to perform its obligations. The guarantor is therefore liable if the borrower defaults.

The memorandum and articles of association of a company should include a specific power to guarantee. This should ideally be an express clause, as a “catch all clause” may not be sufficient to constitute a guaranteeing power for the purposes of Irish law. If the memorandum and articles do not contain such a specific power, the entering into of a guarantee by a company may be outside the scope of its powers.

Independent legal advice should always be sought/provided in relation to the giving of a guarantee.

**RISK AREAS FOR LENDERS**

**13. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?**

**Financial assistance**

Section 60 of the Companies Act 1963 prohibits an Irish company from giving directly or indirectly by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription by any person of or for shares in that company or its holding company. The statutory prohibition is very broadly drafted; the main rationale is the preservation of a company’s capital and shareholder/creditor protection.

Financial assistance can only be given in limited circumstances, such as where it falls within one of the legislative exceptions, or the whitewash procedure is followed. The whitewash procedure involves the swearing of a statutory declaration by a majority of the directors of a company as to the solvency of the company. Within 24 days of the statutory declaration, the shareholders of the company must pass a special resolution approving the financial assistance. The statutory declaration is then filed in the CRO within 21 days of the granting of the financial assistance.

**Corporate benefit**

The directors of an Irish company have a duty to act in what they consider to be the best interests of the company they direct. The transaction must be for the company’s commercial benefit and these requirements should be recorded in the board minutes of the company.

Directors must ask whether they can justify their company providing security for another company’s obligations (in terms of corporate benefit). The risk of giving third party security must be balanced against the actual or potential rewards. A parent company may justify giving security for a subsidiary’s borrowings (downstream security) because it will, directly or indirectly, hope to receive dividends from the subsidiary or benefit from any enhanced value in that subsidiary as a shareholder. Alternatively, a subsidiary might justify supporting its parent (upstream security) because of the support it receives from its parent in, for example, its marketing terms.

However, there are authorities to suggest that:
- Security can still be given, even where there is insufficient corporate benefit ([Rolled Steel Products Limited v BSC (1985) All ER 52; West Mercia Safetywear Ltd v. Dodd (1988) BCLC 250](#)) if:
  - the company’s shareholders unanimously agree; and
  - the company is not insolvent at the time and does not become insolvent as a result of the transaction.
- A company can sacrifice its short term interests for the good of the group ([Re PMPA Garage (Longmile) Limited (1992) ILRM 337](#)).
Additionally, the granting of security, and the liability incurred in respect of which the security was given, must be within the objects of the company as set out in its memorandum of association, otherwise it will be beyond the company's powers and therefore void.

**Loans to directors**

Section 31 of the Companies Act 1990 prohibits the provision of security by a company 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. There are a number of exceptions, including where the loan (or quasi-loan) is made to, or credit transaction is entered into with, a member of the same group. These transactions can sometimes be whitewashed in certain cases, but caution must be exercised as the whitewash procedure is limited and is not available in every instance.

**Usury**

Protection against excessive interest rates in Ireland is now afforded only to borrowers and consumers by the Consumer Credit Act 1995 as amended by s35 Central Bank and Financial Services Authority of Ireland Act 2003.

**Fraudulent and reckless trading.** Security holders should also consider company law provisions relating to fraudulent or reckless trading under sections 297 and 297A of the Companies Act 1963. Fraudulent trading essentially means carrying on the business of a company with intent to defraud creditors or for any fraudulent purpose.

If, in the course of a winding-up, it appears that any person was knowingly a party to carrying on any business of the company with the intention of fraudulent trading, that person may be exposed to personal liability for all or any part of the debts or other liabilities of the company. Fraudulent trading can attract both civil and criminal liability.

Civil liability can be imposed on any person for reckless trading where it appears, in the course of winding up or examinership proceedings, that while an officer of a company he was knowingly a party to carrying on any business of the company in a reckless manner or was engaged in fraudulent trading. That person may also be held personally responsible for all or part of the company's debts and liabilities.

Section 29, Companies Act 1990. Subject to certain exceptions, section 29 prohibits a company from acquiring assets from, or disposing of assets to, a director of the company, or of its holding company, or to a person connected with such a director, unless the company’s shareholders and, in some cases, the shareholders of its holding company approve the acquisition or disposal.

The consequences of a breach of section 29 are that:

- The transaction is voidable at the company's request.
- Any director and, if applicable, a person connected with him, who has entered into the transaction must account for any gain made by him and reimburse the company for any loss made by it.

14. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

The general principle under Irish law is that the polluter pays. However, a lender may be exposed to potential liability under environmental protection legislation, particularly existing provisions that can impose liability on an owner or occupier who causes or permits the damage. This description could include an owner, a lessee, any person entitled to occupy the premises, and any other person having control of the premises. Therefore, a lender could potentially fall within this category if occupying a premises in a default situation.

Additionally, potential liability may arise where a company is shown to operate or control the occupational activity that causes a breach of environmental law, under the European Communities (Environmental Liability) Regulations 2008.

The potential exposure of lenders to liability in this area is relatively limited. A lender is more likely to run the risk of becoming liable once it has enforced a security. However, in practice, lenders in Ireland tend to adopt a pro-active approach in lending contexts where possible environmental liability of this type may arise. For example, lenders usually undertake a degree of environmental appraisal or due diligence as part of the risk appraisal process in a commercial credit application and on-going practices such as environmental audits are a routine feature of many lenders' practices.

An alternative approach is to include an environmental indemnification agreement where the borrower undertakes to indemnify the lender in the event of liability arising.

**STRUCTURING THE PRIORITY OF DEBTS**

15. What methods of subordination are there?

**Contractual subordination**

Contractual subordination is possible and common in Ireland. It occurs where the senior lender and the subordinated lender enter into an agreement as a result of which the subordinated lender agrees that the senior debt will be paid out in full before the subordinated lender receives the payment of the subordinated debt.

**Structural subordination**

Structural subordination is also possible depending on the particular terms of a transaction. Structural subordination arises where one lender (the senior lender) lends to a company in a group of companies that is lower in the group structure than another lender (the subordinated lender).

**Inter-creditor arrangements**

Inter-creditor arrangements are common in Ireland, depending on the nature of the particular transaction. Typical parties include a senior lender, a junior lender, inter-group lender and a borrower. Typical terms in an inter-creditor agreement include provisions as to priorities, standstill, representations and warranties, covenants and other standard clauses.
DEBT TRADING AND TRANSFER MECHANISMS

16. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

Secured debt is traded in Ireland, usually by means of assignment, transfer or novation. An assignment of security should be notified to the security provider. A transfer or novation can be made with the security provider as a party to the transfer or novation. In the case of a transfer or novation, appropriate registrations should be carried out. Typically, Loan Market Association standard documentation would be relied on, which contains standard language in relation to novation and transfer.

AGENT AND TRUST CONCEPTS

17. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

The agent concept is recognised in Ireland.

In a syndicated loan arrangement, the borrower would usually grant a mandate to a “lead bank”, which will then arrange for a syndicate of banks to be set up to provide the necessary finance to the borrower. Liability of an agent is usually limited by the underlying documentation appointing the agent.

18. Is the trust concept recognised in your jurisdiction?

The concept of a trust (and trusts created under the law of another jurisdiction) is recognised in Ireland.

A security trustee can enforce its rights in the courts in Ireland, usually in accordance with the terms of the relevant security document. However, the rights of the security trustee may also be subject to legislative or other public policy considerations.

ENFORCEMENT OF SECURITY INTERESTS AND BORROWER INSOLVENCY

19. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

The circumstances in which a lender can enforce its loan, guarantee or security interest under Irish law are largely dependent on the terms of the underlying loan and terms set out in the security documentation. Typical events of default contained in loan agreements include:

- Non-payment by the borrower of the principal amount or interest when due.
- Non-compliance, such as a failure to observe the covenants or comply with the representations and warranties as set out in the loan agreement.
- Cross-default.
- Insolvency, such as the appointment of an examiner, receiver or liquidator, or the occurrence of some other specified insolvency event that affects the borrower.
- Material adverse change, such as a change in the financial condition of the borrower.

Methods of enforcement

20. How are the main types of security interest usually enforced? What requirements must a lender comply with?

The normal methods of enforcement are for the security holder to appoint a receiver under the terms of the charge deed, or for the charge-holder to become a mortgagee in possession of the charged asset. It is not necessary to obtain a court order to appoint a receiver. For real property it may be necessary to obtain a court order for possession, if the security holder wishes to go into direct possession. Once possession is obtained, it is not generally necessary to get a court order for sale.

Enforcement may be prevented by the appointment of an examiner to the company that created the security. The examiner is appointed by the court where a creditor, shareholder or the company petitions the court and the court is satisfied that there is a reasonable prospect that the appointment of an examiner will facilitate the company or part of the company’s business surviving as a going concern. The examiner is typically appointed for 70 days (but this may be extended to 100 days or in exceptional cases, longer) during which time an examiner endeavours to put a scheme of arrangement in place where the company's creditors will write off part of the amounts owing to them and the company continues to trade.

Rescue, reorganisation and insolvency

21. Are company rescue or reorganisation procedures (outside of insolvency proceedings) available in your jurisdiction? How do they affect a lender’s rights to enforce its loan, guarantee or security?

There are two main company rescue procedures:

- Examinership. Examinership is the main rescue procedure for companies nearing insolvency. The emphasis is on introducing a scheme of arrangement that would assist the survival of the company as a going concern. To aid this process, the company is granted court protection so that, in effect, the rights of the creditors and other third parties against the company are frozen for a period of time (a maximum of 100 days, plus the time required by the court to make the decision). It is commenced by a petition to the court by any of the directors, creditors or shareholders.
- Company voluntary arrangements (CVAs). A CVA is a court-sanctioned procedure to enable a company in financial difficulty to reach a compromise or arrangement with its creditors and avoid liquidation. As a secured creditor is free to enforce its security while the CVA is pending, it is rarely used in practice.

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22. How does the start of insolvency procedures affect a lender’s rights to enforce its loan, guarantee or security?

Security may be set aside in certain circumstances on the beginning of insolvency procedures. There will also be a stay on execution on the appointment of an examiner.

23. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?

There are certain circumstances in which security granted by a company may be vulnerable to being set aside within certain time limits if the grantor subsequently becomes insolvent. Such reviewable transactions include:

- **Fraudulent preferences.** A fraudulent preference is deemed to have been given where the company entered into a transaction with a view to giving a creditor or guarantor of that creditor a better position than it would otherwise have been in if the company goes into insolvent liquidation. The hardening period is six months.

- **Invalid floating charges.** A floating charge on the company’s property may be invalid if it is given in exchange for prior consideration and the company was insolvent at the time or became insolvent as a result of the transaction. It is also invalid if it is granted in the 12 months before the start of the company’s liquidation (or two years if the floating charge is granted to a connected person).

- **Guarantees.** In certain circumstances guarantees may be void where the common law contractual defences (such as undue influence, *non est factum*, duress or unconscionable bargain) are successfully proven.

24. In what order are creditors paid on the borrower’s insolvency?

The priority in which claims are paid is broadly as follows:

- Remuneration, costs and expenses of an examiner that had been sanctioned by the court under section 29 of the Companies (Amendment) Act 1990 are paid in full before any other claim, secured or unsecured.

- Debts due to fixed chargeholders. Assets that are subject to a fixed charge belong to the security holder and not to the company and, accordingly, whether or not the liquidator deals with them is at the request of the secured creditor.

- Expenses certified by an examiner under section 10 of the Companies (Amendment) Act 1990 rank after claims of fixed charge holders (section 29(3), Companies (Amendment) Act 1990).

- Costs and expenses of the winding-up (priorities in relation to costs in a liquidation are set out in the Rules of the Supreme Court Order 74, Rule 128).

- Fees due to the liquidator.

- Any claim under section 16(2) of the Social Welfare (Consolidation) Act 1993, that is any sum deducted by an employer from the remuneration of an employee in respect of an employment contribution due by the employer and unpaid by the employer does not form part of the assets of a limited company in a winding-up. A sum equal to that deducted must be paid into the Social Insurance Fund ahead of all preferential debts (super preferential claim).

- Preferential debts, such as rates and taxes, wages and salaries (section 285, Companies Act 1963).

- Floating charges rank in the order of their creation.

- Unsecured debts ranking equally with each other.

- Deferred debts ranking equally with each other.

Within each ranking, all claims in one category receive full payment before any remaining proceeds are distributed to creditors in the following category. When proceeds are insufficient to meet claims of one category in full, payments for that category are pro-rated.

It is possible for the secured creditors to agree among themselves the order of application of the proceeds of the enforcement of their security so far as their secured claims are concerned.

25. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders?

There are no restrictions on granting security to foreign lenders.

26. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

There are no exchange controls in Ireland restricting payments to a foreign lender.
TAXES AND FEES ON LOANS, GUARANTEES AND SECURITY INTERESTS

27. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security interest?

Documentary taxes
Stamp duty for mortgage deeds executed on or after 7 December 2006 is now abolished.

Registration fees
Registration of security at the Companies Registration Office costs EUR40 (this includes registration of a Form C1, Form 8E or equivalent form). Registration of a Form C6 with the CRO costs EUR15.

Registration at the Circuit Court usually amounts to no more than EUR1 for each registration. Registration at the High Court costs stamp duty of EUR15.

The costs of registering security against intellectual property differ quite substantially depending on whether local as well as international filings are to be made, as trade mark attorneys are used to make the registrations.

The cost of registering the security in the Registry of Deeds is EUR50 for each deed registered.

The cost of registering security in the Land Registry is now EUR175, under the introduction of the Land Registry Fees Order 2012, which came into effect on 1 December 2012.

Notaries’ fees
There is no set fee for the services of a notary in Ireland. A proper professional fee is usually paid depending on the time spent, the skill of the notary in question and the level of responsibility.

28. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security interest?

The fees involved in the granting and enforcement of a loan, guarantee or security interest are generally not significant and vary between transactions.

REFORM

29. Are there any proposals for reform?

The Irish Government published a complete draft of the proposed new Companies Bill (Bill) in December 2012 which, when enacted, will consolidate and reform existing Irish company law.

Part 7 of the Bill (in relation to the registration of charges and priority) is of particular relevance and proposes to reform and consolidate the law in relation to security created by companies in Ireland. There is a proposed change to the definition of what constitutes a charge. The Bill also proposes amendments to the law relating to the registration of charges. It is proposed that registration of a charge may follow either a one-stage or two-stage process. The proposed one-stage process is similar to the current regime while the two-stage process would involve giving notice to the Registrar of Companies of a company’s intention to create a charge. It is proposed that this would be followed by a further notice within 21 days stating the creation of a charge.

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