
CHAMBERS GLOBAL PRACTICE GUIDES

Banking & Finance 2022

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Ireland: Law & Practice
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Law and Practice

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1. Loan Market Panorama

1.1 Impact of the Regulatory Environment and Economic Cycles

Lending activity has continued to operate at a high level across all industries this year. Following the significant decline in real estate finance activity as a result of the pandemic during 2021, there has been a strong resurgence with this area returning to pre-pandemic levels. Overall, the confidence in availability of capital and appetite to support Irish businesses that was evident in 2021 has continued. This is despite the presence of several macro-economic challenges, such as COVID-19, the unfolding Ukrainian crisis, global supply chain uncertainties and inflationary pressure.

However, some uncertainty has developed in the lending market as it remains to be seen how significant of an effect expected European Central Bank interest rate hikes, aimed at easing inflation, will have on the lending market. Additionally, a majority of banks expect inflation will negatively impact their strategy moving forward towards 2023. Borrowers have been preparing for pending inflationary pressure with certain borrowers seeking increases to and additional working capital facilities.

As the impact of Brexit continues to be monitored, it is clear that no significant changes have been caused in the Irish loan market, with Ireland still having close economic and political ties to the United Kingdom.

Positive consequences of Brexit for the Irish loan market include a noticeable increase in Irish law being the governing law for international finance transactions and, in particular, in relation to project financing. As well as this, large international banks operating in Ireland including AIB, BOI,

Barclays, Bank of America, Citibank and others have boosted their balance sheets by as much as EUR200 billion since the Brexit referendum, second only to Germany in terms of the value of assets that were moved from UK to EU banks post-Brexit.

1.2 Impact of the COVID-19 Pandemic

The COVID-19 pandemic had a very significant impact on the loan market in Ireland. Initially, the pandemic caused immediate cashflow and liquidity issues for borrowers in certain industries. Certain of these borrowers were quick to act to utilise headroom under their existing facilities, exercise accordion and extension options together with seeking uplifts to existing credit lines. Conversely, borrowers in certain other industries have exceeded performance expectations during the pandemic and, as a result, some borrowers have entered into refinancings or negotiating more favourable terms with their existing lenders.

The COVID-19 pandemic had a particularly significant impact on SMEs and retail customers. In response, the Banking and Payments Federation of Ireland (BPF) announced on behalf of certain retail banks, non-bank lenders and credit servicing firms that a six-month payment break was to be made available to certain mortgage holders, personal borrowers and SMEs.

Following this payment break, the focus shifted to putting supports in place for customers coming off payment breaks, with an emphasis on active lender-borrower engagement and tailored solutions to reflect individual circumstances. Such supports included the publication of a BPF guide for SMEs outlining the supports available to them as they work towards recovery post COVID-19, and the implementation of the government backed Credit Guarantee Scheme. This

scheme offered a partial government guarantee (80%) to participating lenders against losses on qualifying finance agreements to eligible SMEs, small mid-caps and primary producers.

As of the of 1 July 2022, this Credit Guarantee Scheme has been replaced by the COVID-19 Loan Scheme. This new scheme will provide access to low cost loans between EUR25,000 and EUR1.5 million over terms of one to six years to SMEs and other businesses. Credit will be available without security where the loan amount is less than EUR500,000 and the finance will typically feature a lower interest rate than other comparable lending in the market. Additionally, up to 30% of new loans under the scheme may be allowed for refinancing of existing short-term credit.

Changes as a Result of COVID-19

On 1 August 2020, the Companies (Miscellaneous Provisions) (COVID-19) Bill 2020 was signed into law. The Bill makes temporary amendments to the Companies Act 2014 and the Industrial and Provident Societies Acts 1893–2018 to address issues arising as a result of COVID-19.

It makes provision in respect of business solvency by increasing the period of examinership to 150 days and increasing the threshold at which a company is deemed unable to pay its debts to EUR50,000. The Bill also allows for documents which are required to be executed under seal to be executed in counterpart, as well as certain flexibilities around the holding of creditor and shareholder meetings, including annual general meetings (AGMs) of Irish companies, by electronic or hybrid means. These measures have since been extended and are now due to remain in place until 31 December 2022, with a possibility for further extension by way of government order.

1.3 The High-Yield Market

Irish entities in various industry sectors may be involved in high-yield bond transactions, often as borrowers and guarantors, and in certain circumstances as high-yield bond issuers.

Irish incorporated special purpose vehicles (SPVs), often referred to as “Section 110 companies”, are normally used as high-yield bond issuers in certain European high-yield transactions, often to avoid covenant breaches or local law restrictions on guarantees of securities. Section 110 companies are named as such because Section 110 of the Taxes Consolidation Act 1997 allows for special tax treatment for “qualifying companies”.

Favourable tax laws allow these structures to be, in most cases, tax neutral (with no annual minimum profit or “spread” required at the SPV level) and a “quoted eurobond” exemption. This, together with numerous double taxation treaties, allows interest on securities to be paid gross. A minimal share capital requirement makes incorporating an Irish SPV an easy and attractive process.

European High-Yield Bonds

European high-yield bonds are normally marketed as private placements, primarily to attract US investor interest as well as participation from European investors. These transactions are usually led through London or the USA, and New York law or English law are typically the governing laws of such transactions. The authors are unaware of any high-yield bonds which have been governed by Irish law to date.

Whereas lenders in loan financings would tend to be traditional banks and other financial institutions, investors in high-yield bonds would typically be institutional investors (including invest-

ment banks, insurance companies, pension funds, hedge funds, investment managers and mutual funds) looking for higher rates of return through more aggressive lending practices.

1.4 Alternative Credit Providers

There has been a continued increase in the prominence of alternative credit providers in the Irish market since the financial crisis. The market share of new lending attributed to alternative lenders has increased from 3% in 2018 to 13% in 2021. Non-bank lending is currently concentrated in the buy-to-let and refinance segments of the market, when compared to lending by retail banks. The alternative credit providers group include a diverse collection of direct lenders, debt funds and debt arms of hedge funds and buyout houses. This allows borrowers to be more selective when choosing lenders and results in greater liquidity as well as more competitive pricing and terms.

1.5 Banking and Finance Techniques

In recent years, there has been a continued growth in the asset-based lending market. This has been particularly noticeable in the commercial and residential property development industries, especially in Dublin. Asset-based lending has benefited both lenders and borrowers through reduced credit risk and competitive pricing.

Irish-incorporated real estate investment trusts (REITs) can be listed on the main market of a recognised stock exchange of any EU member state, which has had the effect of attracting fresh capital into the Irish property market. There has also been a recent trend of advancing unsecured debt to REITs, which improves their balance sheet strength. To accommodate this, lenders have been making use of covenant packages

which limit the amount of secured debt a REIT can issue.

After the economic crash in 2008, there was a noticeable increase in the use in invoice discounting as a financing tool. The Irish Asset and Invoice Finance Association anticipates that Irish businesses will repeat this trend as the economy continues its recovery from the effects of the pandemic.

1.6 Legal, Tax, Regulatory or Other Developments

Legal Developments

The effectiveness of contractual automatic crystallisation clauses appears to have been affirmed in a High Court case from November 2020. In *Latur Ltd (in receivership) v Companies Act 2014* [2020] IEHC 592, the High Court held that “there is no rule of law precluding parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise on the happening of an event, or a particular step taken by the chargee”. It also confirmed that while a crystallised floating charge will de-crystallise during an examinership in order to allow the statutory scheme to operate, once the examinership period of protection ceases without the court having approved proposals for the survival of the company, the charge will re-crystallise once again.

Regulatory Developments

In recent years, there has been a push towards the filing and maintaining of beneficial ownership details for certain entities and arrangements. This is driven by EU anti-money laundering directives that have been transposed into Irish law by way of regulations.

- The Central Register of Beneficial Ownership of Companies and Industrial and Provident

Societies was established in June 2019, and requires most Irish companies to file their beneficial ownership details on this central register which is maintained by the Irish Revenue Commissioners.

- Since June 2020, certain financial vehicles must file their beneficial ownership details with the Central Bank's Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles, Credit Unions and Unit Trusts.
- More recently, the Irish Revenue Commissioner's Central Register of Beneficial Ownership of Trusts was established in April 2021. Relevant trusts must file their beneficial ownership information within six months of their creation.

Additionally, Russia's invasion of Ukraine has caused a number of significant regulatory developments in Ireland. As a result of Ireland's membership of the EU all sanctions imposed on Russia by way of EU Regulations are directly effective in Ireland. The Central Bank of Ireland is designated as the competent authority to deal with suspected breaches of these sanctions which include:

- restrictions on import and export of coal, oil and other goods;
- introducing asset freezes, restricting access to funds and assets of named, high-ranking and wealthy individuals with close links to Russia;
- restrictions on transactions with Russian banks; and
- additional financial transaction restrictions.

Ireland's exposure to the conflict is relatively minor compared to some of our EU neighbours, with Ireland's primary exposures relating to

aircraft leasing, pharmaceutical products and imports of petroleum and fertilisers.

1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending

In the past year Ireland has continued its shift towards increased ESG reporting requirements for companies and the popularity of green loans and sustainability-linked loans has continued to rise.

ESG Reporting

The current regime for ESG reporting is based on the Non-Financial Reporting Directive 2014/95/EU. However, it is expected that by the end of 2022 this will be replaced by the Corporate Sustainability Reporting Directive (CSRD), which Ireland will then have 18 months to transpose into Irish law.

The CSRD is set to standardise and simplify sustainability reporting for companies creating one format that meets the needs of EU regulators, investors and other stakeholders. Though the scope of companies subject to ESG reporting is increased by the CSRD, this type of reporting will still not apply to smaller non-listed companies. However, given the recent expansion of the application of ESG requirements as well as the fact that investors are increasingly looking towards a company's performance against ESG performance metrics when evaluating a company, it looks as though many companies not yet subject to reporting under CSRD are expected to take pre-emptive steps by making firm commitments to their ESG practices and policies.

Green Loans and Sustainability-Linked Loans

The year 2022 has seen a greater volume of green finance and sustainability-linked loans as banks continue to deliver on their core values

and sustainability commitments. The legislative environment also continues to evolve with the EU introducing numerous legislative initiatives including the EU Taxonomy Climate Delegated Act, which sets out technical screening criteria for disclosures required under the EU Taxonomy Regulation. This will help lenders and borrowers assess whether a financial product meets the necessary hallmarks to be considered “sustainable financing” and, together with the Green Bond Standard, should assist with the harmonisation of the green loan and green bond markets across Europe.

Green loans have primarily been made available in the property finance and development finance space together with individual large corporates where they have specific green projects as part of their overall ESG strategy.

The availability of green loans and sustainability-linked loans had been limited to the PLC and large corporates, but this year has seen further expansion into the mid-size corporate market as well as small and medium-size enterprises. Ireland is set to be a key player on the sustainable finance world stage with Sustainable Finance Ireland (SFI) with the publication of its National Sustainable Finance Roadmap in late 2021, setting out its plans to make Ireland a leading sustainable finance centre by 2025.

This is an area that is expected to develop further over the next 12–24 months and anticipate that borrowers who have not introduced this concept into their loan agreements will be an outlier in the loan market.

In relation to the contractual terms contained in loan agreements, it will be interesting to see how this develops and where the market ends up in relation to:

- the level of margin reduction;
- whether the margin will go both ways (ie, up and down) or just down;
- the reporting requirements;
- independent verification or self-certification; and
- ambitious target setting.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

The Central Bank of Ireland is responsible for prudential regulation and supervision of credit and financial institutions. Wholesale lending to companies generally does not require authorisation, provided the lender does not take deposits, carries on investment services or provides services to consumers. Traditional banks, those which create securities and fall within the definition of a banking business, are required to hold a banking licence.

A bank authorised in another EEA member state (the home state) can passport its services through establishing a branch in Ireland, or by providing its services in Ireland (the host state) on a cross-border basis.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

At a high level, there are no restrictions on the granting of loans in Ireland by foreign lenders. However, there may be restrictions on loans for certain purposes (eg, mortgage lending) and to certain persons (eg, consumers or SMEs).

3.2 Restrictions on Foreign Lenders Granting Security

There are no specific restrictions under Irish law on the granting of security or guarantees to foreign lenders.

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions, controls or other concerns on and regarding foreign currency exchange, save that a person (legal or natural) shall not operate as a Bureau de Change Business in the absence of an authorisation from the Central Bank of Ireland under Part V of the Central Bank Act 1997 (as amended from time to time).

3.4 Restrictions on the Borrower's Use of Proceeds

Ireland is required to comply with UN and EU sanctions law. In addition, lenders regularly require contractual assurances from borrowers in order to comply with such sanctions law, together with all applicable anti-corruption, anti-money laundering and counter-terrorism laws.

3.5 Agent and Trust Concepts

The agent concept is well recognised and established in Ireland. The role of the agent is governed by the loan documentation.

The concept of a trust is also recognised in Ireland. The security trustee is a trustee of the syndicate members with fiduciary duties to the syndicate members for the duration of the loan contract. The role and rights of the security trustee is governed by the loan documentation and may also be subject to legislative or other public policy considerations.

3.6 Loan Transfer Mechanisms

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 (or in accordance with the terms of the underlying security document). A transfer or novation can be effected 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 in the Irish Companies Registration Office (CRO) and/or Land Registry and/or Registry of Deeds (as applicable). Typically, Loan Market Association standard documentation is relied on, which contains standard language in relation to novation and transfer.

3.7 Debt Buy-Back

This will depend on what is commercially agreed between the lender(s), borrower(s) or sponsor(s), but there is no restriction under Irish law to agree terms relating to the buy-back of debt. However, there could be restrictions contained within the loan agreement in relation to the ability for a borrower or sponsor to buy-back debt.

3.8 Public Acquisition Finance

Certain funds provisions in credit agreements originate from the requirements of the Irish Takeover Rules which govern the takeover of any public limited company incorporated in Ireland. The Irish Takeover Rules require that a bidder must announce a bid only after ensuring that it can fulfil in full any cash consideration (if any is offered) and after taking all reasonable measures to secure the implementation of any other type of consideration. A financial advisor also must stand behind any bid and confirm that the relevant bidder has certain funds; ie, that the funding will be available on the completion of the acqui-

sition of the securities to pay the full amount due. This position must be confirmed in the Rule 2.5 Announcement and the offer document.

Certain fund provisions are specifically negotiated for the relevant public acquisition finance transaction and tend not to be standard provisions contained in other acquisition finance transactions. Whether short- or long-form documentation is to be used will normally depend on the credit requirements of the relevant lenders. Although the main provisions of finance documents are set out in the offer document, such details are not required to be publicly filed or registered in Ireland.

4. Tax

4.1 Withholding Tax

A company making a payment of yearly interest which has an Irish source is subject to withholding tax at a rate of 25%. There are, however, a number of exemptions under Irish law with respect of withholding tax, which would need to be assessed on a case-by-case basis.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Documentary Taxes

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

Registration Fees

When a charge is created over most types of assets in Ireland, details of the charge must be filed with the CRO within 21 days of the creation of the security (the main exceptions to this are shares and cash). While the introduction of the Companies Act 2014 saw the introduction of mandatory e-filing for certain forms such as Form C1 (Registration of a Mortgage or charge

created by Irish company), many forms could not be filed online. The CRO online portal received an overhaul in December 2020 and, as a result, most forms can now be filed online, including the following.

- A Form C1 (Registration of a Mortgage or charge created by an Irish company) must be completed online. The registration cost (this includes the registration of Forms C1A and C1B) is EUR40.
- In the case of registered external companies, the cost of registering Form e-F8 and Form e-F8A (Registration of particulars of a charge on property in the State created by a company incorporated outside the State – there is no cost to register Form e-F8B) is EUR40.
- Registering a Form C6 (Declaration of satisfaction of a charge) or Form C7 (Declaration of partial satisfaction of a charge) costs EUR15. These forms must be filled out online.

There is no fee payable in relation to a Section 1001 notice to the Irish Revenue Commissioners.

In relation to intellectual property, as trade mark attorneys are used to make the 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 EUR50 for each deed registered. The cost of registering security in the Land Registry is EUR175.

Notaries' Fees

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

4.3 Usury Laws

Protection against excessive interest rates in Ireland is afforded to borrowers and consumers by the Consumer Credit Act 1995, as amended by Section 35 of the Central Bank and Financial Services Authority of Ireland Act 2003.

Lenders should be aware of the treatment of default interest under Irish law. The judgments handed down by the Court of Appeal in July 2018 (*Sheehan v Breccia/Flynn and Benray v Breccia*) address 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. It would, therefore, be pragmatic for lenders to include a tailored, negotiated term in the credit agreement relating to default interest (rather than relying on the default interest provisions contained in the standard terms and conditions) in order to give the lender the best chance of such provisions not being considered a penalty.

5. Guarantees and Security

5.1 Assets and Forms of Security

Real Estate

Real estate includes real "immovable" property as opposed to personal property. It includes:

- any piece of land and the buildings on it;
- the airspace above the land, the ground below it and any natural resources on it;
- anything fixed, immovable or permanently attached to land; and
- 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 (the "2009 Act"), the mechanism for creating a legal mortgage over land varied between registered and unregistered land. However, legal mortgages post 1 December 2009 are now covered by the same rules, irrespective of whether the land is registered or unregistered in nature.
- **Equitable mortgage:** the 2009 Act has not had any effect on the creation of equitable mortgages. It is generally agreed that an equitable mortgage may be created in Ireland in a number of ways:
 - (a) where money is advanced on the assumption that a mortgage has been created;
 - (b) where there is an agreement for a legal mortgage;
 - (c) by deposit of title deed; and
 - (d) where the mortgagor holds an equitable interest only in the land at the time of creating the mortgage.
- **Fixed charge:** a fixed charge is, for example, a specific charge on the specific property of a company, eg, on the land and buildings of the company, as security for a loan. A fixed charge invariably involves the vesting of a legal interest in the chargee at the time of the transaction. A fixed charge over land effectively places an embargo on the borrower, precluding them from disposing of the land without the lender's consent or 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.

Formalities

It is generally agreed that registration is the “operative perfection mechanism in respect of security interests in land”. The specific formalities in relation to real estate in Ireland 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. The 2009 Act introduced compulsory first registration in respect of sales of interests in unregistered land, applicable to all counties as of 1 June 2011.

As mentioned in **4.2 Other Taxes Duties, Charges or Tax Considerations**, registration requirements with the CRO also exist in respect of Irish corporate bodies. If a company has created a mortgage or charge over real estate, a relevant filing must be lodged with the CRO within 21 days of the creation of the security. Section 412 (3) of the Companies Act 2014 provides that the priority of a charge will be determined by the date and time of receipt by the registrar of a fully filed charge submission, not the date of the creation of the charge, therefore timely filings are of significant importance. Failure to register the charge, by delivering details to the CRO within 21 days of the creation of the charge or notice to create the charge, will result in making the charge void against a liquidator of the company and any creditors.

If a company has failed to comply with Section 409 of the Companies Act 2014, an application can be made under Section 417 of the Companies Act 2014 to the High Court for an order requesting an extension of the time afforded to effect registration of the charge. If the registration requires amending, based on an omission or misstatement, an order of rectification can also be applied for under these provisions.

When the CRO is satisfied that the statutory requirements have been met, a certificate of charge is issued. The certificate is conclusive evidence that the requirements of the Companies Act 2014 have been complied with.

Tangible Movable Property

Tangible movable property in Ireland could 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: a fixed charge and a floating charge.

A fixed charge attaches to a specific asset or class of assets on creation. With a floating charge, the security “floats” over the asset and remains dormant until some further step is taken by or on behalf of the chargee. 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 may occur on the happening of a specified event or on insolvency of the borrower. These could be such as when a receiver is appointed, or a winding-up commences, or if the chargee intervenes when entitled to do so. An automatic crystallisation clause is one stipulating that a floating charge will crystallise on some specific event occurring. The introduction of the Companies (Accounting) Act 2017 clarifies that crystallised floating chargeholders will not take priority over certain preferential creditors, such as claims of employees and certain taxes on a winding-up.

It should be noted that 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 597 of the Companies Act 2014 (Circumstances in which a floating charge is invalid); and
- they rank after fixed charges.

Formalities

For general registration requirements, please see above. Specific formalities apply in relation to different categories of assets.

Agricultural stock

A fixed and/or floating mortgage can be created over agricultural stock provided the chattels in question comply with the terms of the Agricultural Credit Act 1978 (as amended) 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. Essentially, the security must be registered within one month of creation with each Circuit Court in each district where the mortgagor's land on which the chattels are situated is located.

Aircraft

A mortgage or fixed charge can be created over aircraft. The registration requirements in respect of aircraft are twofold:

- first, where certain conditions are met, registration of the interests of relevant parties may be required under the terms of the Convention on International Interests in Mobile Equipment (Cape Town Convention);
- second, the regular CRO filings are required: registrations are made on a priority basis and notice of the security interest should also be affixed to the aircraft.

Movable plant and machinery

Security over a movable plant and machinery would typically be done by way of a fixed or floating charge. Registration should be made at the CRO and notification by affixing the security interest to plant or machinery.

Ships

Security over a ship must be done by way of 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 should also be affixed to the vessel.

Financial Instruments

Financial instruments are defined in Directive 2002/47/EC on financial collateral arrangements, as amended by Directive 2009/44/EC and Directive 2014/59/EU, which has now been transposed into Irish law as including:

- 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; and
- any other securities that are normally dealt in and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment).

Common forms of security

Common forms of security are:

- legal mortgage;
- equitable mortgage;
- fixed charge; and
- floating charge.

Note that there are certain advantages (and disadvantages) of creating a legal mortgage as opposed to an equitable mortgage in the creation of security under Irish law.

Formalities

In general, any ancillary documentation should be sought in connection with any security over shares. This may include stock transfer forms and the original share certificates. An affidavit and stop notice can also be served on the company whose shares are being charged to put them on notice that the shares have been charged.

Claims and Receivables

The most common types of claims and receivables under Irish law over which security is granted include bank accounts and rent.

Common forms of security

It is generally not common to take security over receivables in Ireland except by way of floating

charge. However, security can also be created by way of:

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

Formalities

The parties must ensure that the contract creating the trade receivable does not contain a prohibition on assignment. A security assignment over receivables is registrable as a fixed charge over book debts and must be registered with the CRO within 21 days. Note that a Section 1001 filing should be made with the Irish Revenue Commissioners within this 21-day period, in accordance with the terms of Section 1001(3) of the Taxes Consolidation Act 1997.

Cash Deposits

Common forms of security

The most common forms of security over cash deposits are:

- security assignment;
- fixed charge; and
- floating charge.

Formalities

Where a fixed charge or assignment has been created by a company, a Section 1001 notice in relation to book debts must also be filed with the Irish Revenue Commissioners, under Section 1001(3) of the Taxes Consolidation Act 1997. The Irish 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 Irish Revenue Commissioners that they have received the notification and updated their records accordingly.

For a security assignment, to create a legal as opposed to an equitable security interest, a notice of the assignment of the bank account must be served on the account holding bank informing it that the account has been assigned. There is no timeframe within which this notice must be served and the bank need not acknowledge the notice for it to be valid.

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 to the account bank.

Under the Companies Act 2014, a charge created over an interest in cash or money credited to an account of a financial institution or any other deposits does not require registration with the CRO.

Intellectual Property

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

- patents;
- trade marks; and
- copyright.

Common forms of security

The most common forms of security granted over intellectual property are:

- legal mortgage;
- equitable mortgage; and
- 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.

Formalities

Registration is required at the CRO within 21 days of creation. Registration can also be required with the following entities, where relevant:

- Irish Patent or Trade Marks Office;
- European Patent Organisation;
- the Patents Office; and
- regional intellectual property offices such as the EPO or EUIPO, as appropriate.

Certain local laws may take precedence over Irish law when it comes to fulfilling registration requirements. In addition, both patents and trademarks can be registered, however copyright arises automatically and is not registerable.

5.2 Floating Charges or Other Universal or Similar Security Interests

A floating charge over all present and future assets is commonly accepted by lenders as a form of security in Ireland.

5.3 Downstream, Upstream and Cross-Stream Guarantees

It is possible for an Irish incorporated entity to provide such guarantees, so long as the provision of such a guarantee does not breach any terms or limitations contained in the company's constitution or in the Companies Act 2014. Among the statutory restrictions in place under the Companies Act 2014 are:

- Section 239, prohibiting a company from entering into credit transactions for the benefit of a director and/or connected persons; and
- Section 82, prohibiting the provision of financial assistance by a company for the purchase of its own shares.

Where a guarantee cannot be provided due to the terms or limitations of a company's constitution, a shareholder's special resolution must be executed amending the constitutional prohibition/limit. This resolution must then be filed in the CRO with a Form G1 (Amending the Constitution). Where a guarantee is prohibited under Sections 239 and 82 of the Companies Act 2014, the relevant obligor will need to consider whether an applicable exemption applies and failing this they must conduct a "Summary Approval Procedure" (SAP). SAPs are discussed in **5.4 Restrictions on Target**.

5.4 Restrictions on Target

Under Section 82 of the Companies Act 2014, it is unlawful 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. The statutory prohibition is broadly drafted, with the main rationale being the preservation of a company's capital and shareholder/creditor protection.

Financial assistance may only be given in limited circumstances, such as where it falls within one of the legislative exceptions or where a SAP has been followed under Section 202 of the Companies Act 2014.

A SAP is a means by which companies can engage in certain restricted activities by ensuring that the persons those restrictions are designed to protect, consent to the restricted activity being carried out. There are seven "restricted activities" for which the SAP can be used to validate otherwise prohibited transactions, including the provision of financial assistance. The directors are required to set out the circumstances in which the transaction or arrangement is entered into and the benefit that will accrue

to the company. The directors are required to swear a declaration of solvency setting out their reasonable belief that the company will remain solvent for the next 12 months. Failure to deliver the directors' declaration to the CRO within 21 days invalidates the activity in question.

The Companies Act 2014 amended the previous regime in relation to financial assistance in that the prohibition against it has been narrowed, such that the giving of financial assistance may not be prohibited if the acquisition of shares is not the principal purpose of the financial assistance. The Companies Act 2014 also provides for the giving of assistance for the purpose of acquiring the shares where it is only an incidental part of some larger purpose of the company, and the assistance is given in good faith and in the interests of the company.

5.5 Other Restrictions

The various restrictions (and related costs, if any) in relation to the granting of security or guarantees has been set out in **5.4 Restrictions on Target**.

5.6 Release of Typical Forms of Security

In the case of fixed security, the chargee executes a deed of release. In the case of floating security, the security giver can deal with the secured assets in the ordinary course of business until such time as the floating security crystallises into a fixed charge.

A Form C6 (full release) or Form C7 (partial release) needs to be registered with the CRO. This can be completed by the chargor and, on receipt, 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. Alternatively, Form C6 or Form C7 can be completed by the chargee and no notification is necessary, and the satisfaction is simply registered.

If security was granted over real estate located in Ireland, it will also be necessary for the chargor to execute a Land Registry discharge document, in addition to the deed of release, by way of a Form 57A. This discharge document is then registered with the Property Registration Authority to release the security over underlying real estate.

5.7 Rules Governing the Priority of Competing Security Interests

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, creating a contractual subordination.

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 which is lower in the group structure than another lender (the subordinated lender).

Intercreditor Arrangements

Intercreditor arrangements are common in Ireland. Typical parties include a senior lender, a junior lender, inter-group lender and a borrower. Typical terms in an intercreditor agreement

include provisions as to priorities, standstill, representations and warranties, covenants and other standard clauses.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

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 as set out in the security documentation. Typical events of default that are often contained in loan agreements in Ireland might include:

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

The normal methods of enforcement are for the security holder to appoint a receiver, pursuant to the terms of the charge deed, or for the chargeholder to become a mortgagee in possession of the charged asset. Generally speaking, a court order is not necessary to appoint a receiver, although in the case of real property, it may be necessary to obtain a court order for possession if the security holder intends to go into direct possession. Once possession is obtained it is

not usually necessary to get a court order for sale.

Appointing an Examiner

Enforcement may be prevented by the appointment of an examiner to the company (that has 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 of the company's survival as a result of this appointment.

The examiner is typically appointed for 70 days (this could be extended to 100 days in exceptional cases and, as a result of COVID-19, the extension currently stands at 150 days – see **1.2 Impact of the COVID-19 Pandemic**), during which time the examiner will endeavour to put a scheme of arrangement, subject to approval by the interested parties and the court, in place where the company's creditors write off part of the amounts owing to them and the company continues to trade.

6.2 Foreign Law and Jurisdiction

Choice of Foreign Law

The Rome I Regulation and Rome II Regulation have force of law in Ireland and the purpose of both regulations is not to harmonise the actual law of EU states that applies to contractual and non-contractual obligations respectively, but to harmonise the rules that determine what law applies to contractual and non-contractual disputes, with the aim of ensuring that the courts in the EU are uniform in their application of laws in international disputes, thereby reducing the risk of forum shopping. The choice of foreign law as the governing law of the contract, will therefore be upheld by the courts of Ireland, provided that the relevant contractual or non-

contractual obligation is within the scope of the relevant regulation.

Submission to a Foreign Jurisdiction

Pursuant to the provisions of the Brussels Regulation Recast (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)), the submission by an Irish natural person, or a company incorporated in Ireland to the jurisdiction of the courts of another EU member state, will be upheld in the Irish courts.

Immunity

Waivers of immunity are effective under Irish law.

6.3 A Judgment Given by a Foreign Court

Provided that neither Article 45 (Refusal of recognition) nor Article 46 (Refusal of enforcement) of the Brussels Regulation Recast is applicable, and subject to general compliance with the Regulation, any judgment given by a foreign court or an arbitral award against a company would be recognised and enforced in Ireland, without a retrial of the merits of the case.

6.4 A Foreign Lender's Ability to Enforce Its Rights

There are no other matters under Irish law which might impact a foreign lender's ability to enforce its rights under a loan or security agreement.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

There are two main company rescue procedures available in Ireland: (i) examinership; and (ii) company voluntary arrangements (CVAs).

Examinership is the main rescue procedure for companies nearing insolvency. The emphasis is on introducing a scheme of arrangement that assists 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 (which is currently a maximum of 150 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.

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. It is rarely used in practice as a secured creditor is free to enforce its security while the CVA is pending.

Making Examinership Accessible

Section 509(7)(b) of the Companies Act 2014 provides for what is colloquially referred to as "examinership-lite". Small private companies that meet certain criteria can apply directly to the Circuit Court to have an examiner appointed, rather than applying to the High Court. While the measure was intended to make examinership more accessible for small private companies, there has not been much uptake. As a result, the Companies (Rescue Process for Small and Micro Companies) Act 2021 was signed into law on 22 July 2021. This provides for a new res-

cue process to be made available to small and micro companies. While it adopts some of the key examinership principles, the process is more administrative, rather than court-led, in order to make it more cost-effective. Applications can still be made for court protection orders.

7.2 Impact of Insolvency Processes

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

7.3 The Order Creditors Are Paid on Insolvency

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

- Section 554 of the Companies Act 2014 – remuneration, costs and expenses of an examiner sanctioned by the court are paid in full before any other claim, secured or unsecured, in any receivership or winding-up of the company;
- 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 behest of the secured creditor);
- expenses certified by an examiner under Section 529 of the Companies Act 2014 rank after claims of fixed chargeholders (Section 554(3), Companies Act 2014);
- 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;

- preferential debts, for example, rates and taxes, wages and salaries (Section 621, Companies Act 2014);
- floating charges, ranking in the order of their creation;
- unsecured debts, ranking *pari passu* (equally) with each other; and
- deferred debts, ranking *pari passu* with each other.

Regarding Section 16(2) of the Social Welfare (Consolidation) Act 1993 mentioned above, 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 it does not form part of the assets of a limited company in a winding-up. Further, a sum equal to that deducted is paid into the Social Insurance Fund ahead of all preferential debts (super preferential claim).

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 thereon are paid *pro-rata*.

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

7.4 Concept of Equitable Subordination

There is no concept of equitable subordination in Ireland. It is almost exclusively a US doctrine, although it has been adopted in other jurisdictions in the EU in special situations, including, but not limited to, Austria and Germany.

7.5 Risk Areas for Lenders

The following are some potential risk areas from the lender's perspective, should a borrower, security provider or guarantor become insolvent.

Financial Assistance

See 5.4 Restrictions on Target.

Corporate Benefit

As part of their fiduciary duties the directors of an Irish company have an obligation 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 and whether a corporate benefit will accrue. The risk of giving third-party security must be balanced against the actual or potential rewards. A parent company might justify giving security for a subsidiary's borrowings (downstream security) because it will, directly or indirectly, hope to receive dividends from the subsidiary or will benefit from any enhanced commercial value in their role as 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;

- the company is not insolvent at the time and does not become insolvent as a result of the transaction; and
- 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 objective of the company as set out in its memorandum of association, otherwise it will be ultra vires and therefore void. However, this is no longer a requirement for limited companies under the Companies Act 2014, which has abolished the ultra vires doctrine in respect of such companies.

Interests of employees and directors' duties

It is now also a requirement for the directors of an Irish company to consider the interests of its employees (Section 224, Companies Act 2014). Under Section 1112 of the Companies Act 2014, there is an obligation on the directors of private limited companies to ensure that the person acting as company secretary has the necessary skills and resources to discharge their statutory duties.

Under the Companies Act 2014, the duties of a director have been codified to reflect common law principles. The principal fiduciary duties have been listed in Section 228 of the Companies Act 2014. Under Section 233, a director is now required to make a statement acknowledging their duties under the law, and Section 225 requires a director to make a compliance statement when the company's balance sheet total for the year exceeds EUR12.5 million and the amount of its turnover for the year exceeds EUR25 million.

Loans to Directors

Under Section 239, 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 (as defined in Section 220). There are a number of exceptions, including where the transaction occurs with a member of the same group. These transactions can sometimes be summarily approved, but caution must be exercised as the Summary Approval Procedure is limited and is not intended to be deployed as a "catch-all" mechanism.

Usury

The outcome of the Breccia case was discussed in **4.3 Usury Laws**.

Others

Other laws to consider include the following.

Section 610 of the Companies Act 2014

Section 610 of the Companies Act 2014 relates to fraudulent or reckless trading. Fraudulent trading essentially means the carrying on of 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 the carrying on of any business of the company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose (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 proceed-

ings, that while an officer of a company, they were knowingly a party to the carrying on of any business of the company in a reckless manner or were engaged in fraudulent trading. Such a person may also be held personally responsible for all or part of the debts and liabilities of the company.

Section 238 of the Companies Act 2014

Subject to certain exceptions, Section 238 of the Companies Act 2014 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 238 are that:

- the transaction is voidable at the instance of the company; and
- any director and, if applicable, person connected with them, who has entered into the transaction must account for any gain made by them and reimburse the company for any loss made by it.

8. Project Finance

8.1 Introduction to Project Finance

Project finance as a financing technique has been used to finance large capital-intensive energy and infrastructure projects in Ireland since the early 1970s. Project finance is a loan arrangement whereby finance is raised on a non- or limited-recourse basis by a SPV, with the repayment of the financing dependent on the cash flows generated from the project post-completion. It is underpinned by a robust legal framework in which sponsors, lenders and gov-

ernment parties rely on both the appropriate level of regulation as well as certainty regarding contract law. Ireland has recently seen a large amount of interest from investors on both the sponsor and equity side.

Such financing is now being offered by non-bank lenders, thus making the availability of credit to fund such projects more accessible. Project finance in Ireland is not subject to any specific legal framework, but will primarily depend on the sector within which the project falls (different regulations for healthcare, education, highway construction, etc).

8.2 Overview of Public-Private Partnership Transactions

Public-private partnership (PPP) is the most widely used project finance infrastructure model in Ireland. Essentially, this involves a public service or asset being funded and operated by the private sector under a long-term concession granted by the relevant public authority.

The government or public authority may provide certain advantages to the project company by way of a guarantee, a grant or use of a state asset for free or below market value. It should be noted that, in certain circumstances, such arrangement may be prohibited by the State Aid Rules.

8.3 Government Approvals, Taxes, Fees or Other Charges

The relevant government approvals, licences and statutory controls required for a project will depend on the specific nature of each project. The tax regime governing project finance transactions is generally the same as for other commercial loan transactions. Certain tax exemptions do apply in respect of certain sectors,

but again this is based on the specificity of the transaction.

The transaction documents do not need to be registered or filed with any governmental body, save to the extent that such documents create security. In that instance, the relevant security filings will need to be made (as outlined in **5.1 Assets and Forms of Security**). The governing law of the transaction documents will, in the vast majority of cases, be the laws of Ireland, however, depending on who the lending pool are, the transaction documents may be governed by English law.

8.4 The Responsible Government Body

With respect to natural resources, the Natural Resources Section (NRS) of the Department of the Environment, Climate and Communications is the relevant authority in Ireland. There is specific primary legislation in Ireland regarding mining, including, but not limited to, the Planning and Development Act 2000, the Minerals Development Act 1940 and the Minerals Development Act 1979. As regards oil and gas, the primary legislation is the Petroleum and Other Minerals Development Act 1960, the National Oil Reserves Act 2007 and the Petroleum (Exploration and Extraction) Safety Act 2015.

8.5 The Main Issues When Structuring Deals

A project finance deal will normally involve a number of lenders that provide funds to the project. Any potential issues which may arise will be dependent on the type of project that is being financed, so any risk should be assessed and allocated between the parties involved.

The project company will be required to adhere to both Irish and EU laws and regulations (including, but not limited to, competition law) which

are specific to the sector in which the project is centred. There are no particular restrictions on foreign investment in Ireland, however, restrictions may apply to foreign investors in relation to certain regulated sectors, but this would need to be assessed on a case-by-case basis.

8.6 Typical Financing Sources and Structures for Project Financings

The typical source of financing for PPPs in Ireland would be bank financing and bond issuances.

8.7 The Acquisition and Export of Natural Resources

As mentioned in **8.4 The Responsible Government Body**, the NRS is the relevant authority in Ireland which deals with natural resources and any policies relating to the acquisition and export of natural resources. The objective of the NRS is to sustainably exploit and manage Ireland inland fisheries, geological resources and oil and gas reserves. Any potential issues or considerations would need to be assessed on the basis of which natural resource is being extracted and comply with the primary legislation outlined in **8.4 The Responsible Government Body**.

8.8 Environmental, Health and Safety Laws

The Health and Safety Authority is the main body in Ireland responsible for health and safety laws. The primary legislation includes the Safety, Health and Welfare Act 2005 (as amended from time to time), Chemicals Acts 2008 and 2010, Safety Health and Welfare (Offshore Installations) Act 1987, Safety in Industry Act 1980, Factories Act 1955, and the Dangerous Substances Act 1979 and 1972. The Health and Safety Authority also ensures that various regulations and orders are adhered to and has issued various codes

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of practice (for example, in relation to chemical agents, working on roads, safety in roof work).

As regards the environment, the national statutory body in Ireland is the Environmental Protection Agency (EPA). The EPA is an independent public body established under the Environmental Protection Agency Act 1992.

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Matheson LLP has more than 50 lawyers in its finance and capital markets team and advises financial institutions and corporations involved in arranging and executing all forms of finance and capital markets transactions in Ireland. The team advises major Irish banks and financial institutions, corporate borrowers and many of the world's leading international banks, investment managers and investment funds, securities and derivatives trading houses, broker dealers, insurance companies, alternative finance provid-

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