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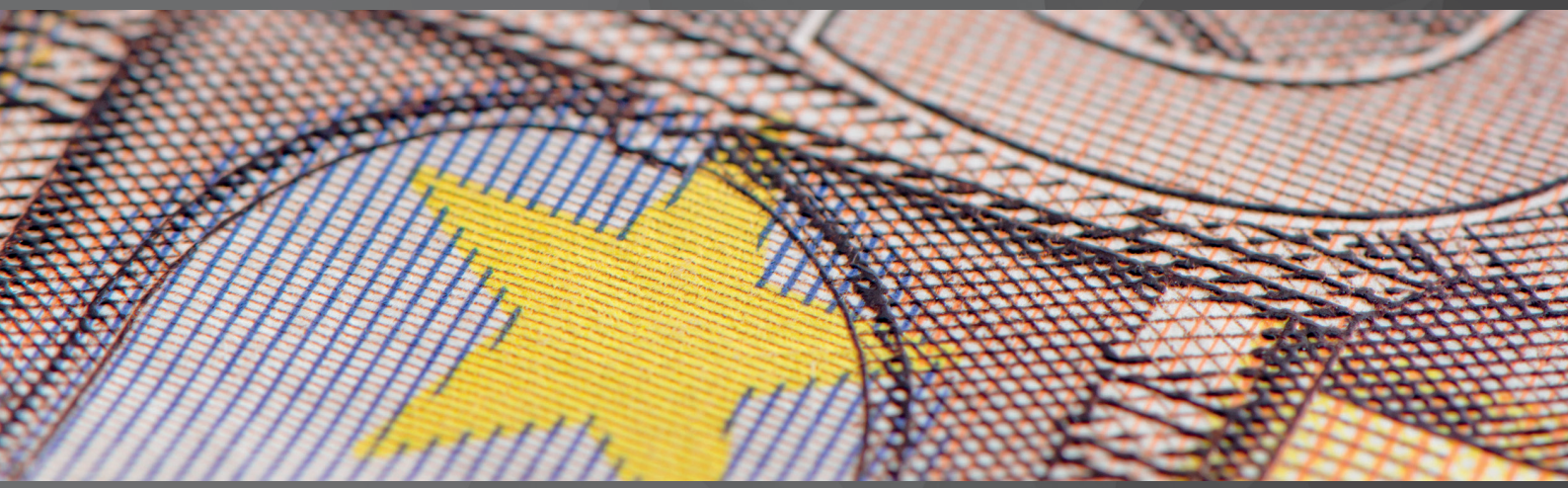

Lending & Secured Finance 2020

A practical cross-border insight into lending and secured finance

Eighth Edition

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

There has been a growing awareness of the importance of sustainable finance as part of a multipronged approach to tacking climate change, both from an international and national perspective.

Sustainable finance is the provision of finance to investments taking into account environmental, social and governance consideration. On 25 September 2019, the Council of the EU announced that it has agreed its position on a proposed regulation (the "**Sustainable Investment Regulation**" or "**SIR**") on the establishment of an EU-wide classification system or "taxonomy", which will provide businesses and investors with a detailed framework to identify to what degree economic activities can be considered environmentally sustainable. At present, there is no common classification system at EU or global level which defines what is an environmentally sustainable economic activity. According to the Council's position, the taxonomy should be established by the end of 2021, to ensure its full application by the end of 2022. The SIR represents a significant step towards a legally binding standard for sustainable finance.

Loan and financing activity levels remain high; domestically, sectors such as real estate and health care are particularly active while aviation and acquisition finance are among the sectors with the most cross-border activity. Over the past 10 years, Ireland has seen a substantial change in its debt funding landscape with the emergence of a large number of non-bank lenders into the Irish market. As a result, the Irish lending market is more diverse than ever before and has led to a range of blended finance solutions for Irish companies.

There have been notable legal/regulatory developments too – for example, unregulated entities (other than securitisation special purpose vehicles which are exempt) that hold legal title to Irish loans and/or control the overall strategy or key decisions relating to such credit must now be authorised and regulated by the Central Bank of Ireland (the "**CBI**") pursuant to the Consumer Protection (Regulation of Credit Servicing) Act 2018 (the "**2018 Act**") (discussed at question 10.1 below). One potential unforeseen/unintended consequence of the 2018 Act is the impact that it may have on the status of UK-regulated lenders in Ireland post-Brexit. In the event of a "hard Brexit", UK-regulated lenders would likely lose the right to cross-border passport under EU financial services legislation and would become "unregulated" for the purposes of Irish law. There is a risk in this scenario that the Irish credit servicing regime, which effectively imposes an obligation that Irish borrowers that obtained loans from regulated lenders must always interface with a regulated firm for the life of that loan, may lead to UK-regulated lenders inadvertently finding themselves in breach of the 2018 Act.

Although the UK left the EU on 31 January 2020, the impact of Brexit on Ireland will not become clear until the end of the current transitional period (which runs until 31 December 2020) but may yet present significant opportunities for the Irish lending market. This is particularly given Ireland's common law system and its geographic location, being close to the UK and mainland Europe, which make it an attractive destination for international banks, currently operating out of the UK, which want to maintain an EU presence post-Brexit.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

There has been a strong level of transactional activity, both domestically and cross-border, across multiple asset classes. Real estate finance has continued to be an area of particular focus, especially commercial investment and residential development (the latter being a sector in which non-bank lenders have been notably active). Standout transactions in this space include Heitman's acquisition of The Circle Collection of 214 residential and three commercial properties, Fine Grain Property's financing of the Westpark business campus in Shannon and multiple financings of high-profile assets and developments by Fairfield Real Estate Finance. Other noteworthy transactions include the securitisation of the Seniors Money Group's book of equity release mortgages where Dillon Eustace acted for Deutsche Bank AG, London Branch and, in the sustainable finance space, a significant loan for a leading utility company provided by a large European bank where Dillon Eustace acted for the lender.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes; however, this is subject to the corporate benefit rule (discussed at question 2.2 below) to certain provisions of the Companies Act 2014 (as amended) (the "**Act**") relating to the provision of financial assistance (discussed at question 4.1 below) and to certain provisions of the Act relating to transactions with directors which require, among other things, that both the guarantor and the borrower fall within the concept of "group" companies for the purposes of the Act.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

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

2.3 Is lack of corporate power an issue?

Generally no, as the doctrine of *ultra vires* has been abolished by the Act and accordingly an Irish company limited by shares has, subject to all applicable laws, the same capacity as an individual. However, the Act introduced a new type of private company – a Designated Activity Company ("**DAC**") – which must (similar to a public limited company) have an objects clause which sets out the specific powers of the company. If it is not specifically stated in the objects clause of such a company that it has the power to issue a guarantee or grant security, then any such action by the company could be subject to challenge by a shareholder of that company. While this in itself should not impact the validity or enforceability of the guarantee/security, there is a risk that the third-party lender may become indirectly involved in a dispute between a company and its shareholders. In addition to this, any liquidator appointed to a company, which has granted security in breach of its objects clause may, in certain circumstances, have clawback rights under the Act which could potentially result in the security being set aside (see question 8.2 below).

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Generally no, subject to the provisions of the Act relating to financial assistance and transactions with directors. However, if the company is regulated or subject to the supervision of the CBI or some other regulatory authority, additional consents may be required. For example, an Irish regulated fund cannot give "guarantees" to support the obligations of a third party (which may include another sub-fund within the same umbrella fund structure). While the term "guarantees" when used in this context is not defined, it is generally accepted that this term includes any security provided to support the obligations of a third party. In terms of formalities, a guarantee must be in writing and must be executed as a deed. Execution as a deed is important for a number of reasons; for example, to remove any concerns about the adequacy of the consideration passing to the guarantor.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No; however, in certain circumstances a guarantee may be set aside as an unfair preference or due to the insolvency of the company (see question 8.2 below).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Generally, no (subject to the application of anti-money laundering, anti-terrorism, anti-corruption and human rights laws and regulations, and any restrictions on financial transfers arising from any United Nations, EU and Irish sanctions).

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

In principle, all assets of an Irish company are available to secure lending, subject to any contractual restrictions to which a company might be bound. The most common forms of security taken by a lender are:

(i) **Mortgage**: there are essentially two types of mortgage – a legal mortgage and an equitable mortgage. A legal mortgage involves the transfer of legal title to an asset by a debtor, by way of security, upon the express or implied condition that legal title will be transferred back to the debtor upon the discharge of its obligation. An equitable mortgage on the other hand involves the transfer of the beneficial interest in the asset to the mortgagee with legal title remaining with the debtor and, as such, creates an equitable security interest only. Mortgages are commonly taken over shares, aircraft and ships.

(ii) **Charge**: this represents an agreement between a creditor (chargee) and a debtor (chargor) to appropriate and look to an asset and its proceeds to discharge indebtedness. The principle difference between a mortgage and a charge is that a charge need not involve the transfer of ownership in the asset. A charge may be fixed (i.e. security attaches to a specific asset) or floating (i.e. security floats over the asset leaving the chargor free to deal with it until, upon the occurrence of certain defined events, the charge crystallises into a fixed charge) in nature. A fixed charge can be created by a company or an individual, whereas a floating charge can only be created by a company. It is also worth noting that a floating charge ranks behind certain preferential creditors such as the Irish Revenue Commissioners ("**Revenue**") and employees of the chargor in respect of unpaid wages, etc.

(iii) **Assignment**: this is akin to a mortgage in that it transfers the legal or beneficial ownership in an asset to the creditor upon the understanding that ownership will be assigned back to the debtor upon discharge of the secured obligation owing to the creditor. Assignments are most commonly utilised in the context of intangible assets such as receivables, book debts and other choses in action. Assignments to a creditor are sometimes referred to as security assignments to distinguish them from absolute assignments where the ownership is being assigned by way of sale for value. In order to be a valid and effective legal assignment, as opposed to an equitable assignment, there must be absolute assignment (although it can be stated to be by way of security), it must be in writing under hand of the assignor, and express notice in writing must be given to the third party from whom the assignor would have been entitled to receive or claim the right which is assigned.

(iv) **Others**: to include a pledge, lien, chattel mortgage, bill of sale and retention of title.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

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

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes. Security over real property, plant, machinery and equipment is most commonly taken by way of fixed charge. Where security is created over real estate which is registered in the Property Registration Authority of Ireland ("**PRAI**"), an additional prescribed form is also required to validly create the security.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables most commonly takes the form of a legal assignment and is permitted so long as the underlying contract creating the receivable does not contain a prohibition on assignment. In order to be a valid legal assignment, certain requirements (as outlined in question 3.1 above) must be adhered to, including the provision of written notice to the third party from whom the assignor would have been entitled to receive or claim the assigned right (the "**Underlying Debtor**"). An assignment not meeting these criteria is deemed to be an equitable assignment. One of the disadvantages of an equitable assignment is that the rights of the assignee will be subject to any equity (such as rights of set-off) already vested in the Underlying Debtor. In addition, should the Underlying Debtor pay off a debt due to the assignor and claim a good discharge of this debt, in circumstances where no notice of the assignment was given to the Underlying Debtor, then the assignee would be solely reliant on the assignor passing this payment on.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. This can take the form of a security assignment, fixed charge or floating charge. Taking a fixed charge over a "blocked" account would generally be considered the most effective form of security a lender could take. A blocked account is one where the chargor is prohibited from withdrawing, transferring or otherwise dealing with the account without the prior consent of the chargee. Given that commercial borrowers generally need ready access to their bank accounts for normal trading purposes, it is more usual that the chargee will accept a floating charge over the trading bank account which allows the chargor to retain control over the cash until such time as a trigger event (e.g. an event of default under the loan documents) causes the floating charge to crystallise.

For a security assignment, a notice of assignment must be served on the account-holding bank informing them that the account has been assigned in order to create a legal security interest. In some instances, the secured party(-ies) and the account-holding bank may agree an account control agreement or similar document regarding the operation of the assigned account.

A notification in relation to book debts should also be filed with Revenue, under s.1001(3) of the Taxes Consolidation Act 1997 within 21 days of the creation of charge to put it on notice of the creation of the charge and to protect the chargee's interests should the chargor default on certain tax obligations in the future.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

Security can be taken over shares issued by an Irish company. There are two main types of security over shares: a legal mortgage and an equitable mortgage. An equitable mortgage – which does not transfer legal ownership and as such does not require the lender to be registered in the company's share register as owner of the shares – is the most common. This is effected by delivery of share certificates and signed but undated share transfer forms, irrevocable proxies and various other deliverables which authorise the lender to complete the undated stock transfer form and any formalities required to become legal holder of the shares if the security becomes enforceable. Prior to the security becoming enforceable, all voting rights, dividends and any communication about the shares will remain with the chargor. It is common for a lender to also take a fixed charge over shares issued by an Irish company. This is commonly taken alongside an equitable mortgage.

Shares may be issued in certificated or uncertificated form; however, ordinarily in the case of a private limited company (which includes a DAC), shares will be issued in certificated form. A public limited company whose shares are listed on a Stock Exchange will issue shares in uncertificated form (which will be held in a clearing system).

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

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, this typically takes the form of a floating charge given that the chargor trading company needs to retain sufficient freedom to deal with inventory in the ordinary course of business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, subject to certain provisions of the Act relating to transactions with directors and the prohibition on the provision of financial assistance (discussed at question 4.1 below), the corporate benefit rule (discussed at question 2.2 above) and solvency considerations (see question 8.2 below).

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Subject to certain exceptions set out in the Act, particulars of charges created by an Irish company over its assets must be registered at the Irish Companies Registration Office ("**CRO**") in the form prescribed within 21 days of its creation. This does not apply to security over certain financial assets, such as cash and shares. Particulars of any charges created by an Irish Collective Asset-management Vehicle ("**ICAV**") must be filed in the form prescribed (form CH1) with the CBI within 21 days of the creation of the security. Failure to do so will render the charge void against any liquidator or creditor of the company/ICAV. A filing fee of €40 is payable to the CRO in respect of each security registration. No filing fees are incurred in respect of a form CH1. As mentioned in question 3.5 above, where security comprises a fixed charge over book debts, a notification should be made to Revenue within 21 days of the creation of the charge. No fee is incurred in respect of such notification.

Security over real property must be registered at the PRAI and security over certain other assets, such as IP, ships and aircraft, needs to be registered at applicable registries. There are no notarisation requirements for security documents under Irish law.

See section 6 regarding stamp duty.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally, no, as prescribed forms are provided in most instances and filing fees are nominal. However, the filing requirements (for example of the CRO and PRAI) are very prescriptive and any errors in the forms can cause delays, extra expense and in the worst case may render the security void, necessitate an application to court for an order rectifying the particulars or require the parties to put new security in place.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Generally no, assuming the underlying contracts do not require any such third-party consents. See also question 2.4 above in relation to regulated entities. Regulated entities may be restricted from creating security over certain assets.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

Generally no, provided the security is properly perfected at the time it was granted and the underlying security documents stipulate any repayment under the facility does not serve to extinguish the security, which should be expressed to secure all amounts owing from time to time.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In general, Irish law security documents are executed as deeds to remove any concerns about the adequacy of the consideration. Other guidelines should be considered, such as Law Society practice notes and recent case law in relation to virtual completion and signing, for example the decision in the English case of *R (on the application of Mercury Tax Ltd) v Revenue and Customs Commissioners [2008] EWHC 2721*. It is generally accepted in Ireland that a previously executed signature page from one document may not be transferred to another document, even where the documents in question are simply updated versions of the same document.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

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

(b) Shares of any company which directly or indirectly owns shares in the company
Yes, s.82 of the Act applies in respect of the acquisition by a company of shares in its holding company.

(c) Shares in a sister subsidiary
No – this is not applicable.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

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

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Ireland.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Secured debts can be assigned, transferred or novated under Irish law. As the security provider must be provided with notice of the assignment, it is not unusual for the security provider to be a party to the transfer or novation.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

(a) Interest payable on loans made by domestic or foreign lenders

A company making a payment of yearly interest from an Irish source is required to withhold Irish income tax from that interest at a rate of 20%.

For these purposes, yearly interest is taken to be interest on a debt, the duration of which is at least one year, or is capable of lasting for a year or more. Interest will have an Irish source if it is paid by an Irish company or branch or the debt is secured on Irish land or buildings.

Notwithstanding the above, there are extensive exemptions under Irish tax legislation from the obligation to withhold tax where interest is paid to domestic or foreign lenders such that, in many circumstances, Irish withholding tax does not apply (assuming relevant conditions are met).

(b) Proceeds of a claim under a guarantee or the proceeds of enforcing security

From relevant case law in the area, it is not clear as to whether a payment made under a guarantee should constitute an interest payment (i.e. the guarantor being deemed to step into the shoes of the borrower) or, alternatively, whether it should be considered a payment derived from a separate and distinct legal obligation. If the former, the analysis at (a) above should apply. Conversely, if the latter applies (such that the payment is not considered interest), Irish withholding tax should generally not apply.

With regard to the proceeds of enforcing security, to the extent that the security being disposed of is Irish lands or buildings or shares deriving their value from Irish land or buildings, there is a requirement for the purchaser to withhold tax at the rate of 15% from the proceeds. This withholding tax can be avoided if (i) the proceeds from the sale do not exceed €500,000 (€1,000,000, in the case of the disposal of residential property), or (ii) assuming certain conditions are met, the vendor applies for and obtains a CGT Clearance Certificate from Revenue and the vendor provides this certificate to the purchaser.

Where security is enforced, tax must be paid by the vendor on any gains arising in priority to any secured liability.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives provided preferentially to foreign lenders and no taxes generally apply to their loans, mortgages and security documents for the purposes of effectiveness or registration.

No Irish stamp duty arises on the origination or novation of a loan. However, in very limited circumstances, stamp duty might arise on the acquisition of a loan by way of assignment.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

Pursuant to general Irish tax rules, unless otherwise exempt, any foreign lender in receipt of Irish source interest income would be liable to Irish income tax. Notwithstanding this, Irish domestic tax legislation provides for exemptions from such income tax where the lenders are resident in EU Member States or in a territory that has signed a double taxation agreement with Ireland. In addition, an exemption may be available under a double taxation agreement itself.

Based on current Revenue guidance, a gain arising on the disposal by a foreign lender of a loan secured on Irish land or buildings may be subject to Irish capital gains tax. In addition, there may be a requirement for the purchaser to withhold tax at the rate of 15% on the proceeds (please refer to question 6.1 above and the discussion there regarding withholding tax on the proceeds of enforcing security). This is a highly technical area and, where applicable, specialist advice should be sought.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

No; see question 3.9 above.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

In certain cases, interest paid to a foreign lender which owns 75% or more of the shares in the relevant Irish borrower could be regarded as a distribution and, therefore, would not be tax deductible for the borrower. Notwithstanding this, there are various circumstances where these rules are disapplied, including where the lender is resident in an EU Member State or pursuant to the provisions of a double taxation agreement.

In addition, as part of the implementation of the EU's Anti-Tax Avoidance Directives ("**ATAD**"), anti-hybrid rules have been recently introduced into Irish tax legislation. Broadly speaking, these rules are intended to prevent arrangements that exploit differences in the tax treatment of a financial instrument or an entity under the tax laws of two or more jurisdictions to generate a tax advantage. The rules apply to arrangements between associated enterprises and to certain "structured arrangements". The new legislation is effective for relevant payments made or arising on or after 1 January 2020.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Generally, the Irish courts respect and recognise the governing law chosen by parties to a contract. In this regard, Rome I Regulation (Regulation (EC) No. 593/2008 ("**Rome I**")) governs the position with respect to contracts relating to civil and commercial matters involving EU Member State parties and provides that, subject to certain limitations, a contract will be governed by the law chosen by the parties. The choice of law in contract disputes falling outside Rome I will be determined by common law, unless there is a specific law or convention which deals with the particular contract in question. Again, the common law generally recognises and enforces the choice of governing law provided for in the contract, subject to certain qualifications such as where there are public policy issues.

The Irish courts can enforce a contract that has a foreign governing law. However, the party seeking to rely on the foreign law will need to provide evidence to the court to prove to the satisfaction of the court what the foreign law is. Generally, the Irish court will not research the foreign law.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

Generally, yes. The recognition and enforcement of foreign judgments in Ireland is determined by international conventions and treaties. In this regard and broadly speaking, there are three categories of jurisdiction, being: (i) judgments from states within the EU; (ii) judgments from states which are party to the Lugano Convention; and (iii) judgments from states not within the EU or not a party to the Lugano Convention. Irrespective of which category of jurisdiction a judgment falls within, an application can be made to the Irish courts to have the foreign judgment recognised in Ireland without re-litigating the facts of the case.

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

With the UK's departure from the EU on 31 January 2020, under the transitional arrangements agreed to 31 December 2020, a judgment made in England should be capable of enforcement in Ireland without any declaration of enforceability being required pursuant to Regulation (EU) No. 1215/2012 ("**Brussels I**"). That being the case, judgments made in England should be treated effectively as a judgment made by a court in Ireland. The position remains to be finally resolved post-Brexit.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Once the Irish court has jurisdiction to determine the matter, the timing for obtaining a judgment on foot of a debt outstanding pursuant to a loan agreement or guarantee will firstly depend on the monetary amount for which the creditor is seeking judgment, as the court system is divided into a number of courts, with each having different monetary jurisdiction. Each of the courts also has its own distinct rules but each has a special procedure available to creditors to recover a debt or liquidated amount. Furthermore, obtaining judgment will depend on whether the debtor enters an appearance to the proceedings or not. In very broad terms, where debt proceedings are brought against a company for a debt owing to a foreign lender of over €75,000 and the company does not enter an appearance to the proceedings, judgment may be obtained within six to nine months of the proceedings issuing. However, there is a Commercial division of the High Court in Ireland which can fast-track commercial cases. Upon proceedings issuing, an application can be made to the Commercial Court for a case to be heard by it and, if a case is transferred to the Commercial Court for hearing, this will likely significantly reduce the time within which judgment would be obtained. There is no automatic entitlement for a case to be heard in the Commercial Court and, broadly speaking, the Commercial Court will only hear commercial disputes where the value of the claim is more than €1 million and where there has not been undue delay in applying to have the case heard by the Commercial Court.

Enforcement of the judgment will depend on the assets which the company has in Ireland and there are a number of methods of enforcement. In relation to immoveable property/land, a foreign lender can register the judgment as a judgment mortgage

over any property/land owned by the Irish company in Ireland, following which it may be in a position to take the necessary steps to dispose of the property and use the proceeds of sale to discharge some or all of the debt. In relation to moveable property, an enforcement order can be obtained, pursuant to which assets of the company may be seized. Furthermore, if it is believed that the Irish company is insolvent, a foreign lender who has obtained judgment for more than €10,000 can issue a statutory demand to the company calling on it to discharge the amount due pursuant to the judgment within 21 days, failing which a petition can be brought to have the company wound up and have all assets liquidated to attempt to satisfy all creditors of the Irish company. The Irish courts will generally only order the winding up of the Irish company if it is satisfied that the Irish company is insolvent. It may take two to three months following the expiry of the 21-day demand letter for a liquidator to be appointed over the Irish company.

In terms of the time period for enforcing a foreign judgment, this will, as mentioned under question 7.2 above, depend on the jurisdiction in which the judgment has been made. Where the judgment has been given in an EU Member State, Brussels I applies and the judgment against the Irish company is essentially enforceable as if it were a judgment made by an Irish court, meaning that the enforcement procedures, as described above, can be invoked.

In relation to judgments made by non-EU Member States, an application has to be made to the Irish courts before the judgment can be enforceable. Where the judgment has been given in a state which is a party to the Lugano Convention (being EU Member States, Iceland, Norway, and Switzerland), an application is made to have the foreign judgment declared enforceable in Ireland. It may take one to two months to have the foreign judgment declared enforceable, following which it can be enforced against a company as set out above. In relation to judgments from non-EU and non-Lugano Convention states, an application can be made to have the foreign judgment recognised in Ireland. However, unlike a judgment from a state which is a party to the Lugano Convention, the application to have the judgment recognised is made on notice to the judgment debtor, which brings with it practical issues such as serving the proceedings. Furthermore, the judgment debtor, being on notice of the application, may attend and oppose the application to have the judgment recognised. Therefore, whilst the application may get a first return date within one to three months from the date of issuing proceedings, the application may not proceed on the first return date if it is opposed, as the judgment debtor will be given the opportunity to challenge the application, and the foreign judgment holder could be significantly delayed in having the judgment recognised, depending on the extent of the challenge. Once the judgment has been declared enforceable or is recognised by the Irish courts, it can be enforced as set out above.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

Generally no, the circumstances in which a lender can enforce its security under Irish law are largely dependent on the terms of the underlying security documents. The most common method of enforcement against a corporate lender is the appointment of a receiver or for the charge-holder to become a mortgagee in possession of the charged property. S.439 of the Act provides that in selling property of a company, a receiver must exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of sale. This may involve recourse to expert opinions and valuations of company property which, depending on the circumstances, could lead to a recommendation that a public auction is necessary in order to achieve the best available price for the respective property. This would have a consequent effect on the timing of any enforcement. The timing of enforcement could also be impacted by the appointment of an examiner (see question 7.6 below).

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

No, foreign lenders are subject to the same statutory limitation periods within which a claim must be brought and the same rules of court as those imposed on Irish lenders seeking to file suit against a company and enforce security through the courts.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes, Irish companies may enter examinership, which is a court-enforced moratorium on creditor action which allows a brief period during which a company can be restructured. This process usually results in creditor balances being reduced, while intangible assets of the company are protected, investment is obtained and the company can continue to trade. The examiner is typically appointed for 70 days (but this may be extended to 100 days or in exceptional cases, longer) during which time the lender will not be permitted to take any enforcement action against the security provider, save in respect of a security financial collateral arrangement as defined in the Financial Collateral Arrangement Regulations. Pursuant to the EU Insolvency Regulations, this moratorium is also ineffective in relation to rights *in rem* of creditors or third parties by way of security in assets situated outside of Ireland and does not affect the right of creditors to exercise their right of set-off against the claims of a debtor. A lender's rights against a guarantor of the debtor company are also preserved if the lender complies with certain requirements.

In addition to the above, there are certain other laws and codes that apply in the context of lending to natural persons and/or small- or medium-sized enterprises ("**SMEs**") (and the enforcement of such loans), many of which must be adhered to by foreign lenders lending into Ireland.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Generally, yes – subject to certain conditions being satisfied. Ireland ratified the New York Arbitration Convention under s.24 of the Arbitration Act 2010. The Convention provides for the recognition and enforcement of domestic and international arbitral awards. Pursuant to s.23 of the Arbitration Act 2010, an award made by an arbitral tribunal under an arbitration agreement shall be enforceable in this jurisdiction either by action or leave of the High Court. For enforcement of foreign arbitral awards, the award must be in writing and be signed by the

arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the tribunal will suffice, so long as the reason for any omitted signature is set out. The award should also state its date and the place of arbitration.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

The capacity of a lender to enforce its rights as a secured party over collateral security is not affected by liquidation proceedings entered into by a company. Should the enforcement of a security fail to discharge the total debt owed to the lender, the balance may be an unsecured claim in the liquidation process. However, the rights of a secured lender will be affected where the company has entered examinership proceedings, as discussed above.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes. Pursuant to s.597 of the Act, a floating charge will be invalidated where it has been created within 12 months of the company entering into insolvency proceedings unless it is proven that the company was solvent immediately after the creation of the charge. This period will be extended to two years where the floating charge has been created in favour of a connected person.

The Act also provides for certain clawback rights where a fraudulent or unfair transfer of company property has occurred. For example, pursuant to s.604 of the Act, any transfer of company property to a creditor will be invalidated where such transfer was made with the dominant intention of securing a preference over other creditors in the company and was made within six months of the insolvency of the company (the period will be extended to two years where the transfer was made to a connected person).

With regard to preferential creditors, the expenses relating to an examinership or liquidation, together with certain taxes, rates and employee claims have priority over floating charge security holders.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

All trading Irish companies and all ICAVs are subject to insolvency proceedings under the Act or the Irish Collective Asset-management Vehicles Act 2015 (as applicable).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Secured creditors may exercise set-off rights and appoint receivers without recourse to court proceedings. Unsecured creditors cannot seize secured assets of a company without a court order authorising such; however, unsecured creditors may be able to repossess goods/assets which have not been paid for in full by the company in question and which are subject to a valid retention of title clause.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Generally, yes.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Yes, Ireland accepts the recognised principles of international law as the rule of conduct in its relations with other States and accordingly, in principle, an Irish court will recognise a party's waiver of sovereign immunity.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

Until recently, commercial lending was not a regulated activity in Ireland and, unless the lender was a bank, there was generally no requirement to obtain a licence. However, the regulatory regime in Ireland has been the subject of significant debate in recent years leading, most recently, to the enactment of the 2018 Act. While not imposing any additional licensing requirements, the 2018 Act does require unregulated entities (other than securitisation special purpose vehicles which are exempt) that hold legal title to loans to Irish consumers or SMEs and/or control the overall strategy or key decisions relating to such loans to be authorised and regulated by the CBI.

In addition, lenders may also be subject to various other reporting and regulatory requirements, such as:

- the Credit Reporting Act 2013, which requires that lenders – both regulated and unregulated – collect and report to the CBI certain information relating to credit advanced to non-consumer borrowers, which includes companies, limited liability partnerships, etc.; and
- lenders are typically required to comply with the CBI statistical reporting requirements.

Lenders (including unregulated lenders) providing certain services, which are already obliged to comply with Irish anti-money laundering and counter-terrorist financing obligations even though they are not authorised or licensed by the CBI, are required – unless they qualify for an exemption – to register with the CBI by virtue of new legislation passed to transpose the Fourth Anti-Money Laundering Directive into Irish law.

In addition, many lenders may find that they fall within the scope of regulation by virtue of other activities carried out by them, for example taking deposits. Any lender in Ireland which

provides banking services, which includes the taking of deposits, is required, on application to the CBI, to obtain a licence from the European Central Bank. Carrying on a banking business in Ireland without a licence is a criminal offence. Banks licensed in another EU Member State may also be required to passport into Ireland in order to carry on a lending activity in Ireland that would otherwise be unregulated.

There are no specific licensing requirements that apply to a security agent under a syndicated facility. However, such an agent would be subject to regulation if it carries on any regulated activities; for example, accepting deposits. Any person or entity carrying on the business of a trustee of a trust or a "Company Service Provider" (as defined in the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 (as amended)) may be required to obtain an authorisation to do so from the CBI (if it is a subsidiary of a credit or financial institution) or the Minister for Justice and Equality (in all other cases).

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

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Notwithstanding the measures referred to at question 10.1 above, the regulatory regime in Ireland relating to lending largely focuses on lending to natural persons and SMEs at present and there is various legislation, regulation and codes of which lenders would need to be cognisant if originating loans to such persons or to SMEs (or acquiring loans originated to such persons or to SMEs).

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The authors would like to acknowledge the assistance of their colleague Shona Hughes in the preparation of this chapter. Shona acts on a wide range of banking transactions for both financial institutions and corporates, both domestic and foreign, on an extensive range of banking law matters. She provides advice on matters in relation to borrowings and the provision of guarantees and security in respect of such borrowings, pre-conditions of security documentation and perfection of security.
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