The Legal 500 Country Comparative Guides

Ireland: Lending & Secured Finance

This country-specific Q&A provides an overview to lending & secured finance laws and regulations that may occur in Ireland.

For a full list of jurisdictional Q&As visit here

Contributing Firm

Dillon Eustace

Authors

Conor Keaveny
Partner, Banking and Capital Markets
The Legal 500
conor.keaveny @dilloneustace.ie

Jamie Ensor
Partner, Insolvency
The Legal 500
jamie.ensor @dilloneustace.ie

Richard Lacken
Partner, Tax
richard.lacken@dilloneustace.ie

Shona Hughes
Associate, Banking and Capital Markets
shona.hughes@dilloneustace.ie

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

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

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

Banks licensed in another European Economic Area ("**EEA**") may be required to passport into Ireland in order to carry on a lending activity in Ireland that would otherwise be unregulated. A bank authorised in another EEA member state (the home state) can passport its services through establishing a branch in Ireland (subject to the CBI's notification requirements), or by providing its services in Ireland (the host state) on a cross-border basis (e.g. services are provided in Ireland without establishing a physical presence in Ireland) (again, this is subject to the CBI's notification requirements).

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

Lenders should be aware that under the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (the "**2018 Act**"), unregulated entities (other than securitisation special purpose vehicles) which acquire legal title either to loans to consumers or to loans to small or medium-sized enterprises ("**SMEs**") which were originated by a regulated entity, are required to be authorised and regulated by the CBI.

In addition to the above, there are certain other laws and codes that apply in the context of lending to consumers and/or SMEs (and the enforcement of such loans), many of which must

be adhered to by foreign lenders lending into Ireland such as in relation to data protection.

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

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

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

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

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

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

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

4. **Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.**

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

Yes. Security over plant, machinery and equipment is most commonly taken by way of a fixed charge and, since the enactment of the Land and Conveyancing Law Reform Act 2009 (the "2009 Act") security over Irish real estate must be taken by way of charge. A charge represents an agreement between a creditor (chargee) and a debtor (chargor) to appropriate and look to an asset and its proceeds to discharge indebtedness. The principle difference

between a mortgage (as discussed below) and a charge is that a charge need not involve the transfer of ownership in the asset. A charge may be fixed (e.g. security attaches to a specific asset) or floating (e.g. security floats over the asset (or a class of assets) leaving the chargor free to deal with it until, upon the occurrence of certain defined events, the charge crystallises into a fixed charge) in nature. A fixed charge over land essentially precludes the chargor from disposing of the land without the chargee's prior consent or the discharge of liabilities owed to the chargee. Where security is created over real estate which is registered in the Property Registration Authority of Ireland ("PRAI"), an additional prescribed form is also required to validly create the security (discussed at question 8 below). In addition, the following forms of security were taken historically over real estate:

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

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

(ii) equipment;

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

(iii) Inventory

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

(iv) receivables; and

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

ownership will be assigned back to the debtor upon discharge of the secured obligations owing to the creditor.

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

(v) shares in companies incorporated in your jurisdiction.

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

It is also common for a chargee to take a fixed charge over shares issued by an Irish company, which is commonly taken alongside an equitable mortgage. Although Irish law does not strictly require that share security be granted under an Irish law governed document, it is frequently the case that Irish law-governed security is taken over shares in an Irish incorporated company, on the basis that Irish law is likely to govern the validity and perfection requirements of the security.

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

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

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

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

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

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

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

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

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

Subject to certain exceptions set out in the Companies Act 2014 (the "**2014 Act**"), particulars of any charge created by an Irish company over its assets must be registered at the Irish Companies Registration Office ("**CRO**") using either a Form C1 or Forms C1A and C1B within 21 days of its creation and similar requirements apply to foreign companies which are registered as external companies with the CRO. This does not apply to security over certain financial assets, such as cash and shares. 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 register the charge with either the CRO or the CBI (as the case may be) 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.

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

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

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

9. **Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?**

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

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

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

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

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

are not required to be notarised under Irish law.

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

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

10. **Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?**

Yes. A company can guarantee and secure the obligations of another group company. However, this is subject to the corporate benefit rule (discussed at question 11 below), to certain provisions of the 2014 Act relating to the provision of financial assistance (discussed at questions 11 and 12 below) and to transactions with directors and/or other connected persons which require, among other things, that both the guarantor and the borrower fall within the concept of "group" companies for the purposes of the 2014 Act.

11. **Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?**

Yes. Lenders should be aware of the following issues when requesting a guarantee from a third party:

- **Corporate Benefit:**

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

- **Financial Assistance:**

Under Irish law, it is not lawful for a company to give any financial assistance for the purpose of an acquisition made or to be made by any person of any shares in that company, or, where

the company is a subsidiary, in its holding company (section 82 of the 2014 Act) (discussed at question 12 below). Financial assistance may only be given in limited circumstances (discussed at question 12 below) or where a “Summary Approval Procedure” (“**SAP**”) has been followed under section 202 of the 2014 Act.

- **Loans to Directors**:

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

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

(i) Shares of the company

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

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

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

(iii) Shares in a related company.

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

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

syndicate?

Yes. Syndicated lending arrangements involving the appointment of a security agent to hold any security on trust for the benefit of all lenders and any other parties entitled to benefit from the security are common in the Irish lending market. However, it is worth noting that under Irish law it is usually the receiver appointed by the lender/security agent over the secured assets who realises 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.

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

This is not applicable in Ireland.

15. **Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?**

(i) Payments of interest to domestic or foreign lenders

Irish income tax at the rate of 20% is required to be withheld where a company makes a payment of yearly interest from an Irish source.

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).

(ii) Proceeds of enforcing security or claiming under a guarantee

From relevant case law in the area, there is ambiguity 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 to be considered a payment derived from a separate and distinct legal obligation. If the former, the analysis at (i) 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 land 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 (a) the proceeds from the sale do not exceed €500,000 (€1,000,000, in the case of the disposal of residential property), or (b) assuming certain conditions are met, the vendor applies for and obtains a Capital Gains Tax 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.

16. **If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?**

The standard rate of Irish withholding tax on interest payments is currently 20%.

However, as noted in Question 15, there are extensive exemptions under domestic 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. These domestic exemptions include where the relevant lender is tax resident in another EU member state or in a territory that has signed a double taxation treaty with Ireland (assuming relevant conditions are met).

In addition, an exemption may be available under the terms of a double taxation treaty itself. In this regard, Ireland has a comprehensive double taxation treaty network with 74 countries (73 currently in effect), many of which provide for an exemption from Irish withholding tax on interest payments to foreign lenders.

17. **Are there any other tax issues that foreign lenders should be aware of when lending into 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.

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. It is important to note that these rules generally only apply to particular cross-border arrangements between associated enterprises and to certain "structured arrangements". While the Irish anti-hybrid rules are predominantly a matter for an Irish borrower (in that they may restrict the ability for that borrower to claim a tax deduction for interest), foreign lenders should still be aware of the rules, given that they may impact on transaction negotiations.

18. **Are there any tax incentives available for foreign lenders lending into your jurisdiction?**

There are no tax incentives provided preferentially to foreign lenders.

19. **Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.**

No.

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

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 contractual 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 (e.g., 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.

21. **Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

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 the US 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. That being the case, judgments made in England should be treated effectively as a judgment made by a court in Ireland at least until 31 December 2020 but the position after that date remains to be finally resolved.

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.

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

In addition, Ireland is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which means that awards granted in Ireland will be directly enforceable and have reciprocal recognition in other states.

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

Ireland has two insolvency procedures applicable to companies generally, being liquidation and receivership. Ireland also has two formal restructuring processes for insolvent companies, examinership and schemes of arrangement.

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

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

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

granted such statutory powers as are contained in Irish company law in addition to any contractual powers contained in a security document.

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

The duration of the protection of the court is 70 days from the date of the presentation of the petition, which period may be extended by a further 30 days upon application to the court. During this time the examiner will compile proposals for a compromise or a scheme of arrangement, to assist the survival of the company or the whole or any part of its undertaking as a going concern. In order for the scheme of arrangement to be approved the examiner must persuade at least one class of creditors whose interests are impaired under the proposals to accept the scheme before it can be brought before the court for sanction. To approve the proposals a court will look to be satisfied that all classes of creditors will be treated fairly and equitably and the proposals are not unfairly prejudicial to any interested party.

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

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

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

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

may direct.

24. **Please comment on transactions voidable upon insolvency.**

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

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

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

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

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

Transactions in breach of the prohibitions on financial assistance and connected party transactions (see questions 11 and 12 above) are voidable, including at the instance of a liquidator.

25. **Is set off recognised on insolvency?**

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

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

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

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

26. **Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?**

There are no restrictions on granting security or guarantees to foreign lenders, or on the making of loans by foreign lenders.

As a matter of principle it is possible for foreign creditors to enforce and/or make claims in relation to securities that are recognised as conferring a valid, registered (where applicable) security interest under Irish law subject to specific rules in particular types of insolvency process (e.g., examinership) that place fetters on creditor enforcement action without consent or leave of the court.

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

Trends in the Irish lending market are heavily influenced by ongoing political developments in Europe and especially in the UK. The impact of Brexit has yet to be fully quantified and has no doubt resulted in a level of uncertainty within the industry. However, Ireland's relatively stable political platform has provided a degree of assurance to lenders and borrowers. 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 true given Ireland's common law system and its geographic location, being close to the UK and mainland Europe, which make it an attractive destination for international banks, currently operating out of the UK, looking to maintain an EU presence post-Brexit. It is worth noting that certain laws may change as a result of the UK's withdrawal from the EU (e.g. as to choice of law and recognition of judgments). In addition, there are other areas of potential reform which may arise as a result of changes in UK legislation and regulation in preparation for or as a result of the UK's withdrawal from the EU. For instance, in the event of a "no deal" EU exit scenario, the government is considering plans to remove EU regulations from insolvency proceedings in the UK, by which the UK will not, automatically recognise EU insolvency proceedings and judgments.

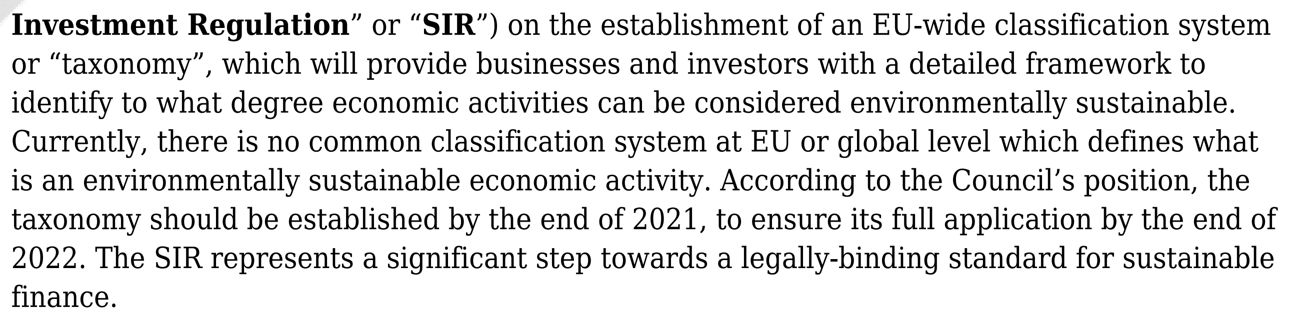
There have been notable legal/regulatory developments too. As outlined above (discussed at question 1 above) unregulated entities (other than securitisation special purpose vehicles which are exempt) that hold legal title to Irish loans and / or control the overall strategy or key decisions relating to such credit must now be authorised and regulated by the CBI pursuant to the 2018 Act. One potential unforeseen / unintended consequence of the 2018 Act is the impact that it could potentially 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. In such a scenario, there is a risk that UK-regulated lenders inadvertently find themselves in breach of the 2018 Act on the basis that the Irish credit servicing regime imposes an obligation that Irish borrowers who have obtained loans from regulated lenders must always interface with a regulated entity for the life of that loan.

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

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

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. Currently, 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 of most cross-border activity.