



ICLG

The International Comparative Legal Guide to: **Lending & Secured Finance 2016**

4th Edition

A practical cross-border insight into lending and secured finance

Published by Global Legal Group, with contributions from:

Advokatfirma Ræder DA
Ali Budiardjo, Nugroho, Reksodiputro
Allen & Overy LLP
Anderson Mori & Tomotsune
Asia Pacific Loan Market Association
Brulc, Gaberščik in Kikelj o.p., d.o.o.
Cadwalader, Wickersham & Taft LLP
Carey
CMS Reich-Rohrwig Hainz
Cordero & Cordero Abogados
Criales, Urcullo & Antezana
Cuatrecasas, Gonçalves Pereira
Davis Polk & Wardwell LLP
Drew & Napier LLC
E & G Economides LLC
Ferraiuoli LLC
Freshfields Bruckhaus Deringer LLP
Fried, Frank, Harris, Shriver & Jacobson LLP

Gonzalez Calvillo, S.C.
JŠK, advokátní kancelář, s.r.o.
Khan Corporate Law
King & Spalding LLP
King & Wood Mallesons
KPP Law Offices
Latham & Watkins LLP
Lee and Li, Attorneys-at-Law
Linklaters LLP
Loan Market Association
Loan Syndications and Trading Association
Maples and Calder
Marval, O'Farrell & Mairal
McCann FitzGerald
McMillan LLP
Milbank, Tweed, Hadley & McCloy LLP
Miranda & Amado Abogados
MJM Limited

Montel&Manciet Advocats
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
Mosgo & Partners
Paksoy
Pestalozzi Attorneys at Law Ltd
Pinheiro Neto Advogados
QUIROZ SANTRONI Abogados Consultores
Reff & Associates SCA
Rodner, Martínez & Asociados
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Tonucci & Partners
White & Case LLP



Contributing Editor

Thomas Mellor, Morgan, Lewis & Bockius LLP

Sales Director

Florjan Osmani

Account Directors

Oliver Smith, Rory Smith

Sales Support Manager

Toni Hayward

Sub Editor

Sam Friend

Senior Editor

Rachel Williams

Chief Operating Officer

Dror Levy

Group Consulting Editor

Alan Falach

Group Publisher

Richard Firth

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
April 2016

Copyright © 2016

Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-910083-90-1

ISSN 2050-9847

Strategic Partners



Editorial Chapters:

1	Loan Syndications and Trading: An Overview of the Syndicated Loan Market – Bridget Marsh & Ted Basta, Loan Syndications and Trading Association	1
2	Loan Market Association – An Overview – Nigel Houghton, Loan Market Association	7
3	An Overview of the APLMA – Janet Field & Katy Chan, Asia Pacific Loan Market Association	12

General Chapters:

4	An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP	15
5	Global Trends in Leveraged Lending – Joshua W. Thompson & Caroline Leeds Ruby, Shearman & Sterling LLP	20
6	Similar But Not The Same: Some Ways in Which Bonds and Loans Will Differ in a Restructuring – Kenneth J. Steinberg & Darren S. Klein, Davis Polk & Wardwell LLP	26
7	Yankee Loans – “Lost in Translation” – a Look Back at Market Trends in 2015 – Alan Rockwell & Martin Forbes, White & Case LLP	32
8	Commercial Lending in the Developing Global Regulatory Environment: 2016 and Beyond – Bill Satchell & Elizabeth Leckie, Allen & Overy LLP	40
9	Acquisition Financing in the United States: Will the Boom Continue? – Geoffrey R. Peck & Mark S. Wojciechowski, Morrison & Foerster LLP	45
10	A Comparative Overview of Transatlantic Intercreditor Agreements – Lauren Hanrahan & Suhrod Mehta, Milbank, Tweed, Hadley & McCloy LLP	50
11	A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements – Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP	57
12	The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasting 2016 – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP	66
13	Recent Trends and Developments in U.S. Term Loan B – David Almroth & Denise Ryan, Freshfields Bruckhaus Deringer LLP	69
14	The Continued Migration of US Covenant-Lite Structures into the European Leveraged Loan Market – Jane Summers & James Chesterman, Latham & Watkins LLP	74
15	Unitranche Financing: UK vs. US Models – Stuart Brinkworth & Julian S.H. Chung, Fried, Frank, Harris, Shriver & Jacobson LLP	77
16	Recent Developments in Islamic Finance – Andrew Metcalf & Leroy Levy, King & Spalding LLP	82
17	Translating High Yield to Leveraged Loans: Avoiding Covenant Convergence Confusion – Jeff Norton & Danelle Le Cren, Linklaters LLP	86

Country Question and Answer Chapters:

18	Albania	Tonucci & Partners: Neritan Kallfa & Blerina Nikolla	91
19	Andorra	Montel&Manciet Advocats: Audrey Montel Rossell & Liliana Ranaldi González	97
20	Argentina	Marval, O’Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	103
21	Australia	King & Wood Mallesons: Yuen-Yee Cho & Richard Hayes	112
22	Bermuda	MJM Limited: Jeremy Leese	120
23	Bolivia	Criales, Urcullo & Antezana: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	130
24	Botswana	Khan Corporate Law: Shakila Khan	137
25	Brazil	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	145
26	British Virgin Islands	Maples and Calder: Michael Gagie & Matthew Gilbert	153
27	Canada	McMillan LLP: Jeff Rogers & Don Waters	160
28	Cayman Islands	Maples and Calder: Tina Meigh & Nick Herrod	169

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Country Question and Answer Chapters:

29	Chile	Carey: Diego Peralta & Elena Yubero	176
30	China	King & Wood Mallesons: Jack Wang & Stanley Zhou	183
31	Costa Rica	Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero Baltodano	190
32	Cyprus	E & G Economides LLC: Marinella Kilikitas & George Economides	198
33	Czech Republic	JŠK, advokátní kancelář, s.r.o.: Roman Šťastný & Patrik Müller	206
34	Dominican Republic	QUIROZ SANTRONI Abogados Consultores: Hipólito García C.	212
35	England	Allen & Overy LLP: Philip Bowden & Darren Hanwell	219
36	France	Freshfields Bruckhaus Deringer LLP: Emmanuel Ringeval & Cristina Radu	227
37	Germany	King & Spalding LLP: Dr. Werner Meier & Dr. Axel J. Schilder	237
38	Greece	KPP Law Offices: George N. Kerameus & Pinelopi N. Tsagkari	248
39	Hong Kong	King & Wood Mallesons: Richard Mazzochi & David Lam	255
40	Indonesia	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Ayik Candrawulan Gunadi	262
41	Ireland	McCann FitzGerald: Fergus Gillen & Martin O'Neill	270
42	Japan	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	278
43	Mexico	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere & Samuel Campos Leal	286
44	Norway	Advokatfirma Ræder DA: Marit E. Kirkhusmo & Kyrre W. Kielland	293
45	Peru	Miranda & Amado Abogados: Juan Luis Avendaño C. & Jose Miguel Puiggros O.	302
46	Puerto Rico	Ferraiuoli LLC: José Fernando Rovira Rullán & Carlos M. Lamoutte-Navas	312
47	Romania	Reff & Associates SCA: Andrei Burz-Pinzaru & Mihaela Maxim	319
48	Russia	Mosgo & Partners: Oleg Mosgo & Anton Shamatov	327
49	Singapore	Drew & Napier LLC: Valerie Kwok & Blossom Hing	334
50	Slovenia	Brule, Gaberščik in Kikelj o.p., d.o.o.: Luka Gaberščik & Mina Kržišnik	343
51	Spain	Cuatrecasas, Gonçalves Pereira: Manuel Follia & María Lérica	352
52	Sweden	White & Case LLP: Carl Hugo Parment & Tobias Johansson	361
53	Switzerland	Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti	368
54	Taiwan	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Cyun-Ren Jhou	377
55	Turkey	Paksoy: Sera Somay & Esen Irtem	385
56	Ukraine	CMS Reich-Rohrwig Hainz: Anna Pogrebna & Kateryna Soroka	392
57	UAE	Morgan, Lewis & Bockius LLP: Ayman A. Khaleq & Amanjit K. Fagura	399
58	USA	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	410
59	Venezuela	Rodner, Martínez & Asociados: Jaime Martínez Estévez	421

Ireland

McCann FitzGerald

Fergus Gillen



Martin O'Neill



1 Overview

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

Robust conditions returned to the Irish lending market as the domestic banks emerged from a period of economic and institutional fragility to take a significant share in the senior debt market. The competition between these lenders for transactions in the commercial real estate, construction and SME sectors has led to relatively favourable conditions, both in relation to pricing and covenant levels, for borrowers in 2015/2016. A notable feature has been the continued growth of the direct lending market, as new non-bank lenders continue to emerge in a manner reflective of trends in the US and the UK. The deleveraging process undertaken by domestic and non-domestic banks in relation to their non-performing and non-core loan books in Ireland continued in 2015, and secondary transactions arising from these loan sales, continue to bring a large volume of transactions to the market. Borrowers have taken advantage of the benefits of the newly available Irish Collective Asset-management Vehicle (known as an ICAV), a corporate fund introduced under legislation in Ireland in 2015, which is attractive when borrowing against commercial real estate as ICAVs are exempt from Irish tax on their income and profits. Irish company law was also overhauled, with a view to making it more efficient and business-friendly, by the commencement of the Companies Act 2014 on 1 June 2015.

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

Loan sales have continued to feature strongly, including Project Poseidon in which Lloyds Banking Group sold a portfolio of loans with a nominal value of €3.6 billion and Project Jewel in which the National Asset Management Agency sold loans secured on the principal retail shopping centres in Ireland for approximately €1.8 billion. Ireland also continued in its role as one of the world's key aviation finance jurisdictions with some major transactions e.g. AerCap's acquisition of International Lease Finance Corporation for USD\$3 billion plus shares in AerCap (funded through debt and cash) to create the leading global franchise in the aircraft leasing industry. The re-emergence of confidence in the real estate sector has brought with it numerous significant financing transactions including the €68 million acquisition of the Frascati shopping centre in Dublin.

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, in principle, provided the company has the capacity to do so and there is sufficient corporate benefit. There are a limited number of instances where there are statutory prohibitions (e.g. see the financial assistance section below) but there are often also applicable exceptions or "whitewash" procedures.

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?

A third party without notice dealing with a company in good faith should not be prejudiced by a lack of corporate benefit for a company in entering into a transaction. The company's directors, however, have fiduciary duties and could be found in breach of these if they caused the company to enter into a transaction without benefit. It is sensible for directors to document in board minutes the reasons (including benefit) for the company's entry into material contracts.

2.3 Is lack of corporate power an issue?

Under the new Companies Act 2014 (in force since June 2015) there are a number of different types of company and the issue of corporate capacity or power is relevant to differing extents dependent on the type of company. Regardless of the company type, the directors have an obligation to ensure that they do not procure entry by the company into a contract which is outside the objects of the company (where relevant) or the powers given to the directors. Lack of corporate capacity or power should not, however, generally render a guarantee void against a third party acting in good faith.

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

Generally a resolution of the board of directors, evidenced by board minutes, is all that is required. A guarantee must be in writing, signed by the guarantor and for good consideration. Guarantees are usually executed as deeds to avoid the risk of an argument based on a lack of consideration.

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

Not as a matter of law; however, a guarantee given where a company is insolvent or close to becoming insolvent is capable of being set aside. Please refer to section 8 below.

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

No; however, international controls or sanctions (e.g. in connection with terrorist financing) could apply in Ireland and it is prudent for a lender to ensure that none are relevant to the particular guarantee.

3 Collateral Security

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

In principle, a lender can take security over any Irish assets belonging to an Irish company.

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?

A secured financing will often involve an obligor company granting an “all assets” debenture, which is expressed to create (i) a floating charge over all present and future assets, and (ii) fixed charges and specific security assignments over certain classes of assets (e.g. real estate, receivables, intellectual property, shares and material contracts). Where details of specific assets are available these should be included in schedules to the debenture, where they are to be subject to a fixed charge.

A prescribed form security document is also required where a company creates security over real estate registered in the Land Registry.

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

Yes. Such security can be created by a charge executed as a deed. Assuming the assets are already owned by the company and identifiable, the charge should be a legal charge. It is also possible to create security over future land, plant, machinery and equipment; however, such security is equitable (rather than legal) in nature. To obtain a legal charge over such future property a supplemental charge should be executed once it has been acquired. As noted in question 3.2 above, where title to the real estate being charged is registered in the Land Registry, a prescribed form security document must also be executed. Other forms of security (e.g. mortgage, pledge, lien and hypothecation) are also possible in respect of plant, machinery and equipment.

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

Security can be taken over receivables by way of security assignment and/or by way of charge (fixed or floating). A security assignment

can be legal or equitable. For an assignment to be legal, it must be in writing, absolute, for the entire debt and notice must be served on the debtor. Where these criteria are not met, the assignment is equitable. A legal assignment has a number of advantages over an equitable assignment, e.g. the assignee can sue the debtor directly, it has a higher priority and the debtor cannot discharge the debt by set-off against the assignor.

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

Yes; security can be created over the rights of an account-holder to the debt represented by the account. Where the account is held with a third party bank, security is created by way of assignment. Notice is usually served on the account bank to effect a legal (rather than equitable) assignment and certain acknowledgments are requested from the account bank. It is not unusual for the account bank to ignore such a request unless specifically negotiated in advance. In certain transactions, lenders will also require an account control agreement though these are not typical in the Irish market. Where the account is held with the lender, security is created by way of a charge, which can be either fixed or floating. For a charge to be categorised as fixed (regardless of how it is described), the lender needs to exercise a significant level of control over the account.

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?

Collateral security can be taken over shares in an Irish company. Shares in an Irish company can be either certificated or uncertificated. Following the principles of *lex situs*, it would be very unusual to seek to create security over shares in an Irish company by means of a New York or English law governed document, but it is not, in theory, impossible to do so. Security over shares in an Irish company is generally effected by a deed of charge, which is accompanied by a number of ancillary documents to assist enforcement, e.g. stock transfer forms and original share certificates. It is also possible to take a legal mortgage of shares but this is less common.

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

Yes; as inventory is revolving by nature, security is generally effected by way of a floating charge.

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, provided the transaction itself does not give rise to a restriction (e.g. see section 4 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?

Security created over certain categories of assets by an Irish company or by a non-Irish “relevant external” company must be

registered in the Irish Companies Registration Office (the “CRO”). The registration can only be effected through the CRO’s online system and the registration must be made within 21 days, otherwise the security is void against a liquidator and other creditors.

Where a fixed charge is created over book debts a notification should also be made to the Irish Revenue, as failure to do so may impact on the secured party’s level of recovery.

Security created over real estate in Ireland should be registered with the Irish Property Registration Authority. The procedure differs depending on where title to the property is registered (Land Registry or Registry of Deeds).

Depending on the circumstances, other registrations may also be required e.g. at the Irish Patents Office or relevant Circuit Courts (for “agricultural chattels”). In addition, registration in non-Irish registers may also be needed e.g. the European Patents Office and the International (Cape Town) Registry (for aircraft).

Irish stamp duty is not payable on the execution of security documents and security documents are not required to be notarised under Irish law. Stamp duty is payable in connection with the realisation of certain assets, including real property and shares.

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?

Assuming title to the secured assets is in order, the time and cost involved in making such filings is not significant. It is worth noting, however, that a transfer of real property will require a “first registration” application if title is registered in the Registry of Deeds and this can take a significant period of time to be processed.

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

Generally speaking, no; however, where a security assignment is being taken in respect of a contract it may be necessary to get the prior consent of the counterparty to the contract. If regulated persons or assets are involved, additional consents may be required.

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

No; the approach to security for a revolving facility and other types of facilities should not be different.

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

While only a limited number of assets require a security document to be executed as a deed, it is standard practice in Ireland for all security documents to be executed as deeds. The formalities for execution of deeds are set out in legislation (and in a company’s constitution) and typically involve application of a company’s corporate seal.

A lender will generally expect to receive a director’s certificate which will include, amongst other matters, certified copies of the company’s constitution and board minutes approving execution of the relevant documents.

Unlike certain other jurisdictions, signature pages should not be signed in advance of security documents being finalised.

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; the Companies Act 2014 prohibits a company giving “financial assistance” (which includes guarantees and security) for the purpose of an acquisition made or to be made by a person of shares in the company (or where the company is a subsidiary, in its holding company).

In the case of a private company, certain exceptions apply (including a refinancing exception) and it is also possible to “whitewash” the financial assistance through the summary approval procedure set out in the Act. The summary approval procedure requires, amongst other matters, shareholder approval and a declaration of solvency by the directors.

In the case of a public company, while certain exceptions apply, the whitewash procedure is not available.

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

As noted above, the prohibition on financial assistance also applies to the giving of financial assistance for the purchase of shares in a company’s holding company (direct or indirect). The position regarding exceptions and availability of a whitewash procedure is as summarised at paragraph (a) above. In addition, a private company cannot whitewash financial assistance for the purpose of an acquisition of shares in its holding company if the holding company is a public company.

(c) Shares in a sister subsidiary

There is no statutory prohibition on the giving of guarantees and/or security in connection with financing provided for the acquisition of shares in a sister subsidiary. As usual, the directors of the company giving the guarantees and/or security need to be comfortable that there is adequate corporate benefit.

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; the use of facility agents and security trustees for syndicated lending transactions is well established in the Irish market. The loan (and, where relevant, intercreditor) documentation should outline the roles of the agent and trustee and how enforcement proceeds are distributed.

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?

Provided the transfer is a valid one, Lender B should be able to enforce the loan and guarantee documentation directly against the relevant obligors. Lender B may be required to provide evidence to a court of the validity of the transfer and should also ensure that related security registrations are updated to refer to Lender B.

If the “transfer” is an assignment of the benefit of Lender A’s rights (rather than a transfer of the rights and obligations which would require borrower and guarantor approval), then the assignment will need to meet the criteria of a legal assignment (see question 3.4 above), including service of notice on the borrower and guarantor, to enable Lender B to enforce the rights directly. In the case of a regulated loan and/or guarantee, compliance with regulatory requirements would also be necessary.

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) Unless an exemption is available, Irish withholding tax applies to payments of Irish source yearly interest made by a company, currently at a rate of 20 per cent.

Yearly interest means interest other than short interest, while short means interest that is not capable of arising for a period of more than one year. Accordingly unless a facility has a scheduled maturity of one year or less, interest arising thereon would be yearly interest.

Separately, interest paid by a borrower that is resident in Ireland or operating in Ireland through a branch or agency with which the relevant facility is connected or that is paid on borrowings secured on Irish land or buildings would typically be regarded as having an Irish source.

There are, however, numerous exemptions from this obligation to withhold an amount for, or on account of, Irish tax from a payment of Irish source yearly interest arising on a loan and these are regularly availed of by both domestic and foreign lenders in financing transactions following careful analysis of their availability.

- (b) In relation to the proceeds of a claim under a guarantee, should the payments be regarded *sui generis*, then no Irish withholding tax should apply as Irish withholding tax does not apply to guarantee payments *per se*. However, should a guarantor step into the shoes of the borrower, the ensuing guarantee payments may be regarded as payments of interest whereby the analysis outlined at (a) should be relevant.

In relation to the proceeds of enforcing security:

- (i) should any such proceeds comprise interest, the analysis at (a) above would apply;
- (ii) in general, in connection with a sale of land or certain mineral or exploration rights in Ireland or unquoted shares in a company where those shares derive their value wholly or mainly from those assets, if the consideration is in excess of €500,000, the purchaser is obliged to

withhold an amount on account of Irish tax from the purchase proceeds, currently at a rate of 15 per cent. This is unless that purchaser is provided with a Tax Certificate issued by the Revenue Commissioners (to the seller upon application by the seller provided that certain conditions are met) relieving that obligation; and

- (iii) where enforcement includes the sale of property by or on behalf of the holder or beneficiary of security, in relation to capital gains tax or corporation tax on chargeable gains the seller must account for any such taxes that would otherwise be due from the security-provider out of the proceeds realised before they are applied for any other purpose. Accordingly such tax liability, if arising, must be settled in priority to any secured liability, regardless of the security provided.

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?

No tax incentives are provided preferentially to foreign lenders. No taxes generally apply to foreign lenders with respect to their loans, mortgages or other security documents for the purposes of effectiveness or registration. In limited circumstances, where a loan is not vanilla, stamp duty might arise on the acquisition of a loan by way of assignment (rather than origination or novation).

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 person in receipt of Irish source interest income would be technically liable to Irish income tax. This would include a company that is not tax resident in Ireland or operating in Ireland through a branch or agency with which the loan is connected. There are, however, exemptions from such income tax in Irish law, available in certain circumstances to lenders resident in an EU Member State or in a territory that has signed a double taxation agreement with Ireland. Separately, exemption may be available under a double taxation agreement itself.

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 to 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.

Ireland does not have thin capitalisation rules *per se*. However, in relation to the tax-deductibility of interest paid by a company to lenders outside Ireland specifically, where that interest is paid to a company with which the Irish payer of interest has more than a 75 per cent shareholding relationship, that interest may be regarded as a distribution and not tax-deductible in certain cases. These rules are, however, dis-applied in numerous circumstances including where the lender is resident in an EU Member State or pursuant to the provisions of a double taxation agreement.

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?

Ireland is bound by Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (the “**Rome I Regulation**”). Article 3 of the Rome I Regulation provides that a contract shall be governed by the law chosen by the parties. Accordingly, if a contract specifies that the laws of any EU Member State (or any other country) shall apply, the Irish court shall be bound to apply the parties’ choice.

However, pursuant to Article 3(3), where mandatory rights or protections afforded under Irish law do not exist under the law chosen by the contracting parties, the Irish court will afford those rights and protections to the relevant contracting party, notwithstanding the governing law chosen by the parties.

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?

Judgments granted by the Courts of an EU Member State (e.g. England)

Ireland is bound by Regulation (EU) No. 1215/2012 (the “**Recast Brussels Regulation**”). Chapter III provides that a judgment made by the courts of one Member State can be enforced in another Member State as if it had been delivered in that Member State itself.

Certain safeguards are provided for judgment debtors, including if:

- it would be manifestly contrary to public policy in the enforcing state;
- the defendant was not properly served with the proceedings in sufficient time to arrange for his defence; or
- the judgment is irreconcilable with a judgment given between the same parties in the enforcing state.

Judgments granted outside the EU (e.g. New York)

In order to be enforceable, a foreign judgment must, amongst other matters, (a) be for a definite sum of money, (b) be final and conclusive, and (c) have been given by a court of “competent jurisdiction” (a concept recently considered by the Supreme Court). The Irish courts will be particularly concerned that the foreign proceedings were properly served on the judgment debtor in accordance with Irish service requirements, such that the judgment debtor had an adequate opportunity to defend the proceedings.

To enforce a judgment originating outside the EU, the procedure is to issue and serve a summary summons with a modified special endorsement of claim referring to the foreign judgment, and then bring a motion for liberty to enter final judgment grounded on affidavit.

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?

The period of time in which a judgment can be obtained and enforced against assets can vary significantly from case to case, depending on whether the defendant defends the proceedings, whether the plaintiff can obtain judgment summarily (i.e. without the need for a full oral hearing), whether the case meets one of the criteria for entry into the Commercial Division of the High Court and how busy the Court lists are during any particular period.

If the proceedings seek to enforce an Irish law governed contract, one might expect to obtain judgment within the following periods:

- if the defendant does not enter an appearance, within 6–10 weeks from the date of demand;
- if the proceedings are contested but the court awards summary judgment, within 9–12 months in the High Court and within 3–4 months in the Commercial Court; and
- if the proceedings are fully contested and remitted for a full oral hearing, within 9–18 months in the Commercial Court, though it could take up to two years in the ordinary High Court. The timeframe for obtaining judgment will often depend on the scope and extent of discovery.

If the proceedings seek to enforce a foreign law governed contract, these periods could increase somewhat, as the parties will be required to produce to the court expert evidence of the particular governing law.

The period of time required to enforce a judgment against assets once obtained depends entirely on the nature of the asset. For example, judgments can be secured against real property within a matter of weeks but it can take considerably longer to actually realise value from the property once secured.

Judgments obtained in an EU Member State can be enforced very quickly in Ireland under the Recast Brussels Regulation, provided the judgment debtor does not contest the enforceability of the judgment in Ireland. Proceedings for the recognition of judgments obtained outside the EU can take a number of months, as described above, before the judgment creditor is in a position to enforce the judgment against assets.

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?

A well-drafted security document should provide the security-holder with sufficient powers to enable it to enforce and realise security with relative ease, though the need for regulatory consents will depend on the nature of the secured assets.

Where a receiver is appointed to realise secured assets, the receiver is under an obligation to obtain the best price reasonably possible for the relevant assets. To ensure that the receiver complies with this obligation he will typically obtain independent valuations of the assets and/or undertake an open marketing process. This process can impact on both the timing and value of realisation.

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?

Foreign lenders are not under any restrictions which do not apply to domestic lenders.

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?

In corporate insolvency, most procedures in Ireland do not provide for a moratorium on the enforcement of security. However, Irish law provides for a corporate rescue procedure called “examinership” by which an insolvent company can apply for the protection of the court for a period of up to 100 days, to allow it time to formulate a Scheme of Arrangement designed to facilitate the survival of the company. During the period of court protection, creditors may not take any enforcement action against the company.

Where the Scheme of Arrangement is approved by the court, creditors’ claims can be unilaterally written down in accordance with the terms of the Scheme. However, in order to approve a Scheme, the court must be satisfied that the company has a reasonable prospect of survival as a going concern, and must consider objections raised by creditors to ensure that the Scheme is not “unfairly prejudicial” to their interests.

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

Ireland is a contracting state to the New York Arbitration Convention, which provides for the recognition and enforcement of arbitral awards, subject to the exceptions provided for in the Convention. The New York Convention has force of law in Ireland under section 24 of the Arbitration Act 2010, and under section 23 of that Act, an arbitral award may be enforced by action or, by leave of the High Court, in the same manner as a judgment or order of the High Court with the same effect; where leave of the High Court is given, judgment may be entered in terms of the award.

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?

Note for section 8: as a general comment, the term “bankruptcy” in Ireland relates solely to a procedure for personal insolvency and does not relate to companies. The equivalent corporate procedure in Ireland is known as “liquidation” and the information provided herein relates solely to corporate insolvency.

The liquidation of a company in Ireland does not affect the ability of a secured lender to enforce security granted by that company. An examinership, however, does create a moratorium on enforcement; please see question 7.6.

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?

Preference periods

A floating charge on the undertaking or assets of a company created within 12 months (or two years in the case of “connected persons”, which can include related companies) before the commencement of the winding-up of that company shall be invalid:

- unless it can be shown that the company was solvent immediately after the creation of the floating charge; and
- except as to money actually advanced or paid in consideration for the charge.

Clawback rights

- (i) *Unfair preference:* Any payment or other transfer of property (including security) by a company within six months of its being wound up insolvent in favour of any creditor with a view to giving such a creditor a preference over other creditors, shall be deemed an unfair preference. The six-month period extends to two years where the creditor is a “connected person”.

If a transaction is held to be an unfair preference, a liquidator or receiver of the company may recover the money paid or property transferred to the creditor, or may have the security set aside.

- (ii) *Improper transfers:* where a company is being wound up, a liquidator, creditor or contributory of a company can apply to court to have a disposition (including security) set aside, and for the return of the assets the subject of the disposal, where such disposition had the effect of perpetrating a fraud on the company, its creditors or members. There is no time limit within which an improper transfer can be challenged.

Preferential creditors

- (i) *Priority over fixed charges:* except for the expenses of an unsuccessful examinership and the possible capital/corporate gains taxes referred to in question 6.1, a fixed charge security-holder has priority to the proceeds of realisation of fixed charge assets.
- (ii) *Priority over floating charges:* the expenses of an examinership, the costs and expenses of liquidation, certain taxes, rates and employee claims have priority over the claims of creditors holding security in the form of a floating charge.

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

Insurance companies are not excluded from the usual procedures for liquidating insolvent companies in Ireland. However, an additional procedure exists for dealing with insolvent insurance companies known as “administration”, which is provided for under the Insurance (No. 2) Act 1983.

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?

A secured creditor can enforce its security without recourse to court proceedings. An unsecured creditor cannot seize assets of a debtor without obtaining and enforcing a judgment through court proceedings.

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?

Yes, in principle. The precise rules governing recognition of submission to a foreign jurisdiction depend on the jurisdiction chosen.

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

The Irish courts will in principle give effect to a contractually agreed waiver of state immunity from jurisdiction and enforcement.

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? 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?

Generally it is not necessary for a lender to be licensed before lending to a company in Ireland. Regulated lenders (such as banks) are

subject to the codes of conduct and regulations issued by the Central Bank of Ireland when lending to certain persons. It should be noted, however, that by lending to a company in Ireland or purchasing a loan originally made by a regulated lender, an unregulated lender may also incur obligations in respect of their conduct (for example under the Credit Reporting Act 2013 and the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015). Ireland does not have particular statutory licensing or eligibility requirements for an agent under a syndicated facility agreement.

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?

As a general comment, please note that the above responses relate to Irish companies. Additional material considerations apply when dealing with other counterparties such as natural persons or regulated funds (whether constituted as an "investment company" or otherwise). Specific advice will always be needed on the terms of the particular transaction being entered into.

**Fergus Gillen**

McCann FitzGerald
Riverside One, Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 611 9146
Fax: +353 1 829 0010
Email: fergus.gillen@mccannfitzgerald.com
URL: www.mccannfitzgerald.com

Fergus is Head of McCann FitzGerald's Finance Group. He focuses on a wide range of debt finance work, with a particular emphasis on corporate lending transactions, debt capital markets (public and private), restructuring, securitisation and structured finance. Fergus advises many financial institutions (Irish and international), non-financial corporates and state-owned entities.

**Martin O'Neill**

McCann FitzGerald
Riverside One, Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 607 1786
Fax: +353 1 829 0010
Email: martin.oneill@mccannfitzgerald.com
URL: www.mccannfitzgerald.com

Martin is a Senior Associate and works as a professional support lawyer in the firm's Finance Group, having previously worked in the corporate banking team. Martin's experience covers a broad range of banking and finance work with a focus on acquisition finance and corporate banking. Martin has advised on a large number of syndicated and bilateral financing transactions, security reviews, enforcement strategies and bespoke remediations as well as loan portfolio sales.

MCCANN FITZGERALD

McCann FitzGerald is one of Ireland's premier law firms, with 68 partners and over 350 lawyers and professional staff.

The firm is consistently recognised as being the market leader in many practice areas and its pre-eminence is endorsed by clients and market commentators alike. Our principal office is located in Dublin and we have overseas offices in London, New York and Brussels.

The firm is divided broadly into four main groupings of corporate, banking & financial services, dispute resolution and litigation and real estate (including construction). We also operate industry sector and specialist practice groups which comprise professionals from different groupings. In this way, we provide advice and representation on the basis of what is best for clients and their requirements.

Our clients include international corporations, major domestic businesses and emerging Irish companies. We also have many clients in the State and semi-State sector.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk