Lending and taking security in Cyprus: overview

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A Q&A guide to lending and taking security in Cyprus. The Q&A gives a high level overview of the lending market, forms of security over assets, special purpose vehicles in secured lending, quasi-security, guarantees, and loan agreements. It covers creation and registration requirements for security interests; problem assets over which security is difficult to grant; risk areas for lenders; structuring the priority of debt; debt trading and transfer mechanisms; agent and trust concepts; enforcement of security interests and borrower insolvency; cross-border issues on loans; taxes; and proposals for reform.

Overview of the lending market

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

2020 will be remembered as the year marred by the 2019 novel coronavirus disease (COVID-19), which radically affected many industries. The full effects of COVID-19 are yet to be evaluated, but it is certain that it has greatly impacted the world economy, trade, tourism, businesses, health systems and society as a whole.

Although there is still uncertainty as to the future and how banks and finance providers will assess the current market risks, in the lending sector COVID-19 has already increased the credit risk of banks' corporate and retail clients. Banks with high exposure to stressed industries are likely to face an increase in non-performing loans, while borrowers are likely to obtain additional loans to finance their operations.

Governments around the world are intervening to attempt to sustain the banking sector and the economy in general, and to alleviate financial hardship. The Cyprus Government continues to support eligible affected businesses. For example:

- The Emergency Measures for Credit Institutions and Supervising Authorities Law 33(I) of 2020 gives the Council of Ministers the power to require banks, credit institutions and pertinent supervising authorities to take emergency measures that contribute to the safeguarding of Cyprus's financial stability. For example, the Council of Ministers can decide itself or authorise the relevant authorities to take measures to suspend the repayment of loan instalments, including interest. The Minister of Finance issued a decree on 30 March 2020, amended on 7 May 2020, under which a moratorium was placed on loan repayments for businesses

that had been performing their loan obligations, natural persons, public entities and self-employed persons until the end of 2020.

- There were restrictions on the filing of eviction claims and foreclosures of properties.
- The Ministry of Labour and Social Insurance has taken steps to provide assistance to employees of most affected entities, and to industries that have suffered the brunt of COVID-19, such as the hotel, tourism and hospitality industry, which forms a large part of the economy. For example, there was a restriction on the termination of employment contracts for businesses applying for state support.

The EU has given member states maximum flexibility in relation to EU rules concerning fiscal and monetary measures. It has also prepared a COVID-19 package to provide new investments in affected member states. On 21 July 2020, EU leaders agreed a EUR750 billion recovery effort, called the Next Generation EU, to help the EU tackle the crisis caused by COVID-19. Alongside the recovery package, EU leaders agreed a EUR1074.3 billion long-term EU budget for 2021 to 2027. Among others, the budget aims to support investment in digital and green transitions. EUR540 billion of funds are already in place for workers, businesses and member states, so the overall EU recovery package amounts to EUR2 364.3 billion.

Forms of security over assets

Real estate

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

Real estate

Under the Immovable Property (Tenure, Registration and Valuation) Law, Cap 224, as amended (Immovable Property Law), real estate includes:

- Land (including land created from backfilling into the sea, and marina and berthing spaces).
- Buildings.
- Natural resources on land.

Common forms of security

The most common form of security taken over real estate is a legal mortgage. Legal mortgages give the mortgagee a contractual first priority right on the immovable property and a right to apply to the Lands Office for the sale of the same, on a default in the repayment of the loan.

A legal mortgage is only constituted when registered, and any dealings relating to the mortgaged immovable property are impossible save with the consent of the mortgagee. An immovable property may be charged with a second or further mortgages, only with the express written consent of all previous mortgagees (*section 29, Transfer and Mortgage of Immovables Law N.9/1965, as amended (Transfer and Mortgage of Immovables Law)*).

Formalities

A legal mortgage over immovable property is created by an instrument in writing signed by the mortgagor and the mortgagee in the form of Form B (or Form N271) under Annex II of the Transfer and Mortgage of Immovables Law, N.9/1965. Both the mortgagor and the mortgagee (or their duly authorised representatives) must attend the district lands office where the immovable property is situated to declare the mortgage to a qualified officer by presenting the signed instrument (*section 8, Transfer and Mortgages Law*).

A description of the property must be given that specifically refers to:

- Its location.
- Its number and date of registration.
- The mortgagor's or mortgagee's interests in the property.
- Any changes in the property's nature or state.
- Any existing lease.

(*Section 18, Transfer and Mortgage of Immovables Law*.)

If the person registering the mortgage is the mortgagor, it must also provide the officer with the mortgage agreement, bearing all the required stamps. It must also confirm that it is the principal of the property and that it has agreed to mortgage the property under the name of the mortgagee. If the mortgagee is registering, it must confirm that it has agreed to accept the mortgage over the property under the terms of the mortgage agreement. A confirmation of acquaintance between the mortgagor and mortgagee must be presented, as well as a confirmation of their mutual intention to register the mortgage. All the written declarations under section 18 must be in Form B in Annex II of the Transfer and Mortgage of Immovables Law. The forms required during the process of a mortgage registration include:

- The registration certificate of the property (title deed).
- Two copies of all the declarations and confirmations above.

The district lands officer must confirm by written instrument that the signature on the declaration document is the signature of the person wishing to register the mortgage. On registration, no subsequent transfer or further mortgaging is possible except with the mortgagee's consent.

If the mortgagor is a legal entity, it must also register the mortgage under section 90 of the Companies Law, Cap.113, as amended (Companies Law) with the Registrar of Companies, on the prescribed form (HE24Y) within the prescribed time limit. The time limit is 21 days from the date of the signing of the charge instrument if the signing took place in Cyprus, or within 21 days of the date on which the charge instrument could have been received by post in Cyprus if dispatched with due diligence. The Registrar of Companies has in practice allowed the registration

of charges created abroad to take place within 42 days from the execution. Failure to register the mortgage with the Registrar of Companies will render the mortgage void against the liquidator or creditor of the company but the mortgage would remain valid and enforceable between the mortgagor and the mortgagee.

Tangible movable property

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

Tangible movable property

Tangible movable property includes plant and machinery that is not permanently affixed to land or buildings, including:

- Goods and stock.
- Equipment (such as machinery and house, industrial plant, farming and agricultural equipment).
- Works of art.
- Aircraft and ships.

(*Section 2, Financial Leasing Law N.72(I)/2016.*)

Common forms of security

Charges. The most common type of security taken over tangible movable property is a fixed or floating charge (debenture). A charge does not give any proprietary right or interest in the property or asset charged but gives the chargee the right over the asset and its proceeds for the purpose of recovering the secured obligations. A fixed charge gives the chargee control over any dealings or disposals of the tangible property by the chargor.

Assets that are less ascertainable may be secured by a floating charge giving the chargor the right to deal with the assets in the ordinary course of business. A floating charge is a security interest that "floats" until an event of default occurs or the company goes into insolvent liquidation, at which time the floating charge "crystallises" and attaches to the relevant assets. In practice floating charges are usually created over the whole business and undertaking of a company, present and future.

Liens. The lien is another common form of security. It can be a common law legal lien or an equitable lien, and it is usually taken over goods that are being transported. The lien gives the holder the right only to retain the debtor's property until payment and does not include a right of sale. The carrier's lien (the right to retain possession of the goods) is then extinguished on it receiving payment for the transport costs.

Mortgages. The most common form of security over a Cyprus-registered vessel is a ship mortgage. As with other jurisdictions, a ship mortgage is the main security for a lender in ship finance. Unlike other charges over tangible movables, a ship mortgage gives the lender rights in rem against the mortgaged vessel, in addition to the right of possession and sale of the vessel and realisation of the proceeds in satisfaction of the debt. Aircraft mortgages over Cyprus-registered aircraft are also commonly used in aircraft financing transactions.

Formalities

Charges. If the chargor is a Cyprus legal entity, it must register the charge with the Registrar of Companies on the prescribed form (HE24) on payment of the prescribed fee within the prescribed statutory time limit (which is the same as for mortgages, see *Question 2*) (*section 90, Companies Law*). A charge that is not duly registered is invalid as against a future liquidator of the legal entity chargor.

Liens. Liens can arise under common law or equitable principles with no formalities being observed, although a contract may explicitly provide for a lien.

Mortgages. Ship mortgages over Cyprus-registered vessels are used extensively in ship finance transactions. A Cyprus registered vessel or share on one can be given as security for a loan or other material consideration (*section 31, Merchant Shipping (Registration of Ships, Sales and Mortgages) Law 45 of 1963, as amended (Shipping Registration Law)*). The instrument creating the mortgage must be drafted according to Form B of Part I of the first Annex to the Shipping Registration Law. The mortgage instrument (usually a mortgage deed) creates the security on the vessel and must be executed by the mortgagor as a deed. It must be supported by a deed of covenants entered into by the mortgagor and the mortgagee (*section 31(2), Shipping Registration Law*), covering the terms and provisions under which the mortgage is granted, including the:

- Manner of payment of the interest and the repayment of the principal.
- Insurances and their renewals.
- Restrictions in relation to the vessel's use.
- Definition of default.
- Powers of the mortgagee, including possession and so on.

The deed of covenants must also be executed by both parties as a deed before attesting witnesses. Unlike other common law jurisdictions, the collateral deed of covenants must be attached to the mortgage, forming a composite mortgagee document known as statutory mortgage and deed of covenants.

If the shipowner is a Cyprus company, the ship mortgage (and the deed of covenants) must be registered in two public registers:

- In the Cyprus Ships Registry, as a charge over the vessel, under section 31 of the Merchant Shipping (Registration of Ships, Sales and Mortgage) Law. Registration can be made at Cyprus Consulate overseas.
- At the Cyprus Registrar of Companies, as a charge against the ship owning company, under section 90 of the Companies law.

The mortgagee can obtain an injunction converting any negative pledge in the deed of covenants restricting the mortgagor from selling or otherwise disposing or further mortgaging or charging the vessel without the mortgagee's

prior consent from a contractual undertaking into a court order (*section 30, Shipping Registration Law*). This order can then be served on the Registrar of Cyprus Ships and entered in the Register as an encumbrance. The Registrar of Cyprus Ships usually demands a written consent from every prior mortgagee before accepting a subsequent mortgage for registration.

If more than one mortgage is registered on the same vessel or share thereof in the Cyprus Ships Registry, the first registered mortgage ranks first against the others, according to their date of registration (and not according to the date of their creation) (*section 33, Shipping Registration Law*). A ship mortgage registered in the Cyprus Ships Registry gives the lender priority over unsecured creditors of the shipowner, but registration is not essential to the validity of the mortgage. If not registered, a mortgage will be a valid equitable mortgage.

Failure to register the mortgage with the Registrar of Companies within the time limit prescribed by the Companies Law renders the mortgage void against a liquidator or creditor of the mortgagor company.

Regardless of the above, a maritime lien has priority over a ship mortgage irrespective of whether it arose before or after the date of the mortgage.

Aircraft mortgages are registrable by a Cypriot corporate mortgagor as a charge against the mortgagor company at the Registrar of Companies (*section 90, Companies law*). Registration with the Cyprus Aircraft Register is also necessary if the aircraft is registered in Cyprus (*Civil Aviation Law, No. 212(I) of 2002, as amended*).

In ship and aircraft financings it is also common to have assignments by way of security, involving mainly assignment of insurances and earnings. Such security assignments are registrable under section 90 and notice of the assignment must be given to the assignor as an additional formality.

Financial instruments

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

Financial instruments

The most common types of financial instrument over which security is granted are shares and debt instruments under the Financial Collateral Arrangements Law, 43(I)/2004, as amended (FCA Law) and Directive 2002/47/EC on financial collateral arrangements (Financial Collateral Arrangements Directive). "Financial instruments" are defined as:

- Shares in companies, bonds and other forms of debt instruments, provided they are the subject of negotiation on the capital markets.
- Any other securities that are usually dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange, or which give rise to a cash settlement (excluding

instruments of payment), including units in undertakings for collective investment in transferable securities (UCITS), money market instruments and claims relating to or rights in or in respect of any of these.

The FCA law applies both to cash and to financial instruments once they have been provided as collateral under financial collateral agreements by way of transfer of title or agreements for the provision of security interest.

Common forms of security

The pledge is the most common form of security taken over directly held shares, such as certificated shares in private companies. A share pledge is a possessory form of security as it involves the physical delivery to the pledgee of the share certificates representing the pledged shares, to achieve actual or constructive delivery of possession. As such, it creates a legal charge over the share certificates but also an equitable charge over the shares. The pledgee retains possession of the pledged property until the obligations secured by the share pledge are fulfilled. The deed of share pledge usually contains a charge over the pledged shares.

A share pledge under Cyprus law creates a special proprietary right over the shares, as opposed to a right *in personam*. The pledgee can enforce the pledge and exercise its proprietary rights over the shares, no matter who the owner of the shares is. The right follows the property (the shares) and not the person. However, this does not mean that the pledgee has any ownership right in the pledged property. Under a pledge of shares of a Cyprus company the right created is a special one that only arises once the pledgor defaults on the debt. The pledgee has only the specific right (a right of sale over the shares) not complete ownership.

For dematerialised securities, such as shares in listed companies traded on the Cyprus Stock Exchange (CSE), a charge can be taken over the special account of the investor's share account, which is then registered in the Central Securities Depository and Central Registry of the CSE.

The most common forms of security granted over indirectly held debt instruments, such as bonds and other tradeable debt securities, is a charge or an assignment or both. The deed of pledge over shares is sometimes drafted to include a fixed charge.

The Cyprus share pledge is a very useful tool in the hands of the pledgee as it can be enforced relatively easily out of court. On execution of the deed of pledge, the pledge deliverables will include:

- The original share certificates.
- Blank instruments of transfer.
- Irrevocable proxy and power of attorney.
- Undated director and secretary resignations.
- Letters of authority, coupled with an undertaking by the directors not to accept or authorise any act in contravention of the covenants contained in the deed of pledge.
- A resolution of the company directors approving in advance the transfer of shares to the pledgee.

On default, in an out of court enforcement, the pledgee will put the pledge deliverables into effect, transferring the shares into its name or into the name of its nominee.

Formalities

A pledge of shares in a Cyprus company held by a corporate shareholder/pledgor (whether or not a Cyprus company) is not registrable (with some exemptions under section 90(2)(θ) of the Companies Law). If the pledge is taken over a foreign company's shares and the pledgor is a Cyprus registered company, the pledge must be registered as a charge with the Cyprus Registrar of Companies to be perfected and valid against a liquidator of the pledgor (*section 90, Companies Law*).

For a pledge over shares of a Cyprus company to be valid and enforceable, the formalities of section 138 of the Contract Law, Cap 149, (Contract Law) must be observed:

- The pledge must be made in writing, signed by the pledgor and the pledgee, and witnessed by at least two witnesses.
- Notice of the pledge must be given by the pledgee to the company whose shares are being pledged.
- A memorandum of the pledge must be entered in the register of members of the company whose shares are being pledged.
- The company must issue and deliver to the pledgee a certificate executed by the appropriate official of the company confirming the fact of the registration of the pledge in favour of the pledgee.

Where the security is financial collateral, no formalities exist (*section 90(2)(θ), Companies Law*) and the requirements contained in section 138 of the Contract Law do not apply.

For charges over debt instruments, although the registration and other formalities are disapplied by the FCA Law, fixed and floating charges continue to be routinely registered with the Registrar of Companies (particularly where the instrument creating the charge contains several charges, one or more of which do not constitute financial collateral under the FCA law).

Claims and receivables

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

Claims and receivables

The most common types of claims and receivables over which security is granted include:

- Rights and receivables under contracts.
- Payment obligations under contracts.

- Claim rights and proceeds under insurance policies (usually life insurance and fire insurance contracts).
- Bank accounts and cash deposits.
- Promissory notes.
- Book debts.
- Rent receivables.

Common forms of security

The form of security over receivables is at the discretion of the contracting parties, and depends on their commercial interests and on whether the security provider wishes to maintain control over the secured receivables in its ordinary course of business. The most common forms of security include:

- Equitable assignment.
- Lien.
- Fixed or floating charge.
- Pledge.

Formalities

There are no statutory formality requirements for creating an equitable assignment, lien, charge, or pledge over property other than pledge of bills of exchange, promissory notes, bonds and shares. However, security agreements are usually executed in writing. The agreement is valid and enforceable if it complies with common law and statutory rules of contract law.

An equitable charge, assignment, lien or charge can be granted over future property, but a pledge cannot be granted over future property. The pledgor must be the owner, possessor or a person with an interest in the movable property.

It is possible to create a pledge over any kind of movable property. The formalities of section 138 of the Contract Law (*see Question 4, Formalities*) only apply when constituting a pledge over:

- Bills of exchange.
- Promissory notes.
- Bonds (other than those secured by mortgage of immovable property).
- Share certificates.

Unless agreed otherwise, compliance with the formalities entitles the pledgee, on default of the pledgor, to:

- The same rights and remedies on the pledge against third parties as the pledgor would have had but for the existence of the pledge agreement (and all payments made to the pledgee by third parties on the pledge are as valid and effective as if made to the pledgor).
- Initiate legal action against the pledgor and withhold the pledged assets, or to sell them after giving reasonable notice to the pledgor.

There are no other statutory provisions specifying the enforcement rights and remedies available to the beneficiary of security taken over receivables. The usual practice is to detail these rights and remedies in the security agreement.

The perfection requirements in relation to securities or any subsequent amendments created over claims and receivables of a legal entity are set out in the Companies Law. A security over receivables is only registrable when it is granted over:

- Book debts of the company.
- The undertaking or property of the company, by a way of a floating charge.
- Any other movable property, if created or evidenced by a document where the company retains possession of such property.

(*Section 90(2), Companies Law.*)

Registration does not affect the validity of the security agreement between the contracting parties but perfects the security and renders it enforceable against any liquidator or creditor of the company.

For equitable securities such as assignments and charges, there is an additional common law perfection requirement stemming from the rule in *Dearle v Hall [1828] 3 Russ 1.* Under this principle, the first security holder must give notice to the relevant contracting third party, in order to gain priority over the remaining equitable interests in the property.

Cash deposits

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

Common forms of security

The most common forms of security over cash deposits are:

- Banker's general lien.

- Fixed or floating charge.
- Assignment.
- Pledge.

A charge over a bank account can be granted in favour of a third party. Typically, the charge is created in favour of the lender and account holder bank. A banker's general lien exists impliedly in every banker-customer relationship, unless the parties contract out of it (*Nikolaos Antoniou v Cyprus Popular Bank (1994) 1 ΑΑΔ 720* and *Halesowen Presswork v Westminster Bank Ltd [1970] 1 All ER 473*). The banker's general lien allows the banker to set off the credit and debit accounts that the customer holds with the bank for discharging a debt owed to the bank.

Another option available to a bank as a secured lender is to provide for a flawed asset clause in the security agreement. Flawed asset clauses offer protection against the capacity of judgment creditors to apply for a garnishee court order in relation to property beneficially belonging to the debtor, but which is in the possession of a third party (*Part 7, Civil Procedure Law Cap. 6, as amended*).

Formalities

See *Question 5, Formalities*.

Intellectual property

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

Intellectual property

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

- Copyright.
- Patents.
- Trade marks.
- Designs.

Common forms of security

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

- Equitable assignment.
- Pledge.
- Floating charge.

There are many pieces of legislation on intellectual property rights, including the:

- Right to Intellectual Property and Related Rights Law 59/1976, as amended.
- Trade Marks Law Cap. 268, as amended.
- Patents Law 16(I)/1998, as amended.
- Industrial Designs Law 4(I)/2002, as amended.
- Protection of Competition Law 207/1989, as amended.

Cyprus is gradually widening the intellectual property protection it offers, while taking considerable steps in encouraging the growth of its intellectual property market.

Formalities

The creation of security over intellectual property is not expressly governed by any intellectual property legislation. The Intellectual Property Law only states generally that intellectual property rights are capable of assignment by an agreement in writing. For receivables, the validity and enforceability of the security depends on the security agreement's compliance with the common law and the provisions of the Contract Law. For EU trade marks, an assignment is void unless it is executed in writing and signed by the parties (*Regulation (EU) 2017/1001 on the European Union trade mark*). Directive (EU) 2015/2436 to approximate the laws of the member states relating to trade marks (New Trade Marks Directive) (still in the process of implementation in Cyprus) provides that:

- A trade mark can be given as security or be the subject of rights *in rem*.
- Each member state must have procedures allowing the recording of rights *in rem* in registers.

The Intellectual and Industrial Property Department under the Registrar of Companies handles the registration of intellectual property rights. Security and any subsequent amendments over intellectual property, or over a patent or copyright licence, created by a company registered in Cyprus are registrable with the Registrar of Companies (*section 90, Companies Law*).

Problem assets

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

There are no restrictions on the type of assets over which security can be granted.

Future assets

Any type of security can be granted over future assets, except a legal mortgage and a pledge.

Fungible assets

Any type of security can be granted over fungible assets, except a legal mortgage.

Other assets

There are no particular assets over which security cannot be granted. However, a potential security holder should be aware of the following:

- Certain receivables and contractual rights may be incapable of being charged due to prior contractual restrictions.
- Restrictions on granting security may be imposed by a company's memorandum and articles of association.
- A company granting security must not breach statutory provisions relating to corporate benefit, directors' duties, financial assistance and fraudulent preferences.

Release of security over assets

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

Security is usually released by an agreement among the contractual parties.

When a legal mortgage over immovable property is released, the property is released when the mortgagor and the mortgagee present the district lands office with the appropriate documentation (*section 34, Transfer and Mortgages Law*). The mortgagor can apply for a court order to cancel the mortgage if the mortgagee fails to release the mortgage despite the discharge of the secured obligations (*section 36, Transfer and Mortgages Law*).

If a security constitutes a registrable charge under the Companies Law, the Registrar of Companies may release the security on the partial or whole repayment of the secured debt, or on proof that part of the secured property has

been released or no longer belongs to the security provider (*section 95, Companies Law; Registrar of Companies forms HE28, HE29, HE30*). Recording the release with the Registrar of Companies is merely a formality and does not affect the validity of the release.

The deed of share pledge usually determines the procedures for its termination. Usually, termination is on:

- The secured obligations having been discharged in full.
- A written agreement of the pledgee and the pledgor.
- The pledgee serving a termination notice on the pledgor.
- Enforcement of the pledge by the pledgee.

Following termination of the pledge, the pledgee returns the share certificates and other documents delivered to it under the deed of pledge to the pledgor or company secretary. A notice must also be sent by the pledgee to the company secretary instructing them to delete the memorandum of pledge entered against the pledged shares in the register of members. If the pledge was registered as a charge at the Registrar of Companies, even though such registration is now exempted from registration under section 90 of the Companies Law, a form HE28 must also be submitted to the Registrar of Companies evidencing the repayment of the secured obligations and asking the Registrar of Companies to issue a certificate of freedom of charges or a statement of registered and deleted charges HE23.

The Registrar of Cyprus Ships will file the repayment event in the Ship Registry on the repayment of a registered mortgage and on the production of the mortgage deed duly signed by mortgagor and mortgagee and on which the receipt of the secured amount is noted (*section 32, Merchant Shipping (Registration of Ships, Sales and Mortgage) Law*).

Special purpose vehicles (SPVs) in secured lending

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

It is common to take security over the shares of an SPV borrower, as it is easier and more cost-efficient to enforce security taken over shares of an SPV rather than taking security over its entire assets. A pledge over a Cyprus company's shares allows out of court enforcement, without the need to apply for a court order.

Quasi-security

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

There is no statutory definition of what constitutes a security interest under Cypriot law. Precedents of English common law and equity which were applicable in Cyprus before 1960 are followed by Cypriot courts (*section 29(1)(c), Courts Law 14/1960, as amended*). The Cypriot courts will therefore consider the common law definitions of security interests in English case law, before recharacterising quasi-security structures as security interests. In so doing, the court will ascertain the intention of the contracting parties and examine whether one or more of the following characteristics of a security interest under the common law are present (*McEntire v Crossley Brothers Ltd [1895] AC 457; Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339*):

- It is created by grant, not by reservation.
- In the event of asset realisation for the satisfaction of the secured debt, the debtor is entitled to any surplus or remains liable for the balance after realisation.
- A borrower has the right to redeem (that is, to free the secured asset by paying the debt).

Sale and leaseback

A sale and leaseback is defined as a transaction where the lessee (borrower) chooses an asset that is then bought by the lessor (lender), or the lessee transfers the ownership title of an asset to the lessor, who then leases it back to the lessee (*Financial Leasing Law 72/2016*). Although the economic effect of these transactions is the same as an asset-secured loan, they are not usually recharacterised as such. The lessor (lender) holds an absolute interest in the leased asset and not merely a security interest, since the lessor is the owner of the leased asset. The lessor grants to the lessee a right of possession, which can be withdrawn on the default of the lessee.

Section 37 of the Financial Leasing Law imposes a requirement to register a sale and leaseback agreement within one month. The transaction is recorded on the relevant register according to the type of property sold and leased. In an aircraft or motor vehicle sale and leaseback registration, a right *in rem* is created in favour of the lessee, which attaches to the registered asset even if the owner of the asset sells it to a bona fide third purchaser. In a sale and leaseback agreement of immovable property, the lessee has the additional right to demand specific performance. These provisions should not be confused with the registration requirements applicable in relation to security agreements. In effect, the registration of the sale and leaseback agreement protects the ability of the lessee (debtor) to exercise its option to purchase the leased asset.

As the Financial Leasing Law has not yet been tested, it is not known whether Cypriot courts would recharacterise a sale and leaseback as a secured loan.

Factoring

Cyprus banks offer factoring services. Factoring is when a company sells its book debts to a factoring company (lender), which in return provides finance to the company. The factoring company is usually responsible for collecting the debts directly from the customers of the company. Although the economic effect of factoring is similar to the company obtaining a secured loan, it will not be recharacterised as a secured transaction since the lender obtains an absolute interest in the books debts and not a security interest over them.

Hire purchase

A hire purchase is a contract under which a lessee receives certain property from the lessor, in return for instalment payments and with the lessee's right to buy the leased property (*Hire Purchase Law 32/1966* and *Finance Leasing Law*). The Supreme Court of Cyprus has stated that a hire purchase transaction is constituted by two distinct contracts:

- A bailment contract during which the property remains under the possession of the lessee.
- A sale contract.

(*Solomou a.o v Marfin Popular Bank Ltd (2011) 1 ΑΑΔ 36*.)

The Cypriot courts do not treat hire purchase transactions as security interests. The absolute title to the leased property remains with the lessor up and until the lessee exercises their optional right to purchase the property.

Retention of title

Retention of title clauses must be contractually agreed on by the transaction parties, as the unpaid seller has no automatic title retention right (*section 12, Combating Late Payments in Commercial Transactions Law 123(I)/2012; section 19, Sale of Goods Act 10(I)/1994*). A simple retention of title (Romalpa clause) under which the title of goods remains with the seller until the buyer fulfils their obligations, does not carry the risk of being recharacterised as a security interest. The debtor (buyer) has no proprietary interest in the purchased goods, and is therefore not able to grant security over them. The effect of a Romalpa clause is best characterised as the retention of an absolute interest in the goods and not as a security interest, which can only be by grant and not by retention.

However, a retention of title clause carries the risk of being recharacterised as a security interest where the term either:

- Is an all monies clause.
- Provides that the seller's proprietary right attaches to any proceeds of sale or products made out of the sold goods.

These scenarios have not yet been tested before the Cypriot courts. It is advisable to draft these clauses in such a form so that they can be severable from the retention of title clause, so that the clause cannot be invalidated against the liquidator for want of registration.

Other structures

A negative pledge is a contractual undertaking that a lender can request that the borrower be prohibited from granting a security interest in the future to other creditors. It does not amount to a security interest.

A set-off arrangement can arise by law, contract or equity. It is not a security interest, as it does not afford a proprietary right in an asset.

Guarantees

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

Companies commonly provide guarantees as security for money owed by itself or a third party. The company granting the guarantee must have the corporate power to do so. In the absence of a clear corporate power, the corporate guarantor must show that it will receive a corporate benefit in giving the guarantee and that it serves its commercial and business interests. Guarantees are usually created by a written contract and are subject to general contractual principles.

Risk areas for lenders

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

The general principles of contract law apply to a loan, security or guarantee. They may also affect specific terms of a loan agreement, such as very high interest in the case of default, which may be unenforceable as a penalty.

Financial assistance

Section 53 of the Companies Law contains a prohibition on financial assistance by a company for the purchase of or subscription for its own shares or those of its holding company. However, no definition of financial assistance is provided. The main prohibition on financial assistance contained in the Companies Law derives from English law, and English case law offers useful guidance in the absence of a clear definition. It is apparent from the authorities that the provision and/or granting of any loan, guarantee and/or security falls within the meaning of financial assistance. Recent amendments to the Companies Law introduced whitewash provisions under which financial assistance by a private company for the acquisition of its own shares or of the shares of its holding company is no longer unlawful, if:

- The private company is not a subsidiary of a public company.
- The transaction was approved in a general meeting by a shareholders' resolution representing a majority of 90% of the issued share capital of the company.

Corporate benefit

Directors owe a duty to their company to act in good faith for the benefit of the company. The company's benefit from acting as a guarantor is typically easy to establish when it relates to a subsidiary in a downstream guarantee.

However, it may be more difficult in cases where a subsidiary is being called to provide a guarantee for its parent company in an upstream guarantee, or for a sister company in a cross-stream guarantee. In addition, if the amount secured by the guarantee exceeds or equals the asset value of the guarantor, that can pose another obstacle in proving a corporate benefit.

Loans to directors

Directors have a general duty to avoid conflicts of interest in the exercise of their duties. Directors have a fiduciary relationship with the company (not with its shareholders). The directors of a company cannot personally benefit from a particular transaction. A director of a company who is in any way, whether directly or indirectly, interested in a contract or a proposed contract with the company is under a duty to declare the nature of their interest (*section 191, Companies Law*).

It is unlawful for a company to provide a loan to any person who is its director or a director of its holding company, or to provide any guarantee or security in connection with a loan provided to such a director by any other person (*section 182, Companies Law*). There are certain exceptions to this prohibition where the:

- Company is a private company.
- Company is a subsidiary and the director is its holding company.
- Loan or guarantee is to provide the director with funds to meet expenditure incurred for the purposes of the company or enabling them to properly perform their duties as an officer of the company.
- Loan or guarantee is part of the company's ordinary business of lending of money or the giving of guarantees.

Usury

Under section 314A of the Criminal Code, Cap. 154, as amended (Criminal Code), and further to the amendment introduced in 2011, usury is a criminal offence which is punishable on conviction with imprisonment not exceeding five years and/or a financial fine not exceeding EUR30,000. A person is prohibited from receiving, collecting or charging interest at a rate that is higher than the interest rate ceiling during the provision of any loan period. This prohibition does not apply to credit institutions. The Central Bank of Cyprus calculates the interest rate ceiling every three months, in accordance with section 314A of the Criminal Code. This is then published in the *Official Gazette of the Republic of Cyprus*.

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

A lender does not become automatically liable under the environmental legislation merely by providing financing, or for being a security provider or guarantor. However, care must be exercised in cases where a lender becomes an "operator" under the Law on Environmental Liability with regards to the Prevention and Remedying of

Environmental Damage No. 189(I) of 2007, as amended. This Law imposes strict liability on the operator in respect of the costs of prevention and remediation of environmental damage caused by any of its listed "occupational activities".

Structuring the priority of debts

15. What methods of subordination are there?

Contractual subordination

A company can raise debt from a number of different sources and it is therefore important to clarify which lenders are entitled to receive interest and repayments first, and which has first claim over the loan collateral. This is the senior lender, with any other (junior) lender being subordinated and only entitled to interest, repayment or the collateral once the senior lender's claim is satisfied in full. Contractual subordination of debt is possible and quite common in lending transactions. This is usually achieved through contractual agreement between the senior lender, junior lender and borrower.

Structural subordination

Structural subordination is another possible method of structuring the priority of debts. This is achieved by concentrating the senior debt in an active company of the group, which has available assets, and directing the junior debt to the parent company. However, these arrangements should be carefully constructed so that they do not run the risk of being considered ineffective if caught by the fraudulent preference provisions of the Companies Law.

Inter-creditor arrangements

Inter-creditor arrangements are common and are typically made between the lenders and the borrower company through an inter-creditor agreement that sets out the terms of their relationship.

Debt trading and transfer mechanisms

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

Debt trading is not a usual practice in Cyprus. However, debt can be transferred by assignment of the benefit and/or rights provided. If the intention is not only to assign the benefit but also the liabilities under the loan agreement, this is achieved by a novation agreement. Another way for a lender to obtain the benefit of the security and guarantees associated with transferred debt, is by perfecting a validly created charge over assets of a company as security for the debt, and filing it with the Registrar of Companies so that the charge is recognisable by the liquidator or any other creditor and takes priority over unsecured lenders.

Agent and trust concepts

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

The agent concept is recognised in Cyprus. Agency is governed by several pieces of legislation, including sections 142 to 198 of the Contract Law. Section 142 of the Contract Law defines an agent as a person employed to do any act for another, the principal, or to represent the principal in dealings with third parties. Section 143 provides that any person who has capacity to contract can appoint an agent.

A contract entered into by an agent as well as any obligations arising from the acts of the agent, are enforceable in the same manner and have the same legal consequences as if the contract had been entered into and the acts done by the principal in person (*section 186, Contract Law*).

Recent UK case law, on which Cyprus courts draw guidance, suggests that the role of the facility agent in finance transactions is limited and the terms of any finance document are of crucial importance. If a party wishes a facility agent or entity to undertake a specific duty or act in certain capacities, the duty is not implied and must be expressly set out in the relevant documentation.

18. Is the trust concept recognised in your jurisdiction?

The trust concept is recognised in Cyprus, which has a common law legal system. The applicable Cyprus law relating to trusts is the Trustees Law, Cap. 193, as amended, and the International Trusts Law of 1992 (*N. 69(I)/1992*), as amended. A trust can be used to hold security over the assets of a debtor for a number of creditors, for example, in a syndicated loan or a securitisation transaction.

The security trustee, as a matter of principle, owes a fiduciary duty to the lenders as beneficiaries of the trust property. However, in the finance lending market where parties choose to govern their relationship by drafting commercial contracts, the scope and nature of the duties of a security trustee are usually defined by contractual terms.

Enforcement of security interests and borrower insolvency

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

The terms of the loan, the guarantee or security documentation set out the circumstances in which an enforcement right is triggered, as well as the way enforcement can be exercised. The actual events that trigger enforcement are contractually agreed between the parties and are usually set out as enforcement events or events of default.

Before enforcing a security interest, the enforcing party must:

- Ensure that a right of enforcement does in fact exist (that is, that an event of default has taken place).
- Determine when and in what manner the enforcement must be undertaken.
- Consider whether there are any restrictions which would prevent the enforcement from taking place (for example, a subordination agreement or an inter-creditor agreement).

In addition, where the loan, guarantee or security document is connected with other documents, the provisions of all the documents regarding enforcement must be considered.

Methods of enforcement

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

The mechanism for enforcement of a security interest is usually set out in the security document. The security document will specify whether there is a right of sale, appropriation, set-off, realisation or management of underlying assets, or a right to appoint a receiver.

Some security documents (for example, a pledge over shares) provide for out-of-court enforcement through pre-delivered deliverables.

Where the security document gives the security holder the power to sell the asset covered by the security, the asset must be sold at market value. Where the security constitutes a financial collateral arrangement under the FCAL, appropriation is only possible where both:

- It has been agreed in the security document that the pledgee may take ownership of the financial instruments.
- The security document contains contractual provisions regarding the method of valuation of the financial instruments.

Where the sale relates to shares, the pledgee has a common law duty to sell the shares in good faith and obtain the best price reasonably obtainable at the time of sale (although the pledgee is not obliged to wait until market conditions improve). Cyprus law does not require a public sale or auction. Where the pledged assets constitute goods (including pledged shares), reasonable notice must be given to the pledgor of the intention to sell such goods, and any contractual provision in the security documents disapplying this requirement will be void and of no effect.

In addition, where a receiver or manager is appointed on behalf of a floating charge holder, the following provisions of the Companies Law apply:

- The receiver or manager must immediately notify the company of their appointment.
- Within 14 days after receiving the notice (or longer if permitted by the court or the receiver/manager) the company must prepare a statement of affairs in the prescribed form and submit it to the receiver/manager.
- Within two months following receipt of the statement, the receiver/manager must deliver for registration:
    - to both the Registrar of Companies and the court: a copy of the statement, and any comments on the statement and to the Registrar of Companies a summary of the same;
    - to the company: a copy of any comments on the statement, if any and where no comments will be made, a notification to that effect;
    - to any trustees of the debenture holders on whose behalf they were appointed and to all the debenture holders (to the extent that they are aware of their addresses): a copy of the summary of the statement.

If an out-of-court enforcement is not possible, the security holder may seek enforcement through the courts.

Rescue, reorganisation and insolvency

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

Corporate reorganisation

The Companies Law allows for corporate reorganisations to take place in the form of compromises or arrangements. A compromise or arrangement is usually proposed between the company and its creditors or the company and its

members. An application is usually made to the relevant district court by the company or any creditor or member of the company, requesting an order for a meeting of the creditors or members of the company. If the majority in value of the creditors or number of votes of members present and voting either in person or by proxy agree to the compromise or arrangement, an application is made to the court for approval. Once the court has sanctioned the compromise or arrangement, it becomes binding on all the creditors or members.

Resolution measures

The Law on the Resolution of Credit Institutions and Investment Companies No. 22(I) of 2016 (Resolution Law) implements the provisions of Directive 2014/59/EU on Bank Recovery and Resolution (BRRD). The BRRD provides minimum thresholds for measures to be taken in connection with failing or unsound credit institutions and investment firms by each member state. Resolution measures can only be taken where the following conditions are satisfied:

- The competent authority, after consulting the Resolution Authority, determines that the institution is insolvent or is facing potential insolvency.
- Having regard to timing and other relevant circumstances, there is no reasonable prospect that any private sector alternative measures, including early intervention measures or the write-down or conversion of relevant capital instruments, would prevent the insolvency of the institution within a reasonable timeframe.
- A resolution measure is necessary for reasons of public interest.

Examinership

The Companies Law introduced the examinership procedure in 2015, which aims to rescue a viable company with liquidity problems through reorganisation in an effort to prevent or avoid liquidation. It provides relief from the actions of creditors so that the company has the time to reorganise its financial affairs. On the filing of a petition, the court can appoint an examiner if it considers that all the following conditions are met:

- The company is, or will most likely be, unable to pay its debts.
- No resolution for the liquidation of the company has been published in the *Official Gazette of the Republic of Cyprus*.
- No court order has been issued for the liquidation of the company.

The court only issues an order for examinership if it is satisfied that there is a reasonable prospect of survival of the company and the whole or part of its business of as a going concern.

The company goes under court protection for a period of four months from the date of the filing of the petition with the court, with the possibility of a two-month extension. The following applies during the court-imposed moratorium period (among other things):

- No winding-up proceedings can be commenced against the company.
- A receiver cannot be appointed, and the company cannot be placed in liquidation.

- No confiscations by third parties, including sequestration proceedings or enforcement, can be carried out against the assets or property of the company without the consent of the examiner.
- Where any claim against the company is secured by a mortgage, charge, lien or other charge or pledge over the whole or any part of the assets, property, or income of the company, no action can be taken for the enforcement of the whole or any part of the security without the consent of the examiner.
- No payment can be made by the company for the settlement or repayment of the whole or a part of an obligation created at a date prior to the submission of an application for examinership, unless the report of the independent expert includes a recommendation that such payment is made, or the examiner authorises it.

Since the procedure has been newly introduced into Cyprus law, the potential effects of the examinership procedure, and whether this will result in any delays or stays in exercising enforcement rights, remain unclear. The position has only been clarified with respect to financial collateral arrangements. An amendment to the Financial Collateral Arrangements Law, 43(I)/2004 (FCA Law) was published on 20 October 2017 which safeguards financial collateral arrangements from the potential detrimental effects of examinership. The FCA Law introduces a new section specifying that the provisions of the FCA Law will be effective irrespective of the provisions of the Companies Law with respect to examinership. The amended FCA Law now expressly provides that a close-out netting provision takes effect in accordance with its terms irrespective of, among other things, the examinership provisions contained in the Companies Law. It has been indicated that, as a basic principle, creditors will not be placed in a less favourable position by the examinership procedure as compared to liquidation.

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

The impact of insolvency procedures on the lender's enforcement rights primarily depends on the type of security that the lender has over the assets of the insolvent entity. It is usual for the commencement of an insolvency procedure to be included in an agreement as an event of default that triggers the termination and enforcement procedures set out under the agreement.

If a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator/ provisional liquidator takes into their custody or control all the property and things in action to which the company is or appears to be entitled.

A secured creditor should, within the prescribed period, submit to the official receiver, liquidator or guarantor, as applicable, a preliminary valuation of the secured asset and agree with them on valuation. If no agreement is reached on the value, an independent valuer may be appointed.

The court may set a deadline by which creditors must prove their debts or claims. Creditors are excluded from the benefit of any distribution made before those debts are proved. The proof sets out whether the creditor is a secured creditor.

Any distribution of property of the company, including actionable rights, transfers of shares or changes in the status of the members of the company, that is made after the initiation of the winding-up by the court is void, unless the court orders otherwise.

When a company is wound up by the court, any attachment, sequestration, distress or execution against the estate or objects of the company after the commencement of the winding-up is deemed void.

It is also possible for stays to be imposed on actions or proceedings against the company. At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, can apply to the court for a stay of proceedings, as well as to restrain further proceedings.

Once a winding-up order has been issued and a provisional liquidator has been appointed, no action or proceeding can be continued or commenced against the company, unless by leave of the court.

On an application by the official receiver or liquidator, the court can also order that secured assets be taken into the receiver's or liquidator's custody and be liquidated as if they were not charged. If so, the security holder has the same priority with respect to any other analogous assets of the company.

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

Where a company goes into liquidation, any conveyance, charge, mortgage, delivery of goods, payment, execution or other act relating to property that took place within six months before the commencement of the winding-up may be considered as a fraudulent preference and be set aside. A preference is considered fraudulent if it is intended to put a creditor in a better position on liquidation of the company than they would have otherwise enjoyed. Creditors who benefit from a fraudulent preference must repay any benefit obtained.

If a transaction constitutes a financial collateral arrangement within the meaning of the FCA Law, the arrangement is not deemed void on the sole basis that a financial collateral arrangement has come into existence, or the financial collateral has been provided, on the day of the commencement of the winding-up proceedings or reorganisation measures, or within a prescribed period before then. However, where such a transaction is considered to be a fraudulent preference of its creditors, it can still be set aside. That means that the provisions of the FCA Law must be interpreted in the context of a bona fide person who had no knowledge or notice of the prior existence of an act of bankruptcy and who is in no way acting with the fraudulent intention of defrauding the other creditors of the company (*see Question 21*).

In addition, when a company is in liquidation, a floating charge created within 12 months from the commencement of the winding-up is void, unless it is proven that the company was solvent immediately after the creation of the charge.

If the requirement to register a charge is not complied with, the charge is void as against the liquidator and any creditor of the company. However, the security remains valid and enforceable as between the chargor and the chargee.

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

Creditors' claims are satisfied in accordance with a priority ranking set out in the Bankruptcy Law and in the Companies Law. In the winding up of an insolvent company the same rules that are in force under the law of bankruptcy regarding the estates of the person(s) pronounced bankrupt will prevail and be observed with regard to the:

- Respective rights of secured and unsecured creditors.
- Debts provable.
- Valuation of annuities and future and contingent liabilities.

(*Section 298B, Companies Law.*)

The order of distribution of assets on a winding-up is as follows:

- Where there is a valid legal mortgage over immovable property the mortgagee has an absolute priority over any other secured or unsecured creditor, in relation to that mortgaged property (*section 23(1), Transfer and Mortgage of Immovables Law*). In cases where an immovable property is charged with a second or further mortgages, the priority between the other mortgagees is determined by the date of the registration of the respective mortgage in the district Lands Office (*section 30, Transfer and Mortgage of Immovables Law*).
- Where there is a valid fixed charge, the net proceeds from the sale of secured assets are primarily used for the settlement of amounts secured by that charge (provided that, where the charge must be registered in accordance with the Companies Law to be valid as against the liquidator, the registration has been duly effected, otherwise the claims will rank *pari passu* with those of unsecured creditors). If there is a surplus, it becomes part of the general pool of assets and is distributed in accordance with the priority list below. If there is a shortfall, the secured creditor is an unsecured creditor only with respect to this shortfall and ranks after the costs of the winding up, preferential debts and any floating charge holders, *pari passu* with all the other unsecured creditors. The ranking between fixed charge holders is determined by the timing of the registration of the charge with the Registrar of Companies. Provisions in inter-creditor or subordination agreements may also have an impact on priority. The obligations under a registrable but unperfected charge are not recognised by the liquidator as secured obligations, but instead constitute unsecured obligations and rank together with unsecured creditors.
- Costs and expenses of the winding-up.
- In a winding up, the following preferential debts are paid in priority to all other debts (other than the aforementioned), which rank equally among themselves and are paid in full, unless the assets are insufficient to meet them, in which case they are reduced in equal proportions:
    - rates and taxes, and all government taxes and duties due from the company;

- any salary owed to an employee and any sum withheld by the employer from the employee's salary for the payment of any obligations of the employee that the employer has not paid, and any other sum or employee benefit that arises as a result of an agreement or employment relationship;
- any compensation that the company must pay to an employee due to bodily harm suffered by the employee as a result of an accident caused by and during their employment with the company; and
- any amount due to the employee in relation to leave to which they are entitled in their employment with the company, up to a one-year employment period.

(*Section 300(1), Companies Law*.)

- Any amount secured by a floating charge.
- Unsecured ordinary creditors.
- Any deferred debts, such as sums due to members in respect of dividends declared but not paid.
- Any share capital of the company.

In addition, set-off and netting (which are both forms of quasi-security) of mutual obligations between two parties are generally recognised and protected under Cyprus law. Therefore, certain assets or amounts of the entity in liquidation that would otherwise form part of the pool of assets and which would otherwise be distributed in accordance with the above priority could be used, depending on the circumstances, to eliminate mutual obligations owed to the entity in liquidation, by way of set off or netting.

Cross-border issues on loans

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

There are no restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders, nor taking guarantees from foreign subsidiaries of the borrower, provided:

- Where such actions involve a corporate lender, security provider or guarantor, they do not contravene the constitutional documents of the company.
- They are allowed under the law of the country of incorporation of the company.

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

There are no restrictions on payments to foreign lenders under a loan agreement or security document, including guarantees. There are no exchange control restrictions on enforcement of guarantees, although a guarantee may be subject to stamp duty. In addition, the Movement of Capital Law No. 115(I) of 2003 states that no restrictions exist in relation to the movement of capital, including payments to and from residents of Cyprus and residents of the EU or a third country.

Brexit

27. If UK financial institutions no longer have "passporting" rights in the EU after Brexit, what regulatory requirements would a UK lender have to comply with to make a loan to, or purchase a loan made to, a borrower in your jurisdiction?

Following Brexit, it is expected that UK credit institutions will no longer be able to exercise their right of establishment (branch passport notifications) or of the freedom to provide services (services passport notifications) under section 10A of the Business of Credit Institutions Law 66(I)/1997 as amended (Business of Credit Institutions Law), which implements the passporting provisions of Directive 2013/36/EU on capital requirements (Capital Requirements Directive IV).

A UK credit institution wishing to exercise banking activities in Cyprus or abroad from Cyprus must establish a branch and obtain a licence pursuant to the Business of Credit Institutions Law. Lending is listed in Annex IV as an activity for which a licence is required. Following Brexit, a licence to establish a "branch of a third country institution" will likely be required.

The purchase of loans is regulated by the Law Regulating the Sale and Acquisition of Credit Facilities and Related Matters Law no 169(I) of 2015, as amended and the Central Bank of Cyprus Directive on Notification of Borrowers and Guarantors of 2016 and the procedures and restrictions set out therein must be complied with.

It applies to:

- Credit facilities granted by authorised credit institutions licensed under the Business of Credit Institutions Laws to physical persons which at the time of purchase have a total balance not exceeding EUR1 million at each such institution.
- Credit facilities that are granted to small and very small businesses when at the time of the purchase the total balance of the credit facility granted to such business or to a group of connected businesses does not exceed EUR1 million with each institution.

However, it does not apply to credit facilities that either:

- Are rated by an authorised credit institution, including branches of thereof to a natural person who is not a permanent resident of Cyprus or to a legal person which is not registered in Cyprus.
- Relate to operations/investments outside of Cyprus.
- Have a main security that includes a mortgage over immovable property and/or charge over property which is located outside of Cyprus.
- Are governed by the laws of another member state.

A UK credit institution seeking to purchase loans falling into this category will need to obtain a licence from the Central Bank of Cyprus to operate as a branch of a third country institution and once it does so it will be considered as a licenced credit institution. If the licence contains a prohibition on purchasing loans, a further licence must be obtained in accordance with the provisions of the Law Regulating the Sale and Acquisition of Credit Facilities and Related Matters Law no 169(I) of 2015, as amended.

Loans that exceed the amounts set out above are subject to notification requirements and the procedure and actions set out in section 18 of the Law Regulating the Sale and Acquisition of Credit Facilities and Related Matters Law no 169(I) of 2015, as amended must be complied with. The purchaser must also make the necessary notifications to the borrower.

28. Will a UK financial institution require a licence to lend after Brexit? Will a UK lender be able to take security from a borrower in your jurisdiction?

See *Question 27*.

It is unlikely that any restrictions would apply to a UK lender taking security from a borrower in Cyprus after Brexit, since in general, the grant of most security interests is not subject to any licensing requirements.

Taxes and fees on loans, guarantees and security interests

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

Documentary taxes

Cyprus Stamp Duty Law No. 19/1963, as amended, imposes *ad valorem* stamp duty on all documents (including contracts) that concern property or proprietary rights situated in Cyprus or matters to be executed or take place in Cyprus, irrespective of where the document is signed (subject to certain exceptions). Contracts, mortgages or other documents drafted in the process of a restructuring, as well as the future repurchase of a mortgage security by the borrower, which was alienated as a result of a restructuring, despite the time of repurchase, are exempted from stamp duty. This exemption will apply up to the amount of the obligations existing at the time of the restructuring (*section 4B*).

The normal stamp duty rates for contracts are:

- EUR0 to EUR5,000: nil.
- EUR5,001 to EUR170,000: 0.15%.
- Over EUR170,000: 0.20%.

The stamp duty on contracts assigning trade marks and patents is EUR1 for every EUR200 of the consideration. Where no consideration is fixed, the fee is EUR18.

The stamp duty for a transfer of lease by assignment, and not by sub-lease, without consideration is EUR9. With consideration, the fee is calculated on the amount of the consideration as for normal contracts.

There is a ceiling of EUR20,000 payable on any document or on any transaction that has several documents. The parties can choose which of the transaction documents is the main document and only that main transaction document is then subject to the full stamp duty. The other transaction documents can be stamped as secondary documents, carrying stamp duty of EUR2 each.

Paying the stamp duty late results in penalties the amount of which depends on the date the stamp duty arose and the submission of the documents to the Stamp Duty Commissioner for stamping.

The practice of the Stamp Duty Commissioner has been to impose stamp duty on performance guarantees issued by Cyprus companies even though the loan secured may have no connection with Cyprus. Stamp duty is calculated based on the amount of the secured obligations.

For share pledge agreements, where the pledge agreement does not explicitly set out an amount up to which the security is applicable and where it refers to secured obligations in other documents, the Stamp Duty Commissioner will request to see the other documents to determine the amount secured and calculate the stamp duty based on that amount. If the pledge is a stand-alone document and does not refer to any other agreement, the Stamp Duty Commissioner will take the market value of the shares into consideration when calculating stamp duty.

Registration fees

Registration fees are as follows:

- Registration of a charge incurs the payment of filing fees in the region of about EUR680 per charge registered (*section 90, Companies Law*). This includes:
    - EUR600 filing charge;

- EUR40 stamps on the form HE24; and
- EUR40 for issuing the certificate of registration in Greek and English.

- A legal mortgage over immovable property must be registered with the district lands office. Registration fees of 1% of the amount secured are payable under the Transfer and Mortgage Law.
- A mortgage over a vessel or any share in a vessel should be registered with the Department of Merchant Shipping, with registration fees dependent on the gross tonnage of the vessel (EUR0.034172 per gross tonne for the first 10,000 tonnes and half that rate above 10,000 tonnes) (*Merchant Shipping (Registration of Ships, Sales and Mortgage) Law, No.45/63, as amended*).

Notaries' fees

Notaries' fees are not applicable.

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

As fees are nominal (with perhaps the exception of stamp duty) there are not usually any strategies to minimise such costs. Share pledges can be enforced automatically out of court by the use of pre-delivered documents (*see Question 20*). If a complete and valid set of deliverables is available, this reduces the enforcement costs significantly as no recourse to the court is required.

Reform

31. Are there any proposals for reform?

There are currently no specific proposals for reform.

Contributor profiles

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Professional qualifications. Admitted to the English Bar, 1987; Admitted to the Cyprus Bar, 1989

Areas of practice. Corporate finance; ship finance; aircraft finance; corporate law; mergers and acquisitions; restructuring and insolvency; foreign investment; commercial law; real estate, trusts and asset protection.

Non-professional qualifications. LLB, University of East Anglia, 1986

Recent transactions/activities

- Engaged to advise in relation to an aircraft financing provided by a Luxembourg based bank to a Cyprus borrower in the amount of EUR55million.
- Advised a prestigious financial institution in relation to the enforcement of security over the shares of a Cyprus company, holding of several subsidiaries and substantial assets in various jurisdictions.
- Undertook the full spectrum due diligence of a Cyprus joint venture company and advised on complex finance, corporate, employment, tax and other aspects.
- Assisted a leading Russian bank on a EUR1billion transaction concerning a Cyprus company's subsidiary Russian LLC and opined on the Cyprus aspect.

Languages. Greek, English, French

Professional associations/memberships. Honourable Society of Gray's Inn; International Bar Association; English Bar Association; Cyprus Bar Association; Society of Trust and Estate Practitioners (STEP); the Cyprus Fiduciary Association; The Corporate and Securities Law Group.

Publications

- *Mergers and Reorganisations - an overview, ILO, January 2019.*
- *Co-author Mondaq newsletters, March 2019 - March 2020.*
- *Co-author International Law Office newsletters in the Corporate Finance/M&A area, March 2018 - March 2019.*
- *Co-author Lending & Taking of Security - Cyprus Chapter, PLC Finance Global Guide, Thomson Reuters, 2017/18, 2018/19, 2019/20.*

- *Co-authored "Restructuring & Insolvency - Cyprus Chapter", Getting the Deal Through, The Law Business Research Ltd (2016, 2017, 2018).*
- *Co-authored "The Cyprus International Trust", 2012, updated 2017 and 2019.*
- *Legal Memo on Cyprus resident non-domiciled status, 2015, updated 2017.*
- *Co-author Company Formations in Cyprus, Lawyer issue, 2015.*
- *Co-author Updated Cyprus Real Estate Investments Schemes, Corporate LiveWire (2015.)*
- *Co-author Anti-Money Laundering-update Cyprus, IBA AML Forum, 2014.*
- *Co-author Recent Amendments to the Cyprus International Trust, 2012.*
- *Financial Assistance – Still an Issue? Legal 500, 2007.*
- *Implications of the Financial Collateral Arrangements Law, International Law Office, (ILO), 2006.*
- *Co-author Forthcoming Changes to the Takeover Regime, European Single Financial Market, Euromoney Yearbooks, 2006/07.*
- *Employment Legislation Requirements, 2005.*

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Professional qualifications. Admitted to the Cyprus Bar, 2010

Areas of practice. Corporate law; financial law; mergers and acquisitions; banking and finance; commercial law; shipping finance law.

Non-professional qualifications. LLB Law, Keele University, 2008; Legal Practice Course, Kaplan Law School, 2009; Blockchain, Law, Regulation and Policy course, UNIC, 2019

Recent transactions/activities

- Advising a major Russian bank for more than ten consecutive years in relation to the structuring and maintenance of security granted in connection with a financing of more than USD7 billion.
- Advising a major Russian leading bank, with respect to the out-of-court enforcement of Cyprus law security following the default of a facility exceeding USD400 million.

- Producing the Cyprus Industry Opinion for the International Capital Market Association (ICMA) and the International Securities Lending Association (ISLA), which is available to professional members of the ICMA and ISLA.

Languages. Greek, English, French, Italian

Professional associations/memberships. Cyprus Bar Association.

Publications

- *Co-authored "Lending & Taking Security: Cyprus", PLC Finance Global Guide, 2017, 2018, 2019.*
- *Authored "Cyprus Companies in "shadow banking" - what to look out for", International Law Office Corporate/M&A Newsletter, 2019*
- *Co-authored "Restructuring & Insolvency - Cyprus", Getting the Deal Through, 2017*
- *Co-authored "The Corporate Governance Review: Cyprus", The Law Reviews, Law Business Research, 2015, 2016, 2017.*
- *Co-authored "The International Comparative Legal Guide to Corporate Governance: Cyprus", Global Legal Group, 2012, 2013, 2014.*
- *The Adoption of MiFID in Cyprus, 2011.*

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Professional qualifications. Admitted to the Cyprus Bar, 2011

Areas of practice. Corporate finance; ship finance; corporate law and M&A; restructuring and insolvency; foreign investments; commercial law; trusts and asset protection.

Non-professional qualifications. LLB Law, University of Kent, 2009; LLM in Law, King's College London, 2010; Certificate in Corporate Finance, by the Chartered Institute for Securities & Investment (CISI), 2016

Recent transactions/activities

- Advising a leading Russian bank in a syndicated senior secured term loan facility of up to EUR210 million and a senior secured revolving credit facility of up to EUR110 million for the

purpose of refinancing of existing debt facilities provided by a global provider of financial services.

- Provided specialised legal support to a large group of companies involved in aluminium production, energy generation and distribution, regarding its 100% acquisition of two Cyprus companies, in order to operate photovoltaic power stations through solar power plants in Cyprus.
- Engaged by a major Russian bank to advise on the global restructuring carried out and concerning various companies of a large international oilfield service group providing well drilling and workover services to leading oil and gas companies in the Russian Federation, Central and Southern Asia and the Middle East. Providing ongoing detailed restructuring advice on the mechanisms and steps for implementing this, including assistance with incorporation of new entities, entry into share and purchase agreements, handling mergers and providing relevant advice on merger laws and regulations and advising on liquidations.
- Engaged to provide advice on a proposed refinancing of existing senior and subordinated loans relating to a Russian company, formed to create and maintain a major infrastructure project. Advised and commented on the documentation which included an agreement for the sale and purchase of a participatory share interest in the registered charter capital of the company, a deed of guarantee and indemnity, and a participation agreement with respect to the company, negotiated the terms of those and provided assistance and support throughout the project.

Languages. Greek, English, Slovak, Spanish

Professional associations/memberships. Cyprus Bar Association; Chartered Institute for Securities & Investment (CISI).

Publications

- *Author, Transforming General Meetings: Covid-19 and other "viruses", Patrikios Pavlou & Associates LLC, 2020.*
- *Author, Covid-19: Legal Reflections on Virtual Closings, Patrikios Pavlou & Associates LLC, 2020.*
- *Co-author, International Law Office newsletters in the Corporate Finance/M&A area March 2018 - March 2019.*
- *Co-author, Lending & Taking of Security - Cyprus Chapter, PLC Finance Global Guide, Thomson Reuters, 2017.*
- *Co-author, Company Formation in Cyprus, LawyerIssue, 2015.*
- *Co-author, Obtaining Republic of Cyprus Citizenship by Investment - Updated Incentive Schemes, Patrikios Pavlou & Associates LLC, 2014.*
- *Co-author, The International Comparative Legal Guide to: Corporate Governance - Cyprus 5th & 6th edition, Global Legal Group 2012-2013.*

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Professional qualifications. Admitted to the Cyprus Bar, 2012

Areas of practice. Corporate finance; corporate law and M&A; commercial law; dispute resolution, arbitration, real estate.

Non-professional qualifications. LLB, Brunel University London, UK, 2010; Master of Laws (LLM) in Commercial and Corporate Law, Queen Mary University of London, UK, 2011

Recent transactions/activities

- Advising a leading Chinese-owned real estate group in relation to the acquisition of a large investment group operating in the Russian commercial real-estate market, owning properties of more than USD4 billion in value.
- Advising a major Russian bank in relation to the amendment of a put and call option agreement with respect to the shares of a Cyprus company involved in the design, construction and operation of a trade and exhibition centre with an area of more than 400,000 square meters in the Russian Federation.
- Associate Lecturer in Banking and Finance.
- **Languages.** Greek, English, French

Professional associations/memberships. Cyprus Bar Association.

Publications

- *Author, Cyprus and the "new normal", reasons to invest, Patrikios Pavlou & Associates LLC, 2020.*
- *Author, The validity of electronic signatures under Cyprus Law - Covid19, Patrikios Pavlou & Associates LLC, 2020.*
- *Author, Beyond Majeure. Legal implications of the COVID-19 epidemic on contractual obligations under Cyprus Law, Patrikios Pavlou & Associates LLC, 2020.*
- *Co-author, The Legal 500: Force Majeure Country Comparative Guide, 2020.*
- *Co-author, Lexology-GTDT, Project Finance, 2020, 2021.*
- *International Comparative Legal Guide - Project Finance 2018 (Cyprus Chapter), Law Business Research – Global Legal Group, 2018.*

- *Restructuring and Insolvency 2018 - Cyprus Chapter, Getting the Deal Through, 2018.*
- *Restructuring and Insolvency 2017 - Cyprus Chapter, Getting the Deal Through, 2017.*

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