

SCHEDULE 2
IRELAND
COUNTRY ANALYSIS

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1. General

1.1 Pledge – General Characteristics

- The pledge, under Irish law, would normally comprise a legal mortgage or “charge” of the securities. It would generally be executed by the pledgor under seal and by the pledgee (or its attorney) under hand. This requirement of execution under seal arises out of the fact that it is usual for such a security document to include a power of attorney in favour of the pledgee, by way of security, to execute documents under seal. Where the power of attorney purports to enable the attorney to execute under seal the power must itself be executed under seal.
- A charge on cash may be created under Irish law. A mortgage or charge on fungible securities can be created under Irish law; in this case the relevant security agreement would create a mortgage and a charge to give the highest possible degree of protection against the rights of third parties.
- A single pledge may be used in respect of more than one transaction.
- There are no other applicable notifications or formalities.
- Irish law does not expressly permit use of collateral whether or not such use is permitted by the security agreement and it is unlikely that such right would be permitted under Irish law.

If the agreement would have been governed by a law other than Irish law and such law permits the use an Irish Court would probably not interfere with the ability to rehypothecate, but the Irish Court’s characterisation of the interest thereby resulting might be affected.

- A fixed charge may be created over future assets yet to be appropriated to the security.
- While no problem exists concerning the creation of a security over a fluctuating pool of assets, the pool must be specifically designated or described.
- Provided the security document contemplates substitution and charges substitute collateral at the date of creation, then provided the substitute collateral is properly appropriated, it should be covered by the security interest. However, if it was not, a new charge should be taken. While there is no specific requirement of Irish law that states that the secured party should consent to the substitution of collateral, the risk is that the security may be characterised as a floating charge if no such consent is required. The effect of such recharacterisation would be to rank the pledgee’s interest in the collateral behind preferential creditors in a winding-up.
- Irish stamp duty is payable on the Pledge at a maximum of IR£500. Security created by a non-Irish entity over Irish assets is also subject to Irish stamp duty.

1.2 Transfer of Title – General Characteristics

- Irish Courts would not recharacterise a transfer of title as a security interest unless the intention of the parties clearly intends to purport the transfer of title. Use of wording in a document inconsistent with outright transfer could be prejudicial unless it is clear that the outright transfer is intended.
- If the transfer is recharacterised as a security interest and if it is registrable under the Irish companies legislation, then it will be void against the liquidator or creditors of the collateral provider, although between the parties (provider and receiver of collateral) it will still be valid.
- In short we can say that transfer of title arrangements will not, as a general rule be recharacterised.
- Contractual set-off may be enforceable on insolvency.
- Third party claims will not disrupt set-off and netting between solvent counterparties in certain circumstances.

Provided that the transfer of title arrangements and the contract give rise to claims supported by the arrangement have been entered into before the collateral taker has notice of the claim of the third party creditor, then the collateral taker has priority in the exercise of its netting and/or set-off right against the value of the collateral under the collateral arrangement.

2. Private International Law and Domestic Law Aspects of Collateral

Validity of the Contract/Attachment

Irish Private International Law:

- The law governing the creation of a security interest will be the governing law of the relevant security agreement.

Irish Domestic Law:

- A “signed declaration” between the pledger and the pledgee plus a “certified deed of transfer” by the pledger are required.

Perfection:

Irish private international law:

- The Irish courts will recognise as valid a security interest if it is valid under the law governing the security interest and provided the relevant perfection requirements are fulfilled both in Ireland and under the laws of the place where the collateral is located, and the governing law of the security interest.

Irish domestic law:

- Under Section 99.1 of the Irish Companies Act 1963, most of the security interests including floating charges and charges on “book debts” created by Irish companies and by companies incorporated outside Ireland but with an established place of business in Ireland, must be filed in the Irish Companies Registration Office within 21 days of their creation; if the requirement was not met then the charge will be deemed void against a liquidator or any creditor of the company and the secured debt will become immediately due and payable.

Section 99 does not specify charges over shares as being registrable. Also this Section applies to charged assets wherever located of Irish companies and irrespective of the governing law of the contract creating the charge. There will be a Companies Registrations Office filing fee of IR£25 for a Section 99 registration.

Priorities:

Irish domestic law:

- The following will take priority:
 - liens
 - any security interest to which the collateral was subject at the date of its acquisition by the pledgor.
 - any fixed charge subsequently created over the collateral if the security document fails to take effect as a fixed charge.;

Further, if as a matter of the governing law, the charge over collateral is deemed to be a floating charge, preferential.

- The general rule regarding priorities or charges over book debts and intangibles is that they are governed by the order in which notice is received by a third party debtor (unless subsequent chargee has notice of the prior charge). Notwithstanding that a chargor will not create further security over its books or debts, the priority of the chargee in relation to those books debts can be displaced by a subsequent chargee without notice.

Enforcement:

Irish private international law

- The law of the jurisdiction in which a receiver or liquidator exercises its rights and powers will govern the enforcement procedures.

Irish domestic law:

- There are no particular formalities regarding enforcement and it may take place according to the terms of the security agreement without court approval or intervention and without any form of auction or other procedure required. There is no minimum period of time to be respected before any further action

required, except in some cases set out on the Section 20 of the Conveyancing and Law of Property Act, 1881.

There is no necessity to have a court appointed official or any public auction procedure in order to sell the collateral.

- Section 4 of the Netting of Financial Contracts Act 1995 may allow the pledgee to enforce its security interest and set-off the proceeds of realisation thereof against the pledgor's obligations under a Master Agreement provided that the agreement in a financial contract within the meaning of that Act and that the security is given solely to secure the Master Agreement and cannot be set aside on the grounds of fraud, misrepresentation or similar grounds.

Insolvency:

Irish domestic law:

- There are four possible corporate insolvency routes:
 - (i) liquidation: i.e., winding-up of a company by a court order or by voluntary liquidation. Where the company is a bank, the Central Bank of Ireland may in some circumstances present a petition. Special winding-up provisions apply with respect to licensed banks. In certain circumstances the Central Bank may suspend certain activities of the licence holder for up to six months (extendable to 12 months by the court).

During the "freezing" period, winding-up/bankruptcy procedures cannot be initiated against the licence holder. The Central Bank has similar powers against investment business firms.

- (ii) examination: during an examination process a creditor cannot, generally, enforce security or contractual rights such as set-off. Examination is a form of reorganisation or rehabilitation proceedings. Enforcement of the security interest would be subject to a stay for a period of time determined by the Irish Court, called the "protection period".
 - (iii) receivership: the holder of security may appoint a receiver to take into his charge or control the secured assets with a view to realising them and discharging the liabilities owing to the holder of the security.
 - (iv) schemes of arrangement or composition: the Companies Act 1963 provides for the implementation of schemes of compromise or arrangement which are approved by the court.
- The Netting of Financial Contracts Act, 1995 creates a statutory right of set-off in relation to bi-lateral "financial contracts". The right of set-off is exercisable in respect of the proceeds of any guarantee, money or other security provided solely to secure the obligation of one party in respect of one or more financial contracts and applies irrespective of Irish Insolvency Law. In order to secure that the pledgee's security interest has priority over all other claims.

As stated earlier with respect to examination an automatic stay comes into effect. During a stay no execution may be made against the company's assets and no secured creditor may enforce its rights under its security. However, provided that the security arrangements are bi-lateral "financial contracts" entered into by the parties in their own right and not as agents for anyone else and the security is given solely to secure those bi-lateral arrangements they in absence of fraud, misrepresentation or similar grounds, the pledgee will not be affected by the stay.

- Section 345 of the Companies Act 1963 allow non-Irish companies to be wound-up in Ireland on certain grounds. The general rule is that any such companies must have some assets in Ireland for this to take place.

3. Miscellaneous

3.1 Cross-border transactions in multi-tiered holding systems

The owner of a share in a pool of fungible securities may have absolute title to and/or an indirect interest in the assets.

The "lex loci" of these fungible securities held through an account in a clearing system is the place where such account is held.

The Irish conflicts of law rules would apply the requirements of the "lex loci" to a holding or the transfer of fungible securities and the creation and perfection of a security interest in these kind of securities and would also apply the governing law of any agreement to determine the validity of the transfer of and creation of a security interest in fungible securities.

3.2. Implementation of the Settlement Finality Directive

The Central Bank of Ireland in conjunction with the Department of Finance were working together on the implementation of the Directive, the regulations implementing it were enacted at the end of 1998, and came into force on 4th January 1999 finally implementing the Directive.

The Irish authorities were of the opinion that some of the regulations' terms raise drafting issues.

The scope of the application of Article 9(2) was not addressed in the regulations, however we can imply that the Irish authorities go for a broad view as a way to maintain the competitiveness of Ireland in the international financial market.

Another limitation of the Regulations were that: issues regarding indirect participants in payment systems are not addressed; it was unclear whether the relevant collateral must be provided to the "member" in connection with its participation in the payment system or whether it is sufficient that it merely be a member, in order to take benefit from the Regulations; the definition of "payment system" is not really clarified as being limited to certain payment/securities settlement systems established in Ireland.