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Acquisition Finance 2022

Ireland: Law & Practice and Trends & Developments

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IRELAND

Law and Practice

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1. MARKET

1.1 Major Lender-Side Players

Irish acquisition finance is typically arranged by Irish banks, international banks and/or non-bank lenders (in particular, direct lenders). Historically, the Irish lending market has been dominated by local banks. However, there have been significant changes in the market over the past ten years following the global financial crisis. Additionally, in the last 18 months, two significant lenders, KBC and Ulster Bank, have announced that they will be departing the Irish market and the traditional domestic banking sector is smaller as a result. Furthermore, a range of blended finance solutions have emerged for Irish companies, with a large number of non-bank lenders entering the Irish market, varying from funds to smaller private equity lenders. While these lenders have primarily focused on property acquisition and development financing, many have also provided financing for leveraged and acquisition financings.

Non-bank lenders provide additional options for borrowers, competition for banks and diversification in market segments underserved by other traditional bank lenders. When considering the most effective strategy to finance an acquisition or ongoing operations, non-bank lenders may offer worthwhile solutions – either on their own or in conjunction with a traditional bank.

Notwithstanding the emergence of non-bank lenders in recent years, traditional bank finance remains the most common source of third-party acquisition financing in the Irish market and accounts for most bank-led acquisition financings. The nature of the acquisition, size of the facility and the identity of the purchaser (particularly its credit rating and industry sector) will affect the arrangement of the syndicate.

1.2 Corporates and LBOs

The lending market in Ireland was busy throughout 2021, and there have been many new financings provided by the Irish pillar banks, international funders and non-bank lenders in, amongst others, the real estate investment sector and the development finance space and the leveraged acquisition market. Despite the impact of COVID-19, activity levels were high, particularly in the second half of the year, and a number of sectors performed strongly again, notably leveraged/acquisition finance both in relation to public M&A deals and private leveraged buy-outs. The Irish M&A market recorded a busy year with approximately 240 significant transactions in 2021, representing a 33% rise on 2020 and the highest volume of such transactions since 2006. Acquisition financing activity is expected to remain buoyant during 2022, and cross-border transactions should increase as COVID-19 restrictions ease globally. However, it remains to be seen what impact the war in Ukraine will have on global markets, and this, coupled with rising inflation and interest rate increases (already seen in the US and potentially expected in Europe), could negatively affect lending markets.

1.3 COVID-19 Considerations

In the early months of COVID-19, Ireland experienced a slowdown in planned and new acquisitions as many borrowers focused on their immediate liquidity needs. However, beginning in the latter part of 2020 and 2021, the easing of restrictions saw an increase in investor appetite to invest capital and take advantage of new opportunities.

The widespread business disruption resulting from COVID-19 initially impacted transaction timelines in the Irish debt market. Transaction timelines became protracted due to business disruptions in the first lockdown; however, both lenders and borrowers adjusted to a series of lockdowns and work-from-home measures

implemented by the Irish government. As a result, there was a substantial increase in the use of both powers of attorney and electronic signatures (or e-signatures). In Ireland, many documents can be executed using an e-signature provided that appropriate execution formalities are fulfilled, and there are no constraints on the use of e-signatures in the document in question. As 2020 drew to a close, lenders and borrowers had adjusted to the "new normal", and remote working restrictions had a reduced impact. Accordingly, timelines to close transactions remained relatively stable during 2021 as contracts could be executed remotely. It is anticipated that the use of powers of attorney and e-signatures will continue to be prevalent in Ireland in 2022.

To help mitigate the effects of the pandemic, the Irish government implemented a number of support initiatives for business, including the COVID-19 Credit Guarantee Scheme (the "COVID-19 CGS"). Under the COVID-19 CGS, the Irish government guaranteed up to EUR2 billion of loans provided by Irish banks to SMEs whose businesses had been impacted by the pandemic. A number of these measures are still in place, however, some government supports will be phased out or end in the coming months and later in 2022.

COVID-19 has had a significant impact on the profitability and cash reserves of businesses that faced a range of challenges in relation to meeting their obligations under loan agreements. In particular, this has prompted borrowers and lenders to carefully review and consider the financial covenants in loan agreements for actual or potential breaches. The impact of COVID-19 also saw lenders and borrowers evaluate the concept of "material adverse effect" and the force majeure provisions in their financing documents for actual or potential breaches and any consequential events of default arising therefrom. In addition, banks granted payment breaks on mortgages, personal loans and business loans for those businesses and individuals experiencing financial difficulties during the period of uncertainty resulting from COVID-19. As a result, loan documentation was dominated by amendments and waivers, extension requests and short-term loan facilities. As the impact of COVID-19 on the Irish population and economy diminishes, it is unlikely that such measures will become a standard feature of Irish law-governed financing documents.

2. DOCUMENTATION

2.1 Governing Law

From a governing law perspective, there are no differences between corporate loans, acquisition finance and LBOs. Generally speaking, the transaction documents in many deals involving an Irish target will be governed by Irish law. However, in the context of larger multi-jurisdictional financings (particularly transactions involving non-Irish lenders or syndicated facilities), the laws of another jurisdiction (usually English or New York law) will typically govern the transaction documents.

2.2 Use of Loan Market Agreements (LMAs) or Other Standard Loans

In most instances, the facilities agreement is based on the Loan Market Association's (LMA) standard form leveraged acquisition facilities agreement adapted in accordance with Irish law standards, market practices and requirements (as applicable). The facilities agreement will then be further amended throughout the course of the negotiations between the parties to reflect the specifics of the transaction contemplated.

Private equity sponsors and non-bank lenders typically have their own preferred form of facilities agreements, frequently "LMA lite". The

frequency of term loan B-style facilities in the leveraged market has resulted in lending terms moving further from LMA standards.

2.3 Language

Although there is no specific legal requirement, in the vast majority of transactions governed by Irish law, loan documentation (including the finance and security documents) will be drafted in English.

2.4 Opinions

Legal opinions are considered standard documents in acquisition finance transactions governed by Irish law and, in almost all cases, will be a condition precedent to completion. Typically, counsel for the lender will issue an opinion regarding the legality, validity and enforceability of the finance documentation and address issues such as governing law and jurisdiction.

In addition, the borrower's counsel will issue an opinion regarding the capacity and authority of the borrower (and other obligors) to enter into the finance documents and perform its (their) obligations thereunder.

In multi-jurisdictional transactions, counsel from each jurisdiction where an obligor is incorporated and/or security is granted will be expected to issue an opinion to the lender/agents (as applicable).

3. STRUCTURES

3.1 Senior Loans

Acquisition financing in Ireland regularly involves third-party debt (frequently by way of senior loans, but in certain cases will include the provision of mezzanine or second lien debt), together with shareholder debt funded by the shareholders or sponsors. High-yield bonds have not been a common feature of acquisition financings in Ireland to date.

Senior loans will usually comprise several bullet and/or amortising term facilities and one revolving credit facility. The term loan facilities will typically be used to finance (or refinance) the acquisition price, refinance certain existing indebtedness of the group (including in the target) and finance any future capital expenditures. These facilities will usually be secured, and the senior loans will rank in priority to other debt (see **4.1 Typical Elements**).

3.2 Mezzanine/Payment-in-Kind (PIK) Loans

As mentioned above, leveraged acquisitions may also involve mezzanine or second lien debt.

The mezzanine finance will generally comprise a term loan, which ranks pari passu with the senior debt in terms of payments, but will have a second ranking claim to the senior security package on enforcement. Mezzanine finance will usually be secured on the same terms (and, in many cases, in the same transaction documentation) as securing the senior debt. Commonly, if there is senior and mezzanine debt, a single security trustee will hold the security for all of the senior and mezzanine lenders. On enforcement of the security, the enforcement proceeds are distributed by the security trustee in accordance with the terms of the relevant intercreditor agreement.

3.3 Bridge Loans

Bridge loan facilities are intended to be short-term forms of financing and, therefore, arranged to encourage quick refinancing. They are used to bridge the required financing to facilitate the completion of the acquisition. Although associated with higher interest rates, bridge loans are suitable for time-sensitive transactions and will usually be refinanced prior to drawdown.

As such, a bridge loan will usually be available for drawdown for the shortest period necessary to permit the completion of the acquisition. This period will depend on a number of factors (eg, the nature of the acquisition and the length of time required to obtain any necessary consents in connection with the acquisition). A bridge ensures certainty of funding for the acquisition in the immediate term while providing more time for long-term debt to be put in place.

3.4 Bonds/High-Yield Bonds

As outlined above, high-yield bonds have not been regularly used in acquisition financings in Ireland to date. That being said, bonds may be used to finance acquisitions and would usually be employed in combination with an initial bridge loan, which would be subsequently refinanced out of the proceeds of the bond issue on or after completion of the acquisition. However, from a timing perspective, it may be difficult to issue a bond to fund the acquisition upfront, and as a result, a bridge facility will frequently be used as additional funding support for a borrower if required, even though it is not drawn down in most instances.

3.5 Private Placements/Loan Notes

Private placements/loan notes can be used by issuers to fund or part-fund acquisitions. However, they are not frequently used in the Irish market for this purpose. As with bonds, these products are commonly used in conjunction with a bridge facility and other forms of debt.

In certain leveraged financing transactions, loan notes are used to form part of the equity investment from the sponsors or are used to fund deferred consideration payable to the vendors. As such, the LMA's leveraged documentation is drafted because investor and/or vendor loan notes may be issued as part of the financing for the acquisition, and they will be subordinated to the senior liabilities and any high-yield bonds.

3.6 Asset-Based Financing

Asset-based financing is a form of senior secured lending involving the advancement of funds based on the value of certain assets of the borrower and can be beneficial for acquisition financings. The facility will be secured against the relevant asset class and can be provided on its own or in connection with a wider debt package.

In asset-based financing structures, the target's assets may be used as the borrowing base for the facility, leveraging the performance of the asset class (rather than using EBITDA) to determine the availability of the loan and check its performance. Asset-based lending can offer an alternative option to cash-flow funding, given that the interest charged will often be lower (as the facility will be closely connected with the valuation of the secured assets), and there may be fewer and more amenable covenants than a classic secured term loan facility.

4. INTERCREDITOR AGREEMENTS

4.1 Typical Elements

The relative priorities of the different classes of creditors can be established by the use of either:

- structural subordination – where one lender (the senior lender) lends to a company in a group of companies which is lower in the group structure than another lender (the subordinated lender); or
- contractual subordination – where the senior lender and the subordinated lender enter into an agreement pursuant to which the subordinated lender agrees that the senior debt will be paid out in full before the subordinated lender receives the payment of the subordinated debt. The subordinated lender is contractually subordinated to the senior lender.

Intercreditor agreements (ICAs) are common in Ireland, depending on the nature of the particular transaction. Acquisition finance transactions are often funded from a number of different sources (eg, equity, senior debt and mezzanine debt), so there will be a number of different types of creditors, each of which will be keen to protect its own interests. Usually, the parties to an ICA will include a senior lender, a junior lender, an intergroup lender and a borrower. Typically, the terms in an ICA will include provisions as to priorities, standstill, representations and warranties, covenants and other standard clauses.

ICAs for Irish leveraged and acquisition financings are regularly based on the LMA standard form amended to include the appropriate capital structure of the deal. The ICA may be Irish law-governed or, in the case of larger multi-jurisdictional financings, could be governed by the laws of another jurisdiction. In smaller transactions, the borrower's sponsors and the lenders may enter into a simple subordination agreement. Similarly, in smaller transactions where the parties are only concerned with regulating the priority of security interests in respect of the same assets, the priority arrangements might be documented in a straightforward deed of priority.

In an ICA, the different classes of secured creditors will document their agreement with respect to, among other things:

- the relative priorities of their claims and the repayment and security enforcement proceeds "waterfall";
- the restrictions imposed on the junior lender, including any "standstill" periods, restrictions on the ability to accept payments under the junior debt above a certain threshold, and restrictions on amendments to the junior debt; and
- establishing a procedure by which the junior lender must return any payments received by it in contravention of the ICA.

Typically, both scheduled payments of principal (and voluntary and mandatory prepayments of principal) for the senior debt are permitted in accordance with the terms of the relevant senior debt. On the other hand, junior lenders are usually entitled to payments of cash plus interest, fees and indemnity payments in accordance with the terms of their debt, however, their rights to receive payments of principal are restricted.

One of the most important provisions in an ICA is referred to as the "standstill" provision. A "standstill" provision prevents the junior lender from taking enforcement action against collateral, following a default under the junior debt, for a specified period after notice of the default has been given to the senior lender. The purpose of the standstill provision is to give the senior lender an exclusive period during which it may assess its rights and, if it so determines, enforce its rights against the collateral without interference from the junior lender.

In some cases, the ICA may also include undertakings from the senior lenders not to make material amendments to or grant waivers relating to material matters under the senior finance documents without the consent of the junior lenders.

4.2 Bank/Bond Deals

The LMA has published two forms of intercreditor agreements for bank/bond structures:

- a super-senior revolving credit facility/senior secured notes agreement; and
- an agreement contemplating super-senior revolving facility/senior secured notes/high-yield notes.

Typically, the "super senior" bank debt and the bonds will rank pari passu as regards payment and the common security package. The payment waterfall will give "super senior" bank lenders priority in relation to the proceeds of disposal of enforcement of security.

Transactions can deviate from that assumed by the LMA documents, and commonly the parties will want to negotiate alternative positions depending on the structure of the deal.

4.3 Role of Hedge Counterparties

The borrower may be required to enter into hedging in leverage transactions in respect of a minimum portion of its term facilities to alleviate against interest rate fluctuation and, with respect to certain transactions, adverse exchange rate fluctuations. In such circumstances, the hedge counterparties will be a party to the ICA governing the relationship between the various creditors as the borrower may incur payment obligations to the hedge counterparties.

Hedging liabilities rank pari passu with the senior facilities and share in the security package. This approach mirrors the position adopted by the LMA precedent ICA for leveraged acquisition finance transactions. In this regard, scheduled payments under the hedging will usually be permitted until the senior creditors enforce or an insolvency event occurs.

5. SECURITY

5.1 Types of Security Commonly Used

Typically in acquisition finance transactions, the security package is implemented as follows:

- prior to the closing date, the lenders take security over the shares in the acquisition vehicle and its rights under the acquisition agreements; and
- after the closing date, the acquisition vehicle grants security over the shares of the target.

The remaining security to be provided (eg, security granted over the shares and all of the assets of each company within the acquired group) is entered into within an agreed (and usually short) timeframe from the closing date, in accordance with the terms of the relevant facilities agreement or a set of "agreed security principles" (namely, principles outlining the security sought and the factors to be considered).

Furthermore, guarantees will normally be required from all "material companies" within the acquired group (as well as any group company that becomes a "material company" following completion). The acquired group will also be subject to an ongoing guarantor coverage test (ie, group companies responsible for a certain percentage of the assets and/or earnings of the group must provide guarantees and accede to the relevant finance documents (as applicable)).

Types of Security

Borrowers in secured acquisition finance transactions will typically provide a combination of mortgages, charges and assignments. In principle, security may be granted over all of the assets of an Irish company, subject to any contractual restrictions which might be in place. The most common forms of security taken by a lender are the following.

- Mortgage – there are two types of mortgage: a legal mortgage and an equitable mortgage. A legal mortgage involves the transfer of legal title to an asset by a debtor, by way of security, upon the express or implied condition that legal title will be transferred back to the debtor upon the discharge of its obligation. On the other hand, an equitable mortgage involves the transfer of the beneficial interest in the asset to the mortgagee with legal

title remaining with the debtor and, as such, creates an equitable security interest only. Mortgages are commonly taken over shares, aircraft and ships.

- Charge – a charge is an agreement between a creditor (chargee) and a debtor (chargor) to appropriate and look to an asset and its proceeds to discharge indebtedness. The principal difference between a mortgage and a charge is that a charge need not involve the transfer of ownership in the asset. There are two forms of charges – a fixed charge and a floating charge. A fixed charge attaches to a specific asset, whereas a floating charge "floats" over the asset (or the asset class), leaving the chargor free to deal with it until (upon the occurrence of certain defined events) the charge crystallises into a fixed charge. A fixed charge can be created by a company or an individual, whereas a floating charge can only be created by a company. It is also worth noting that a floating charge ranks behind certain preferential creditors such as the Irish Revenue Commissioners ("Revenue") and employees of the chargor in respect of unpaid wages, etc.
- Assignment – an assignment is similar to a mortgage in that it transfers the legal or beneficial ownership of an asset to the creditor based on the understanding that ownership will be assigned back to the debtor upon discharge of the secured obligation(s) owing to the creditor. Assignments are frequently utilised in the context of intangible assets such as receivables, book debts and other choses in action. Assignments to a creditor will sometimes be referred to as security assignments to distinguish them from absolute assignments where ownership of the asset is being assigned by way of sale for value. In order to be valid and effective, a legal assignment (as opposed to an equitable assignment) must:
  - (a) be an absolute assignment (although it can be stated to be by way of security);
  - (b) be in writing under hand of the assignor; and
  - (c) express notice in writing must be given to the third party from whom the assignor would have been entitled to receive or claim the right which is assigned.

5.2 Form Requirements

In the majority of leveraged and acquisition financings a debenture (general security agreement) will be provided. This is a single security document entered into by a company in favour of the secured party/ies creating security (which can be a combination of mortgages, assignments and/or fixed and floating charges) over all of the assets of the borrower. A debenture will typically include:

- a fixed charge over specific assets which are identifiable and can be controlled by the lender (eg, land or buildings, restricted accounts, intellectual property assets);
- a floating charge over fluctuating and less identifiable assets (eg, inventory, agricultural stock, goods, plant and machinery);
- an assignment of any interest in receivables, contracts, insurance policies and bank accounts; and
- a mortgage and/or charges over real estate and shares.

In terms of specific asset classes, the following is an outline of the forms of security which can be taken pursuant to a debenture.

Real Property, Plant, Machinery and Equipment

Security over real property, plant, machinery and equipment is most commonly taken by way of fixed charge. It should be noted that security over Irish real estate must be taken by way of charge. Any security created over real estate

must be registered in the Property Registration Authority of Ireland (PRAI), and in this regard an additional prescribed form is also required to ensure the validity of the security (see **5.3 Registration Process**).

Shares

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

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

Equipment

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

Inventory

Security over inventory will typically take the form of a floating charge as the chargor trading company will need to retain sufficient freedom to deal with inventory in the ordinary course of business. The security is deemed to "float" over the assets and remains dormant until some further step is taken by or on behalf of the chargee, at which point the floating charge crystallises into a fixed charge. The crystallisation of a floating charge into a fixed charge may occur on the happening of a specified event (ie, an event of default) or where the borrower becomes insolvent.

Receivables

Security over receivables most commonly takes the form of a legal assignment and is permitted provided the underlying contract creating the receivable does not contain a prohibition on assignment. A legal assignment is similar to a mortgage in that it transfers the legal or beneficial ownership in an asset to the creditor, subject to that ownership being assigned back to the debtor upon discharge of the secured obligations owing to the creditor.

Registration Requirements

Security created by a company incorporated in Ireland must be registered to protect the secured creditors (see **5.3 Registration Process**).

5.3 Registration Process

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

creditor of the company. A filing fee of EUR40 is payable to the CRO in respect of each security registration.

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

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

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

5.4 Restrictions on Upstream Security

Please see **5.5 Financial Assistance** and **6.2 Restrictions**.

5.5 Financial Assistance

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

5.6 Other Restrictions

Other than the registration of the relevant security at the CRO (see **5.3 Registration Process**), the key issues to consider in terms of the validity of security in Ireland include:

- the corporate benefit rule (discussed below);
- certain provisions within the 2014 Act relating to the provision of financial assistance (see **5.5 Financial Assistance**);
- certain provisions within the 2014 Act regarding certain transactions with directors (discussed below); and
- claw-backs and preferences (see **7.2 Claw-Back Risk**).

Corporate Benefit

Although not specifically provided for in the 2014 Act, it is generally accepted that Irish companies must derive some form of corporate or commercial benefit from transactions which they enter into. Accordingly, prior to authorising the provision of any guarantee or security to a third party, the directors of the company should consider the commercial benefit that will accrue to the company as a result of providing such security. These considerations should be recorded in the board minutes of the company approving the provision of such security. Directors who author-

ise a transaction which does not benefit the company may be liable for breach of their statutory and fiduciary duties. In cases where a guarantee of the borrowings of another corporate group member is being provided, a corporate benefit will generally arise for the entity providing the guarantee if the provision of the guarantee/security benefits the group as a whole. For example, a holding company which guarantees the obligations of its subsidiary could feasibly expect to benefit from the success of that subsidiary through increased dividends.

Loans to Directors

The 2014 Act prohibits a company from providing security in favour of a person who makes a loan (or a quasi-loan) to, or enters into a credit transaction with, a director of that company or its holding company, or a person connected to that director. There are a number of exemptions to this prohibition, including where the loan (or quasi-loan) is made to, or credit transaction is entered into with, a member of the same group. In certain circumstances, these transactions can be approved using the SAP outlined in the 2014 Act (and discussed at **5.5 Financial Assistance**).

5.7 General Principles of Enforcement

Under Irish law, the circumstances in which a lender can enforce a loan, guarantee or security interest are largely dependent on the terms of the underlying loan agreement and as set out in the security documentation. Typical events of default that are often contained in Irish law-governed loan agreements might include:

- non-payment of the principal amount or interest by the borrower;
- non-compliance (eg, a failure to observe the covenants or comply with the representations and warranties as set out in the loan agreement);
- cross-default; and
- insolvency events (eg, the appointment of an examiner, receiver or liquidator, or the occurrence of some other specified insolvency event that may be affecting the borrower). Material adverse change (eg, a change in the financial condition of the borrower).

The normal enforcement methods are for the security holder to appoint a receiver, a person appointed by a security holder to realise the secured asset(s) in discharge or part discharge of the company's liability to the secured creditor. The receiver's role is to realise the secured assets and pay down or discharge any unpaid indebtedness from the proceeds. The circumstances of a receiver's appointment depend largely on the provisions of the particular security document and loan agreement. The terms of the security document may provide for the appointment of a receiver and manager, in which case the receiver can continue to operate the business during the course of the receivership with a view to maximising the value of the secured assets. It would be common in such circumstances for the debenture or other security document to confer a range of specific powers on the receiver, such as the power to carry on business, borrow, sell and compromise. A receiver appointed over the assets of a company will be granted such statutory powers as are contained in Irish company law in addition to any contractual powers contained in a security document.

Enforcement may be prevented in circumstances where the company (that has created the security) is in examinership. Examinership is a process whereby the company is given court protection from its creditors while efforts are made to ensure the company can survive as a going concern. A petition to the court for the appointment of an examiner may be presented by the company or its directors, a creditor (including an employee) of the company, or by

the shareholders (holding not less than 10% of the share capital of the company).

The court will agree to appoint an examiner where it is satisfied that there is a reasonable prospect that the appointment of an examiner will facilitate the company or part of the company's business surviving as a going concern. An examiner is typically appointed for 70 days (but this may be extended to 100 days in exceptional cases), during which time the examiner will seek to implement a rescue plan or "a scheme of arrangement". During this time, creditors cannot take any action to recover debts owing by the company (or take any legal proceedings against the company) without the court's consent, and a liquidator/receiver cannot be appointed.

Pursuant to the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the "2020 Act"), the examinership process may be extended to up to 150 days (with court approval). However, unless the government's power under the 2020 Act to extend the interim period is exercised before 31 December 2022, the temporary amendments to the 2014 Act introduced by the 2020 Act to address issues arising as a result of COVID-19 will expire.

The examiner must consult with each class of shareholder and each type of creditor to get approval for the scheme of arrangement. If at least one type of creditor accepts the plan, the examiner can bring the plan before the court. The court will allow each class of member and each type of creditor to give their opinion on the scheme of arrangement, after which the court will either approve the plan (either as presented or with changes it determines necessary) or reject the plan.

6. GUARANTEES

6.1 Types of Guarantees

Upstream, downstream and cross-stream guarantee and security packages are available and widely used in leveraged and acquisition financings involving Irish companies. Unlike many jurisdictions, guarantees are not typically required to be limited by way of guarantee limitations.

As discussed above, in determining whether it is appropriate to enter into a guarantee, the directors of the company (acting in accordance with their statutory fiduciary duties) must consider whether it is in the best interests of the company to give the guarantee. With regard to downstream guarantees, there is a valid argument that borrowing funds under the facility agreement (particularly where there is a condition of the agreement that the parent provides a guarantee) will enable the subsidiary to carry on and enhance its business, thereby increasing both its own value, the value of the group as a whole and also the dividends the parent guarantor will receive.

Upstream guarantees can be more complicated. The analysis will always depend on the facts of each transaction, however relevant factors may include the benefit accruing to the guarantor as a result of the group having access to increased liquidity or, if the guarantor is dependent on the borrower for liquidity support or other intra-group services, the benefit derived from the continuation of those services as a result of the loan being made to the borrower.

Irish law distinguishes between guarantees and indemnities. A guarantee is a secondary obligation, dependent on the existence of a primary obligation. In its most basic form, it is a promise to be liable for the debt (or some other obligation) of another party. An indemnity is an undertaking as an independent obligation to make

good a loss and will be enforceable even where the obligation guaranteed is not. Therefore, it is typical in leveraged and acquisition financings for a guarantee to be drafted as a guarantee and indemnity, in which case the distinction can be ignored in practice.

In terms of formalities, a guarantee must be in writing and must be executed as a deed. Execution as a deed is important for a number of reasons, eg, to remove any concerns about the adequacy of the consideration passing to the guarantor.

6.2 Restrictions

Irish companies are entitled to provide such guarantees; however, care should be taken to ensure that entering into such a transaction does not breach (i) the corporate benefit rule (see **5.6 Other Restrictions**), (ii) any term or guarantee limit contained in its constitutional documents, (iii) Section 239 of the 2014 Act (Prohibition of loans, etc, to directors and connected persons) (discussed at question **5.6 Other Restrictions** above), or (iv) Section 82 of the 2014 Act (Financial assistance) (see **5.5 Financial Assistance**). Where (ii) arises, a shareholders' special resolution will be required to amend the guarantee limit contained in the company's constitutional documents and, together with a Form G1, filed in the CRO. In respect of (iii) and (iv), if the transaction would otherwise be prohibited, the relevant obligor will need to approve these activities by carrying out the SAP (see **5.5 Financial Assistance**).

6.3 Requirement for Guarantee Fees

There is no requirement for a guarantee fee to be charged under Irish law.

7. LENDER LIABILITY

7.1 Equitable Subordination Rules

There are no specific equitable subordination rules in Ireland that provide a regime for courts to lower the priority of admitted creditor claims because of that creditor's unlawful actions, as such. It is almost exclusively a US doctrine, although it has been accepted in other jurisdictions in the EU in special circumstances.

In Ireland, creditors that have aggrieved the debtor company can be subject to claims for compensation or restitution. Further, related parties or non-arm's-length creditors will, in the same way as other creditors, rank in accordance with their adjudicated and admitted claims, whether that be as a secured, preferential or unsecured creditor.

In addition, there are no specific limitations on claims by related creditors against the debtor. Subject to claims subsisting against related parties or non-arm's-length creditors as being prohibited, transfers to connected persons within agreed look-back periods, related or non-arm's length creditors are allowed to have their claims adjudicated on their merits as with any other creditors.

7.2 Claw-Back Risk

There are certain provisions in the 2014 Act pursuant to which security granted by an Irish company could be set aside within certain time limits in circumstances where the grantor subsequently becomes insolvent. These provisions include the following.

- Unfair preference – any conveyance, mortgage or other act made by a company, which at the time is unable to pay its debts as they become due, in favour of a particular creditor or some other person and which is done with a view to giving that person a prefer-

ence over another creditor will be deemed to be an unfair preference and will be invalid. However, an unfair preference will only be found to exist where (i) the winding-up of the company commences within six months (or two years if the unfair preference was made in favour of a connected party) of the relevant act, and (ii) at the commencement of the winding-up, the company is unable to pay its debts. Case law (under the equivalent provision of the previous 2014 Act) suggests that a "dominant intent" must be shown on the part of the company to prefer one creditor over other creditors. If a transaction is found to be an unfair preference, a liquidator or receiver of the company may recover the money paid or property transferred to the creditor or may have the security set aside.

- Invalid floating charges – a floating charge created within the 12 months before the commencement of the winding-up of a company will be invalid unless the company was solvent immediately after the creation of the floating charge. Exceptions are made for (i) monies actually advanced or paid, (ii) where the actual price or value of goods or services sold or supplied was paid to the company at the time of or subsequent to the creation of (and in consideration for) the charge, or (iii) in respect of interest at the appropriate rate. Where the floating charge is created in favour of a "connected person", the 12 months is extended to two years.
- Improperly transferred assets – where a company is being wound up, the High Court may, if just and equitable to do so, order the return of assets the subject of disposal (including by way of security) where such disposition had the effect of perpetrating a fraud on the company, its creditors or its members. There is no time limit within which an improper transfer can be challenged.

8. TAX ISSUES

8.1 Stamp Taxes

Stamp Taxes

No Irish stamp duty arises on the origination or novation of a loan. Likewise, the transfer of a loan or funded debt, by whatever name known, is generally exempt from stamp duty under Irish tax legislation.

The transfer of shares in Irish companies typically attracts Irish stamp duty; however, various exemptions can potentially be availed of (eg, on reorganisations). Furthermore, Irish stamp duty should not apply to the transfer of shares in companies not registered in Ireland (provided that the shares do not relate to any Irish land and buildings nor derive their value or the greater part of their value (directly or indirectly) from Irish land and buildings). Irish stamp duty should not be applicable to the creation of security over shares.

Notwithstanding the above, it is standard that the relevant loan documentation would provide protection for the lenders in respect of any Irish stamp duty that arises in respect of the loan documentation.

8.2 Withholding Tax/Qualifying Lender Concepts

Withholding Tax

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

For these purposes, yearly interest is taken to be interest on a debt, the duration of which is at least one year or is capable of lasting for a year or more. Interest will have an Irish source if paid by an Irish company or branch, or the debt is secured on Irish land or buildings. Notwithstanding the above, there are extensive exemptions under Irish tax legislation from the obligation to

withhold tax where interest is paid to domestic or foreign lenders such that, in many circumstances, Irish withholding tax does not apply (assuming relevant conditions are met). These domestic exemptions include where the relevant lender is a tax resident in another EU member state or territory that has signed a double taxation treaty with Ireland (assuming relevant conditions are met).

In addition, an exemption may be available under the terms of a double taxation treaty itself. In this regard, Ireland has a comprehensive double taxation treaty network with 76 countries (73 currently in effect), many of which provide for an exemption from Irish withholding tax on interest payments to foreign lenders.

In negotiating loan documentation, these exemptions are typically dealt with by the use of the qualifying lender concept (ie, lenders that interest can be paid to without the requirement for the borrower to apply Irish withholding tax).

Qualifying Lender

It is standard for loan documentation to include "tax-gross up" language such that, if there is a requirement for the borrower to withhold Irish tax on interest payments to the lender, the borrower will be required to gross-up the payment so that there is no loss to the lender. Notwithstanding this, it is also standard to include qualifying lender language. In brief, this protects the borrower against the above tax gross up if, at the date of the relevant interest payment, the lender could have received the payment without suffering Irish withholding tax if it had been a Qualifying Lender, but it is not or has ceased to be a Qualifying Lender, except as a result of a change of law after execution of the loan agreement (it is standard for the change of law risk to remain with the borrower). Prior to entering into a loan agreement, the borrower would typically perform the relevant due diligence to ensure that the lender meets the requirement to be a Qualifying Lender. Furthermore, lenders joining the agreement after it has been executed are typically required to confirm their Qualifying Lender status on becoming parties to the loan agreement. The result of the above is that the gross-up obligation is generally triggered only if, after the date of the agreement, there is a change in the law that results in the relevant lender losing its qualifying lender status.

8.3 Thin-Capitalisation Rules

There are no thin capitalisation rules in Ireland. However, there are a number of rules that limit the tax deductibility of interest expenses in various circumstances, and, in the case of loans utilised by borrowers to fund share acquisitions, there are several conditions that must usually be met prior to interest deductibility being allowed.

9. TAKEOVER FINANCE

9.1 Regulated Targets

Ireland operates a merger control regime, set out in Part 3 of the Competition Acts 2002-2017 (the "Competition Acts"), which requires that mergers/acquisitions involving companies whose turnover exceeds certain financial thresholds must notify the Competition and Consumer Protection Commission in Ireland (CCPC). In addition, where the merger/acquisition exceeds the thresholds specified in the EU Merger Regulation (Council Regulation (EC) No 139/2004), a notification may be required to be made to the European Commission, which has exclusive jurisdiction to review the merger/acquisition.

Furthermore, acquisitions of target companies that operate in regulated industries, such as media/publications, and financial services are subject to additional regulatory requirements.

Where a transaction constitutes a "media merger" within the meaning of the Competition Acts, approval from the CCPC is also required. In addition, "media mergers" are also subject to approval by the Minister for the Environment, Climate and Communications. A "media merger" is defined as a merger/acquisition involving two or more entities carrying on a media business and at least one of those entities carries on a media business in the state. "Media mergers" must be notified to the CCPC irrespective of the value of the transaction and/or size of the targets involved.

Acquisitions of target companies operating in the financial services sector that exceed certain thresholds must first be notified to and approved by the Central Bank of Ireland (CBI). The European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009 (the "2009 Regulations") applies to the acquisition of certain regulated entities in Ireland, including:

- credit institutions;
- insurance or assurance undertakings;
- reinsurance undertakings;
- investment firms or market operators of regulated markets (ie, MiFID firms); and
- UCITS management companies.

Not all financial service companies are subject to the 2009 Regulations, eg, AIFMs, however, the CBI has imposed similar notification requirements in respect of AIFMs in its AIF Rulebook.

The effect on the transaction will vary according to the sector. However, in many cases, the consent of the regulator will be required before a transaction can proceed, and regulators have wide-ranging powers to combat non-compliance. For example, the CCPC can void a transaction, impose fines and/or bring criminal charges for non-compliance with the merger regime in Ireland. With regard to the loan documentation, regulatory compliance by the target entity and the maintenance of any applicable authorisations should be addressed (eg, in the representations, undertakings and events of default in the loan agreement).

9.2 Listed Targets

The acquisition of public companies in Ireland is regulated by the Irish Takeover Panel Act, 1997 (the "1997 Act"), the Irish Takeover Panel Act 1997, Takeover Rules, 2013 (the "Takeover Rules"), the Irish Takeover Panel Act 1997, Substantial Acquisition Rules, 2007, the European Communities (Takeover Bids) Regulations 2006. The European Union (Market Abuse) Regulations 2006 will apply to companies that are listed on regulated markets and the Irish Listing Rules will apply to shares listed on Euronext Dublin. The Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (the "Transparency Regulations") sets out minimum disclosure requirements in relation to significant shareholdings and voting rights. This includes certain takeovers/acquisitions. The purpose of the Transparency Regulations is to ensure that sufficient information is published about issuers whose securities are admitted to trading on a regulated market.

Methods of Acquisition

Generally, takeovers or acquisitions of listed companies in Ireland will be structured as either a takeover offer or a scheme of arrangement. A takeover offer (otherwise known as a tender offer) involves the bidder offering to purchase the target shareholders' shares in the company. Where certain minimum conditions are met, the bidder can use a statutory "squeeze out" procedure to compulsorily acquire the remaining shares where the bidder has obtained 90% of the target shares. A scheme of arrangement is a statutory procedure set out in the 2014 Act and involves the target company proposing the acquisition by a bidder of 100% of its own shares

to the shareholders of the target company. The scheme of arrangement must be approved by the shareholders of the target company and the High Court. It is also possible to effect a takeover using the cross-border merger procedure set out in the European Communities (Cross-Border Mergers) Regulations 2008, where the merger involves at least one EEA company and one Irish company.

Financing

General Principle 5 of the Irish Takeover Rules provides that an offeror must only announce an offer after ensuring that it can fulfil any cash consideration and after taking all reasonable measures to secure the implementation of any other type of consideration. Furthermore, Rule 2.5 of the Takeover Rules provides that a bidder may only announce a firm intention to make an offer once it and its financial advisers are satisfied, after careful and responsible consideration, that the bidder can and will continue to be able to implement the offer. Rule 24 of the Takeover Rules also sets out certain information that must be included in an offer document, including details of how the offer is to be financed and the source of the finance. Takeover financing can be in the form of cash, loan notes, warrants or shares in the bidder, or a combination of these. Where an offer involves cash, Rule 24.7 of the Takeover Rules provides that confirmation must be provided by an appropriate third party (ie, the bidder's bank or financial adviser) that resources are available to the offeror sufficient to satisfy full acceptance of the offer. Under the proposed new rule 13.4, an offer subject to any condition relating to finance will be prohibited.

Proposed Updates

On 21 December 2021, the Irish Takeover Panel published proposed amendments to the Takeover Rules. The amendments seek to bring some of the Irish Takeover Rules more in line with their UK equivalent provisions. Some of the principal amendments proposed by the Panel are as follows.

"Put-up or shut-up" (PUSU) period

The Irish Takeover Panel has proposed adopting a similar PUSU regime to that in place in the UK. This would introduce a default PUSU period of 28 days after a potential bidder is publicly identified. Any publicly named bidder must, within 28 days, announce a firm intention to make an offer or announce that it will not proceed with an offer.

Prohibition on offers made subject to conditions relating to finance

The Irish Takeover Panel have proposed introducing a new rule 13.4 which prohibits an offer being made subject to any condition relating to finance. There is an exception for circumstances where a cash bidder proposes to finance the cash consideration by an issue of new securities, in which case the offer can be made subject to any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading.

Announcement of a "strategic review"

Where a public company announces a strategic review with express reference to a possible offer, the Irish Takeover Panel has proposed that the offer period should commence from that date. Thus, the Takeover Rules and disclosure requirements would apply from this point.

Email distribution and website notifications

The Irish Takeover Panel has introduced a proposal that allows the distribution of takeover documents by email instead of hardcopies and notifying shareholders via website notifications, eg, notifying shareholders that documents have been published online.

10. JURISDICTION-SPECIFIC FEATURES

10.1 Other Acquisition Finance Issues

The impact of Brexit and the extent to which it will affect the Irish lending market remains difficult to assess. Given that UK entities no longer have automatic access to the European Union Single Market in financial services, Ireland, as the most significant remaining common law and English-speaking EU member is likely to be attractive to new market entrants. In addition, it has become apparent that Irish law is beginning to be used more regularly as the governing law for international finance transactions.

The developing economic situation with rising inflation is an area of concern, and we have seen interest rate increases in both the US and the UK in recent months, and it is likely that the ECB will follow suit at some point in 2022, raising its interest rate from 0% for the first time in over five years. While economies seem to be recovering following COVID-19 lockdowns and restrictions, there are continuing global supply chain issues that will have an ongoing impact on world economies for months or perhaps years to come. In addition, Russia's invasion of Ukraine and the consequent very significant expansion of financial sanctions against Russia will also be a major area of concern with regard to market performance. That said, overall, there is good reason to expect another robust year of M&A activity in Ireland in 2022. The country's relative economic advantages – including ease of access to EU markets and its status as the largest English-speaking member state in the EU – should help mitigate the other challenges, even if COVID-19 developments are harder to anticipate.

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Trends and Developments

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Emerging from the Pandemic

After the COVID-19-induced shocks of early 2020, the latter stages of that year brought renewed business activity and increasing confidence. Those sentiments persisted into 2021, and, as the year progressed, transaction volumes increased significantly in the banking market generally and in the case of acquisition finance in particular. Various factors are credited for this "bounce", including businesses adjusting to a new normal in a reimagined working landscape, increasing optimism as multiple vaccines gained regulatory approval in the USA, Europe and worldwide, and then were rolled out with good – and in some countries, exceptional – levels of public acceptance and continuing governmental supports to mitigate the damage wrought by the pandemic. This optimism increased purchaser confidence that a return to normal or at least an imaginable new normal was imminent. This, combined with increased seller realism as to value (and an appreciation that the most unexpected events can wipe it out) and financiers refocusing away from the fire fighting on their existing books and returning to lending, drove transaction volumes.

That "bounce" was particularly evident in the Irish M&A market, which had a strong, you could almost say bumper, year in 2021. The figures point to transaction volumes exceeding USD100 billion and over 700 announced transactions. While AerCap's acquisition of GECAS for USD30 billion may have grabbed the headlines, Ireland saw a notably high level of M&A deals with valuations of USD1 billion or more. That said, the busiest area of Irish M&A activity remains in the mid-market space, where deal values are typically between EUR30 million and EUR150 million.

What's Hot?

Transaction volumes were strong in a wide variety of industry sectors, but, perhaps unsurprisingly, "hot" sectors include technology, pharma and transport/logistics. Ireland has also proven to be a happy hunting ground for aggregators and consolidators, especially in the nursing home and insurance broker spaces. There were significant moves in the Irish banking market, too, with KBC Bank and Ulster Bank confirming their departure from the Irish market. This gave AIB the opportunity to acquire significant elements of the Ulster Bank loan book, notably on the corporate lending side, and allowed Bank of Ireland to take on substantial portions of KBC's portfolio of loans.

The longer-term implications of this consolidation in the Irish domestic banking market remain to be seen. While it is certainly the case that Ireland, and Dublin in particular, has seen an influx of international banks and financial institutions in the aftermath of Brexit, the Irish domestic banks have traditionally played – and continue to play– a key role in providing acquisition finance, especially in the all-important mid-market arena. A further mitigant is the increased level of activity from non-bank lenders, private equity funds and credit funds over recent years that has evolved from roots in the short term, high-interest rate real estate lending to more traditional financing on asset classes and at rates in competition with the domestic banks.

One consequence of the strong M&A market has been the number of deals that have used

an auction process to play multiple prospective acquirers off against each other and shorten the transaction timeline. This has obvious implications for a potential funder, including reduced time for due diligence and negotiation of the transaction documents. A potential acquirer may also be required to show some certainty of funds before being allowed to bid, which may require the funder to commit to a deal more quickly than it would otherwise do.

Structure of the Deal

Acquisition finance on Irish transactions typically involves third party debt, usually, senior secured loans but mezzanine or second lien debt does feature, along with sponsor or shareholder funding, either by way of subordinated debt or equity. The Irish domestic banks have been significant providers of this senior debt, but as the number of such lenders has decreased, alternative sources of funding have emerged and grown in importance. Non-bank lenders in the Irish market have been predominately focused on the real estate finance market (both investment and development) but as their number has increased, their profile has evolved, and acquisition finance is proving to be an attractive market for them. We have also seen the emergence of financing from family or private offices, which, as with the non-bank lenders, was previously more a feature of the real estate financing landscape. However, it remains the case that high yield bonds are not a typical feature of Irish acquisition finance arrangements.

Private equity has considerably increased in significance as a provider of acquisition finance in the Irish market over the last number of years, and this trend accelerated through 2021. Again, a number of reasons have been offered for this, including pent-up demand for investment opportunities as a consequence of the pandemic and a perception of heightened value in targets, again brought about by the impact of COVID-19 on business activity. In any event, this source of funding has been attractive both for business owners looking for an exit and those seeking additional investment for expansion.

It is important not to view these diverse funding sources as mutually exclusive. Particularly in the mid-market space, transactions are often structured with both elements of private equity and more traditional bank funding; in those scenarios, the bank funding is usually structured as senior secured debt, with the private equity funding coming in as equity or subordinated debt or some combination of both. In many cases, the bank providing the senior debt will require the private equity house to give security over its shareholding in the target company or group, but this can be done on a limited recourse basis, often with the inclusion of non-petition and corporate obligations wording, to mitigate the risk to the private equity house, its officers and investors.

Balancing the Risk

In this context, it is worth noting that acquisition finance providers and particularly banks providing senior debt, will require comprehensive security packages encompassing the acquiring vehicle/borrower, the target and its group and the shareholders in/sponsors of the acquiring vehicle. Security from the acquiring vehicle is typically in the form of an all asset mortgage debenture, including both fixed and floating charges over all of the entity's assets, with a particular emphasis on the shares it acquires in the target. A similar approach is usually taken with the target and its group companies, underpinned by a guarantee of the acquirer/borrower's obligations to the senior lender. The particular focus of the security in the case of the target or its group companies will be dictated by the nature of their assets, eg, intellectual property or real estate.

In circumstances where the target (and any of its group companies) are incorporated in Ireland, the provision of such guarantees and security for the purpose of an acquisition of the target's shares will likely trigger financial assistance concerns under Section 82 of the Irish Companies Act. However, it is typically possible to address this issue once the target (and any Irish group companies) carry out a summary approval procedure as set out in the relevant legislation (which we describe in our Law and Practice chapter).

Where a bank provides senior secured debt, it is relatively common for it to also provide other credit lines to the acquirer and the wider target group, such as overdraft, leasing lines or letter of credit facilities. Typically, those additional or ancillary facilities will be collateralised by the same guarantee and security package as the debt advanced for the acquisition finance. Where a private equity house provides finance in the form of debt, that debt is typically secured in a manner very similar to, if not the same as, a senior secured lender. As Irish companies have expanded their operations outside of the country, whether into Europe, the USA or Asia, this has introduced an additional layer of complexity to acquisition finance transactions as, in many cases, the target group will contain members in one or more foreign jurisdictions. More traditional bank lenders, private equity houses and non-bank lenders are all now well used to such multi-jurisdictional complications; the challenge can be a logistical one – identifying the relevant foreign jurisdiction(s), enlisting appropriate legal and financial advice in the relevant location(s) and then completing all of the various elements simultaneously.

Irish or Not?

Looking at cross-border issues, it is worth noting that the Irish domestic banks favour Irish law governed facility agreements, albeit in Loan Market Association format or a close approximation. While there is a higher proportion of non-Irish private equity houses and non-bank lenders now willing to lend under Irish law documents, it remains relatively common for their facility agreements to be governed by English (notwithstanding an anticipated move away from English Law due to Brexit, which has not emerged) or even New York law, depending on their preference. Where a loan facility will be or is likely to be, syndicated, it is usually governed by English or New York law. Typically, this does not raise any major concerns other than the costs involved in retaining legal counsel in multiple jurisdictions. As is usually the case, the law governing the security is determined by the location of the assets to be secured – assets located in Ireland, eg, would be secured under Irish law; those in Singapore, as another example, by the laws of Singapore.

Acquisition Finance Goes Green, or at Least Sustainable

One very notable recent trend in acquisition finance documents – irrespective of their origin (traditional bank lender, private equity house or non-bank lender) – is the move to incorporate ESG (Environmental, Social, Governance) principles into the debt documents. Green Loans are possible, and Sustainability-linked Loans (SLLs) are increasingly common and are particularly well suited to incentivising a business to transition to a more sustainable operating model. As with any SLL, the key consideration is how to measure a borrower's sustainability performance – what sustainability performance targets (SPTs) to set against key performance indicators (KPIs) to measure improvements in the borrower's sustainability profile. As an improvement in that profile typically brings a financial benefit to the borrower, whether by way of a margin ratchet or otherwise, the methodology for determining the borrower's performance in this respect is vital.

As with SLLs provided for non-acquisition finance purposes, where a borrower is con-

cerned at the optics of benefitting financially from "doing the right thing" or, more commonly, a lender is concerned at the optics of benefitting from its borrower "not doing the right thing", a mechanism can be introduced for a charitable donation or some other form of contribution to cause to advance sustainability objectives. Funders of all types are often concerned with a potential "ESG Controversy", meaning a significant event with high or severe adverse ESG impact but where the borrower manages to continue to meet its KPIs. In that circumstance, the funder may want the borrower to lose the benefit of any sustainability-linked saving.

What's Next?

While ESG is here to stay, as 2022 unfolds, the outlook for the Irish M&A market, and the acquisition finance which supports it, is a little more uncertain, albeit there are definitely some causes for optimism. Close to home, governmental supports provided through the pandemic are ending, although the anticipated deluge of insolvency and examinership activity, post lockdowns and the various standstill arrangements that many availed of have not emerged; we will see two major banks leave the jurisdiction and can only hope the huge level of dry powder raised by credit and private equity funds in recent years will replace this source of funds at least in part; Brexit and the Northern Ireland Protocol is back on the agenda after a number of months away from the headlines, war has returned to Europe with Russia's invasion of Ukraine, interest rates seem to be only heading upwards albeit from such low levels and with current estimated rises leaving rates at just above historic lows, and there is talk of a recession building on both sides of the Atlantic. As a small, open economy, Ireland is far from immune to these issues, and while activity levels remained high as Quarter 1 gave way to Quarter 2, the outlook is harder to predict.

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