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Cyprus

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FORMS OF SECURITY

1. What are the most common forms of security granted over immovable and movable property? Are there formalities that the security documents, the secured creditor or the debtor must comply with? What is the effect of non-compliance with these formalities?

Immovable property

Mortgage. The security most commonly granted over immovable property is the mortgage. A mortgage can be legal or equitable:

- **Legal mortgage.** This gives the lender a legal interest in the mortgaged property until full repayment of the loan or the performance of some other obligation. A mortgage does not constitute an estate in land but rather a contractual right for the benefit of the mortgagee and a charge on the immovable property.
- **Equitable mortgage.** This transfers an equitable interest in the property (as opposed to a legal interest) to the lender until full payment of the debt or the performance of some other obligation.

Charge. Another form of security is the charge. This is generally regarded as a type of mortgage, although there is a difference between the two: a mortgage is a conveyance of property subject to a right of redemption, whereas a charge conveys nothing and simply gives certain rights to the chargee over the property in question as a security.

Movable property

The security devices for movables are the:

- **Lien.** A lien may be legal under common law or equitable. The common law lien is relevant in the current context. This is the right to retain possession of property belonging to another person until a debt has been paid. This type of lien merely gives the holder the right to retain the debtor's property until payment, not a right to sell or otherwise deal with the property, and it is extinguished if the creditor gives possession to the debtor or his agent. A common example is the carrier's lien, a carrier's right to retain possession of goods against payment of transport costs.
- **Pledge.** A pledge is the loan of money in return for the delivery of possession to the lender. The lender has the power to sell in the event of default by the borrower but the general ownership of the goods remains with the borrower.
- **Floating charge.** A floating charge is a security interest, generally over all of the company's assets, which "floats" until an event of default occurs or until the company goes into insolvent liquidation, at which time the floating charge crystallises and attaches to all the relevant assets. It gives the secured creditor two key remedies in the event of default:
  - firstly, the creditor may crystallise the charge, and then realise any assets subject to the charge as if it was a fixed charge;
  - alternatively, if the floating charge encompasses substantially all of the assets and undertaking of the company, the charge holder may appoint a receiver to take control of the business with a view to discharging the debt out of income or selling off the entire business as a going concern.

Formalities

To have legal effect, mortgages, charges and other rights over immovable property should be registered with the Department of Lands and Surveys (*Immovable Property (Transfer and Mortgage) Law, No. 9 of 1965*). However, registration is not compulsory.

A company creating a charge over any of its property is required to send particulars of the charge accompanied by the charge itself to the Registrar of Companies within 21 days after creation of the charge (*section 91, Companies Law*). If a company acquires property subject to a charge, it must send the same particulars together with a certified copy of the charge within 21 days of acquiring the property (*section 92, Companies Law*). The charges must be properly stamped to be accepted for registration. Failure to comply with sections 91 and 92 of the Companies Law makes the company and every officer liable to a default fine of EUR425 (as at 1 February 2011, US$1 was about EURO.7).

Any other person interested in the charge may submit the particulars to the Registrar of Companies for registration and recover the cost from the company (*section 91, Companies Law*).

Section 96 of the Companies Law gives the court power to extend the time for registration or to register a charge out of time if it considers it appropriate to do so.

A charge that is not registered in the prescribed manner will be void against the liquidator and any creditor of the company (*section 90, Companies Law*).

CREDITOR AND SHAREHOLDER RANKING

2. Where do creditors and shareholders rank on a company's insolvency?

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

- First, the costs of the winding-up.
- Second, the preferential debts. Preferential claims are defined in section 300 of the Companies Law and comprise:
  - all government and local taxes and duties due at the date of liquidation and having become due and payable within 12 months before that date and, in the case of assessed taxes, not exceeding one year's assessment;
  - all sums due to employees, including wages, up to one year's accrued holiday pay, deductions from wages (such as provident fund contributions) and compensation for injury.

  Claims of employees who are shareholders or directors may not rank as preferential depending on the nature of the shareholding or directorship (*section 300(1), Companies Law*).

  A person who has advanced funds for the purpose of paying employees will have a subrogated preferential claim to the extent that the employees' direct preferential claims have been diminished because of the advances (*section 300(2), Companies Law*).
- Third, any amount secured by a floating charge.
- Fourth, the unsecured ordinary creditors.
- Fifth, any deferred debts such as sums due to members in respect of dividends declared but not paid.
- Finally, any share capital of the company. Where there are different classes of share capital, such as preference shares, their respective rankings will be determined by the terms on which they were issued.

Within each category of claim, creditors rank equally and abate in equal proportions if there are insufficient funds to pay them in full (*section 300(3), Companies Law*).

UNPAID DEBTS AND RECOVERY

3. Do trade creditors use any mechanisms to secure unpaid debts?

The commonest mechanism is the retention of title clause (Romalpa clause (*Aluminium Industrie Vaassen BV v Romalpa Aluminium Limited*)). This is a provision in a contract for the sale of goods that the title to the goods remains vested in the seller until the buyer fulfils certain obligations (usually payment of the purchase price). In the event of the purchaser's insolvency the buyer may be able to recover possession of goods that have not been paid for.

In Cyprus law, English law precedents after 1960 are highly persuasive and although retention of title clauses have not been tested in the Cyprus courts, it is likely that the courts would follow the English precedents, of which there are many.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Question 6*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

Unsecured creditors can bring an action for recovery of debt in the district court of the debtor's place of business or residence. Recovery actions can be protracted if the debtor files a defence.

A creditor who has obtained a judgment against a debtor may enforce it in various ways, including:

- A writ of execution for the sale of movables.
- Garnishee proceedings requiring a third party who owes money to the debtor to pay the money directly to the creditor instead.
- Registration of a charging order over the debtor's immovable property or chattels.
- A writ of delivery of goods, ordering goods to be delivered to the creditor.
- A writ of possession of land, ordering the land to be delivered to the creditor.
- A writ of sequestration, ordering the seizure or attachment of property.

If the debtor owns certain assets and there is a risk that the debtor will dispose of them, the creditor may obtain an injunction to freeze them. Apart from this, prejudgment attachments are not available.

Section 299 of the Companies Law incorporates into Cyprus law the right of set-off in corporate insolvencies. This applies the relevant provisions of the Bankruptcy Law (Cap. 5) to corporate insolvencies. In the event of mutual credits, mutual debts or other mutual dealings between a debtor and any of his creditors, the sums due in respect of these mutual dealings are netted off to arrive at a balance (*section 35, Bankruptcy Law*). If the outcome is a balance owed by the insolvent company, the creditor claims in the insolvency proceedings for the net balance and does not have to pay anything to the company. If the outcome is a balance owed to the insolvent company, only the net amount is payable. The right of set-off is automatic.

STATE SUPPORT

5. Is state support for distressed businesses available?

There is no specific state support scheme.

RESCUE AND INSOLVENCY PROCEDURES

6. In relation to each available rescue and insolvency procedure:

- **What is its objective and, where relevant, what are the prospects for recovery?**
- **How is it initiated, when, by whom and which companies can it be applied to?**
- **Can the company obtain any protection from its creditors during the procedure?**
- **What substantive tests apply?**
- **How long does it take?**
- **What consents and approvals are required?**
- **Who supervises the procedure and controls the company's affairs (for example, an independent accountant or the court)?**
- **How does it affect the company, shareholders, employees, trading partners and creditors?**
- **How is the procedure formally concluded and what happens to the company on conclusion?**

Company arrangements and reconstructions

Objective. Company reorganisations are used:

- For the financial restructuring of a company which is viable but subject to short-term liquidity problems.
- To effect a wide range of mergers and reorganisations of companies, owing to the favourable tax treatment of reorganisations.

The procedure can apply where a compromise or arrangement is proposed between a company and its creditors, or between a company and its members or any class of them.

Initiation. The company, a creditor, member or, in the case of a company being wound up, the liquidator may apply to the court for an order for a meeting of the creditors or members of the company to be convened, in whatever way the court directs, to consider the proposals (*section 198, Companies Law*).

The procedure is available to all Cyprus-registered companies apart from banks and insurance companies, which are subject to special procedures.

Protection from creditors. There is no protection from creditors during the procedure. Therefore, it is important to keep creditors informed and acquiescent.

Substantive tests. The notices of the meetings sent to creditors and members must be accompanied by a statement explaining the effects of the proposals. This statement must identify any interests of the directors and the effect of the proposals on those interests.

Length of procedure. The reorganisation procedure is flexible and fast, and with proper planning reorganisations can be completed within weeks.

Consents and approvals. The approval of the court is required for the convening of any meetings and to sanction the resolutions passed at those meetings. To be binding, the compromise or arrangement must be passed by a majority in number representing 75% in value of the creditors or members present and voting at the meeting of creditors or members, and must subsequently be approved by the court.

Supervision and control. The procedure is controlled by the company and its advisers, subject to the oversight of the court.

Effect. A compromise or arrangement is binding on:

- All the creditors or members.
- The company.
- In the case of a company being wound up, on the liquidator and contributories (those persons liable to contribute to the assets) of the company.

Conclusion. The court order approving the compromise or reconstruction must be delivered to the Registrar of Companies for registration and a copy must be annexed to every copy of the memorandum or other document comprising or defining the constitution of the company issued after the order has been made.

Receivership

Objective. A creditor holding a charge over assets may appoint a receiver to realise the assets subject to the charge and discharge the debt out of the proceeds. If the charge is a floating charge covering substantially all the assets of the company, the creditor may appoint a receiver and manager. The purpose of receivership is recovery of the secured creditor's debt. It does not bring the existence of the corporate debtor to an end, as liquidation does, and therefore offers the best chance of the debtor continuing as a going concern. The secured creditor's recovery prospects are entirely determined by the value of the security in relation to the debt.

Initiation. Debenture holders or other creditors of a company can make an application to the court. The court orders a receiver (who may be the Official Receiver) to be appointed (*section 336, Companies Law*). Alternatively, a secured creditor may appoint a receiver under a specific power contained in the charge.

The procedure applies to all Cyprus-registered companies apart from banks and insurance companies, which are subject to special procedures.

Protection from creditors. The appointment of a receiver does not give any protection against recovery actions by creditors. However, if the appointment is under a crystallised floating charge, the creditor is unable to enforce any judgment he may obtain.

Substantive tests. The court appoints a receiver if it considers that the interests of the creditors concerned require protection by the appointment of a receiver, depending on the circumstances of the case (for example, whether the assets are in jeopardy).

An appointment under a charge merely requires compliance with the provisions of the charge.

Length of procedure. If the receiver can quickly realise charged assets and account to his appointer and the company, the process can be completed in months. More usually, receiverships take years to conclude.

Consents and approvals. No consents and approvals are required.

Supervision and control. The receiver controls the assets over which he has been appointed, for as long as his appointment lasts. The extent of his powers and the degree of supervision over him are set out in the document appointing him, which may be a court order or an appointment under a charge (*see Question 10, Receivers*).

Effect. The effect of receivership is to suspend the directors' powers of management over the assets encompassed by the receivership. Within seven days of appointing a receiver, the appointer must notify the Registrar of Companies (*section 97, Companies Law*). If the appointment is under a floating charge covering substantially all the assets of the company, the receiver must immediately notify the company, which must within 14 days provide the receiver with a statement of affairs, including a statement of all assets and liabilities (*section 340, Companies Law*). Based on this the receiver decides whether to realise assets piecemeal (for example, if there are sufficient readily realisable assets to discharge the amount payable to the secured creditor) or as a whole.

Conclusion. Once the receiver has repaid the sum due to the appointer (or has concluded that it is uneconomic to continue the receivership), he will account to the appointer and the company, and notify the Registrar of Companies under section 97 of the Companies Law that he has ceased to act. He must send an account of his receipts and payments to the appointer, to the company and to the Registrar of Companies within two months of ceasing to act.

If the appointment lasts for more than one year, the receiver must submit annual accounts to the same people at each anniversary.

Winding-up by the court (compulsory liquidation)

Objective. Compulsory liquidation is a creditor's ultimate sanction. The company immediately ceases to trade, the assets are realised and distributed, and the company's existence comes to an end. The threat of compulsory liquidation may be used as a debt collection tool. However, if a company actually goes into compulsory liquidation, recovery prospects are slim. Compulsory liquidation also involves investigation into the conduct of persons involved in the company to ascertain the reasons for its demise and their part in it.

Initiation. A petition for the winding-up of a company may be presented by (*section 213, Companies Law*):

- The company.
- Any creditor (including a contingent or prospective creditor).
- A contributory.
- A member.

The Official Receiver may present a petition against a company that is being wound up voluntarily.

On hearing the petition, the court may dismiss it, adjourn it, or make any order that it deems fit. If a winding-up order is made, the liquidation will be deemed to have commenced at the time of presentation of the petition unless a resolution has previously been passed for a voluntary winding-up (*see below*), in which case liquidation will be deemed to have begun with the passing of the resolution.

The procedure applies to all Cyprus-registered companies apart from banks and insurance companies, which are subject to special procedures. The court can wind up a company incorporated outside Cyprus which is carrying on business in Cyprus or which having carried on business in Cyprus ceases to do so. This applies even if the company has been dissolved or otherwise ceased to exist as a company by virtue of the laws of the country in which it was incorporated (*section 362, Companies Law*).

Protection from creditors. No legal action or proceeding can be continued or commenced against a company in respect of which a winding-up order has been made, or a provisional liquidator has been appointed, except both (*section 220, Companies Law*):

- With the court's leave.
- Subject to such terms as the court may impose.

A provisional liquidator may be appointed after the presentation of a winding-up petition, to protect the company's assets.

A creditor who has issued execution against a company's property or has attached any debt due to the company after commencement of the winding-up cannot retain the benefit of the execution or attachment against the liquidator in the winding-up (*section 305, Companies Law*). This is subject to the court's power to order otherwise.

Substantive tests. The court can wind up a company if any of the following applies (*section 211, Companies Law*):

- It has resolved by special resolution to be wound up by the court.
- Default is made in delivering the statutory report to the Registrar of Companies or in holding the statutory meeting.
- The company does not commence its business within a year from its incorporation or suspends its business for a whole year.
- The number of members is reduced below one in the case of a private company or below seven in the case of any other company.
- The company is unable to pay its debts.
- The court is of the opinion that it is just and equitable that the company should be wound up.

Length of procedure. Compulsory liquidation is the most formal insolvency process and proceedings generally take several years to complete.

Consents and approvals. No consents and approvals are required.

Supervision and control. The Official Receiver or a liquidator subsequently appointed in place of the Official Receiver supervises the procedure, under the oversight of the court.

Effect. On the making of a winding-up order the company may no longer trade, except with the approval of the court (or the committee of creditors, if there is one) for the beneficial realisation of assets. No action may be proceeded with, or commenced against, the company except by leave of the court and subject to such terms as the court may impose (*section 97, Companies Law*). Any disposition of the company's property that takes place after

the commencement of winding-up and any transfer of shares or alteration in the status of the members of the company after the commencement of winding-up will be void unless the court orders otherwise.

All the company's assets vest in the Official Receiver, who is responsible for realising them and distributing the proceeds among the creditors. The directors are required to provide the Official Receiver with a statement of affairs detailing all the company's assets and liabilities, including prospective and contingent assets and liabilities. The Official Receiver (or liquidator appointed to act in his place (*see below*)) will realise the assets, determine the amount of individual claims and distribute any funds in accordance with the priorities set out in *Question 2*.

Section 233 of the Companies Law gives the liquidator extensive powers to realise the assets and determine claims, including the right to:

- Bring and defend actions on the company's behalf.
- Continue to trade for the beneficial realisation of assets.
- Borrow on the security of the company's assets.
- Do anything else that may be necessary for the purposes of the winding-up.

Certain of these powers require the approval of the court (or the committee of creditors, if one has been appointed) and all powers are subject to the control of the court. Any creditor or contributory may apply to the court in respect of the exercise of the liquidator's powers (*section 233(3), Companies Law*).

The Official Receiver is a government official and in Cyprus the post has always been combined with that of Registrar of Companies. The Official Receiver may apply to the court for another person to conduct the liquidation under his direction. He will convene meetings of creditors and contributories (shareholders) to ascertain their wishes on this issue (*section 227, Companies Law*).

Liquidators in compulsory liquidations have extensive powers to investigate the conduct of persons involved with the company, including the power to apply to the court for the public examination of any officer of the company or anyone involved in its promotion. The court may order the arrest of any person it considers liable to abscond and the seizure of any relevant records (*section 257, Companies Law*).

Conclusion. Once the assets have been realised and the funds have been distributed, the liquidator may apply to the court for the dissolution of the company. The company is dissolved with effect from the date of the order (*section 260, Companies Law*). The liquidator is required to send a copy of the order to the Registrar of Companies.

Members' voluntary liquidation

Objective. Members' voluntary liquidation is the means of bringing to an end the existence of a solvent company which is no longer required and distributing the assets among the members. It is generally undertaken as a housekeeping measure in the context of group reorganisation.

Initiation. A members' voluntary liquidation starts with a statutory declaration (usually referred to as a declaration of solvency) by the directors (or a majority of them if there are more than two) that, having enquired fully into the affairs of the company, they consider that the company will be able to pay its debts in full within a maximum of 12 months (*section 266(1), Companies Law*). The statutory declaration must be made within five weeks before the date of the proposed resolution to wind up and delivered to the Registrar of Companies before the date of the proposed resolution to wind up (*section 266(2), Companies Law*).

Once the statutory declaration has been delivered to the Registrar of Companies, the liquidation is initiated by the passing of a resolution (*see below, Consents and approvals*) of members to wind up the company.

The procedure applies to all Cyprus-registered companies apart from banks and insurance companies, which are subject to special procedures.

Protection from creditors. A creditor who has issued execution against a company's property or has attached any debt due to the company after commencement of the winding-up cannot retain the benefit of the execution or attachment against the liquidator in the winding-up (*section 305, Companies Law*). This is subject to the court's power to order otherwise.

Substantive tests. The critical factor is the ability to pay debts in full within one year of liquidation. If the directors are unable to make the statutory declaration of solvency or if, having been appointed, the liquidator forms the opinion that the company will be unable to pay its debts, the liquidation must be undertaken as a creditors' voluntary liquidation (*see below, Creditors' voluntary liquidation*).

Length of procedure. By definition, creditors in a members' voluntary liquidation must be paid in full within a year of commencement of the liquidation. Realisation and distribution of residual assets to members and formal conclusion of the winding-up may take longer. If the liquidation continues for more than one year the liquidator must convene annual meetings of members and lay accounts before them.

Consents and approvals. The members' resolution to wind up the company must be made by either:

- **Special resolution.** This requires a 75% majority of votes cast at a general meeting. Not less than 21 days' notice of the meeting, specifying the intention to propose the resolution as a special resolution, must be given.
- **Ordinary resolution.** An ordinary resolution, requiring a simple majority of votes cast at a validly convened general meeting, is sufficient if the company's articles of association provide for a fixed period for the duration of the company, or specify that a certain event should occur for the winding-up.

Supervision and control. The liquidator has the same extensive powers as a liquidator in a compulsory liquidation to do whatever is necessary to achieve a beneficial winding-up. Apart from needing the court or committee's approval to settle any category of claims in full, or to make compromises of claims, he can exercise those powers without reference to anyone (*section 286, Companies Law*).

The liquidator can also apply to the court to determine any issue or to exercise any of the powers available to the court in a compulsory liquidation (*section 290, Companies Law*).

Effect. The effect of liquidation is to vest the assets in the liquidator as trustee. The company may no longer trade except to the extent required for beneficial realisation of the assets.

Conclusion. Sections 273 and 274 of the Companies Law set out the provisions concerning the conclusion of members' voluntary liquidations, which may be summarised as follows:

- Once the liquidator has realised all the company's assets, discharged its liabilities and distributed remaining assets among the members he is required to call a final meeting of members (which must be advertised with one month's notice in the official *Gazette*) and lay before it an account of his receipts and payments.
- The liquidator must notify the Registrar of Companies of the meeting within a week of its having taken place.
- The company is deemed to be dissolved three months after the registration of the return of the meeting, subject to the right of the liquidator or any other interested person to apply to the court for the three-month period to be extended.

Creditors' voluntary liquidation

Objective. Creditors' voluntary liquidation is used to distribute the available assets of an insolvent company among the creditors and bring the company's existence to an end. Like compulsory liquidation, it may involve investigation into the conduct of persons involved in the company to ascertain the reasons for its demise and their part in it.

Initiation. The first step in a creditors' voluntary liquidation is the convening of separate meetings of members and creditors:

- **Members' meeting.** The purpose of the members' meeting is to pass a resolution to wind up the company and appoint a liquidator.
- **Creditors' meeting.** The purpose of the creditors' meeting is to (*sections 276 to 278, Companies Law*):
  - present creditors with a statement of the company's financial position and a list of creditors' claims;
  - nominate a liquidator to act in place of the liquidator appointed by the members; and
  - appoint a committee of inspection of up to five persons to assist and oversee the liquidator and fix his remuneration. If the creditors and members nominate different people to act as liquidator, the creditors' wishes will prevail, subject to a right to apply to the court (*section 277, Companies Law*).

The creditors' meeting must be convened for the same day as the members' meeting, or the following day, and notice of the meeting must be posted to creditors simultaneously with the notice to members, and advertised in the official *Gazette* and two local newspapers.

The procedure is available to all Cyprus-registered companies apart from banks and insurance companies, which are subject to special procedures.

Protection from creditors. The same applies as in a members' voluntary liquidation (*see above, Members' voluntary liquidation: Protection from creditors*).

Substantive tests. None.

Length of procedure. Creditors' voluntary liquidations are often protracted as realisation of assets, agreement of claims and completion of investigations can take years. If the liquidation lasts longer than a year, separate annual meetings of members and creditors must be held within three months of each anniversary to consider the conduct of the liquidation and the liquidator's receipts and payments account (*section 282, Companies Law*).

Consents and approvals. A creditors' voluntary liquidation can be initiated by passing a special resolution or an ordinary resolution, if the company's articles of association provide for a fixed period for the duration of the company or specify that a certain event should occur for the winding-up (*see above, Members' voluntary liquidation: Consents and approvals*). However, creditors' voluntary liquidations are usually initiated by passing an extraordinary resolution. This requires a 75% majority of votes cast at a general meeting (of which notice has been given, specifying the intention to propose the resolution as an extraordinary resolution) to the effect that the company cannot by reason of its liabilities continue its business and that it is advisable to wind up.

Supervision and control. The same applies as in a members' voluntary liquidation (*see above, Members' voluntary liquidation: Supervision and control*).

Effect. The same applies as in a members' voluntary liquidation (*see above, Members' voluntary liquidation: Effect*).

Conclusion. The same applies as in a members' voluntary liquidation (*see above, Members' voluntary liquidation: Conclusion*).

STAKEHOLDERS' ROLES

7. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure?

Which stakeholders have the most significant role depends on the nature of the proceeding and who is most affected by its outcome:

- **Company arrangements and reconstructions.** The creditors will have the decisive role if they are being asked to accept anything less than full, immediate settlement of their debts. Otherwise the members will have the decisive role.
- **Receivership.** The debenture holder controls the process and the debenture holder's interests will be paramount.
- **Compulsory liquidation or creditors' voluntary liquidation.** The unsecured creditors control the appointment of a liquidator and the liquidator will report to them.
- **Members' voluntary liquidation.** The creditors have no say in the appointment of a liquidator or in the liquidation process as long as they are assured of payment in full within 12 months of liquidation. If the liquidator considers that full payment within 12 months will not be possible, he must take steps to involve the creditors and convert the liquidation to a creditors' voluntary liquidation.

LIABILITY

8. Can a director, parent company (domestic or foreign) or other party be held liable for an insolvent company's debts?

If a person is proved to be involved in fraudulent trading under section 311 of the Companies Law or some other offence (such as misappropriation of assets under section 312 of the Companies Law), the court may make an order for him to be personally liable for the company's debts or to pay compensation. However, in the absence of severe misconduct such as this, there are no provisions for lifting the corporate veil.

There is no provision for the combination of proceedings against the parent company and its subsidiaries for administrative purposes, or for the aggregation of assets and liabilities. Each company is a separate legal entity and is subject to separate procedures.

SETTING ASIDE TRANSACTIONS

9. Can an insolvent company's pre-insolvency transactions be set aside? If so:

- **Who can challenge these transactions, when and in what circumstances?**
- **Are third parties' rights affected?**

Challenging transactions

There are a number of provisions in the Companies Law which may invalidate a charge granted by a company or any other disposition it has made, or any debt which it has incurred:

- A charge that has not been properly registered is void against the liquidator and any creditor of the company (*section 90(1), Companies Law*) (*see Question 1, Formalities*).
- Section 301 of the Companies Law extends the "fraudulent preference" provisions of bankruptcy law (which are set out in the Fraudulent Transfers Avoidance Law, Cap 64) to companies. Any transaction (including any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company) that the company enters into within six months before the commencement of its liquidation may be deemed a fraudulent preference against its creditors. It will therefore be invalid unless there is full consideration for the company having entered into it. In determining whether there was a fraudulent preference, the court looks at the dominant or real intention and not at the result. The onus is on those who claim to avoid the transaction to establish that the dominant intention was to prefer.
- A floating charge on the undertaking or property of the company created within 12 months of the commencement of winding-up is valid only to the extent of any cash paid to the company at the time of, or subsequently to, the creation of and in consideration of the charge. This is unless it is proved that immediately after the creation of the charge the company was solvent (*section 303, Companies Law*). The onus of proving the company's solvency is on the holder of the floating charge. Solvency requires not only an excess of assets over liabilities, but also the ability to pay debts as they become due.

Third parties' rights

The counterparty to a transaction at an undervalue or the beneficiary of a preference will not be protected merely by reason of having acted in good faith and for value. This is consistent with the principle that the critical element of an improper preference is the company's intention to prefer, and that the state of mind of the person receiving the preference is immaterial.

CARRYING ON BUSINESS DURING INSOLVENCY

10. In what circumstances can a company continue to carry on business during insolvency or rescue proceedings? In particular:

- **Who has the authority to supervise or carry on the company's business?**
- **What restrictions apply?**

Receivers

As long as the order appointing him (in the case of a court appointment) or the charge and the instrument of appointment (in the case of a receiver appointed under a charge) give him the power, a receiver or a receiver and manager may carry on the company's business.

A receiver is personally liable on any contract he enters into in the performance of his functions, except as far as the contract excludes personal liability. As long as the contract has been entered into with proper authority, he has a right of indemnity out of the assets (*section 337, Companies Law*).

Once a receiver has been appointed, every invoice, purchase order or business letter issued by or on behalf of the company, receiver or manager showing the name of the company must contain a statement that a receiver or manager has been appointed (*section 338, Companies Law*).

Liquidators

In any form of liquidation, the liquidator may only carry on the business of the company so far as is necessary for the beneficial winding-up of the company. In a compulsory liquidation, the liquidator requires the approval of the court or the committee of inspection to carry on business (*section 233(1), Companies Law*). Liquidators in voluntary liquidations are not required to obtain approval.

ADDITIONAL FINANCE

11. Can a company that is subject to insolvency proceedings obtain additional finance (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

A liquidator in a winding-up by the court can borrow on the security of the company's assets (*section 233, Companies Law*). Section 286 of the Companies Law extends this power to liquidators in voluntary liquidations. Receivers appointed by debenture holders are generally able to obtain funding from their appointor. The terms of the financing are a matter for agreement between the receiver and the appointor. Repayment of this finance has no special priority under law.

MULTINATIONAL CASES

12. In relation to multinational cases:

- **Do local courts recognise insolvency and rescue procedures in other jurisdictions, and court judgments made during these procedures? Is recognition given under specific legislation or under case law (for example, principles of comity)?**
- **Do courts co-operate where there are concurrent proceedings in other jurisdictions?**
- **Is your jurisdiction party to any international treaties, model laws or EU legislation (if applicable)?**
- **Are there any special procedures that foreign creditors must comply with when submitting claims in local insolvency proceedings?**

Recognition

Cyprus courts have not yet been involved in cross-border insolvency arrangements or co-operation with other jurisdictions, so there is no case law. There is no domestic legislation that prevents recognition of insolvency proceedings in another jurisdiction. The appointment of a foreign insolvency officeholder will also be recognised and there is no need for the officeholder to apply for formal recognition.

Concurrent proceedings

If there are concurrent proceedings in Cyprus and abroad against a foreign company, the Cyprus courts consider the local proceedings as subsidiary to the foreign proceedings. Generally, Cyprus courts recognise judgments and orders made by courts in other jurisdictions if the Cyprus courts consider that those judgments or orders have been properly made under the foreign law and that the foreign courts had the necessary jurisdiction. Under Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation) the Cyprus court may not question whether the court hearing the main proceedings had jurisdiction. This will be clarified by case law in due course.

International treaties

Cyprus has not entered into any agreements in relation to insolvency. The Insolvency Regulation has had direct effect in Cyprus since the island's accession to the EU on 1 May 2004, but there have not yet been any significant developments or decisions involving it.

Procedures for foreign creditors

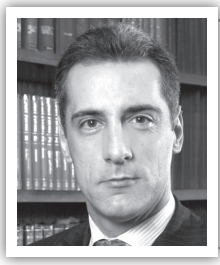
Foreign creditors may prove their claim in a Cypriot liquidation under the normal procedure. In the event of concurrent liquidation of the same company in the foreign jurisdiction, a creditor who proved his claim in Cyprus will only receive a share in any distribution after any amount received in the foreign proceedings has been taken into account.

REFORM

13. Are there any proposals for reform?

There are no current proposals for reform. The insolvency provisions of the Companies Law mirror the corresponding English law of the mid-twentieth century and have not been updated. However, they have proved adequate to date, partly due to Cyprus's largely uninterrupted economic prosperity since it became independent. However, a consensus is beginning to emerge on the desirability of a more modern insolvency regime which promotes a rescue culture and fosters enterprise. It is likely that a revision and updating of the Companies Law, including its insolvency provisions, will be undertaken in the next few years.

CONTRIBUTOR DETAILS



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Recent transactions

- Advising a major Russian bank in a series of acquisitions to support strategically important businesses.
- Acting for another Russian financial group in connection with the transfer of its holding company from mainland Europe to Cyprus.
- Advising leading global organisations, including Staples and Callaway Golf, on the Cyprus law and tax aspects of internal reorganisations.
- Co-ordinating the multi-billion dollar sale of a majority shareholding in one of Russia's largest companies, listed in Moscow and London.

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Recent transactions

- Advising on the restructuring of the Cyprus intermediate holding company of an AIM-listed company.
- Dealing with the Cyprus aspects of the corporate restructuring of a European multinational group with activities worldwide.
- Advising on Cyprus corporate law matters concerning the acquisition of a Cyprus-incorporated holding company with a controlling stake in a subsidiary company with a strong presence in the Russian oil and gas and chemicals industry.

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