

Chapter 11

Cyprus

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- § 11:1 Introduction—In general
- § 11:2 —Relevant agencies
- § 11:3 —Financing practices
- § 11:4 Objectives of secured transactions regime
- § 11:5 Basic approaches to security—In general
- § 11:6 —Types of security—Immovable property
- § 11:7 —Tangible movable property
- § 11:8 —Intangible movable property
- § 11:9 —Commercial security
- § 11:10 —Future and fungible assets security
- § 11:11 Creation of security interest—In general
- § 11:12 —Charges created outside Cyprus or on property outside Cyprus
- § 11:13 —Debentures
- § 11:14 —Pledges over bills of exchange, bonds, promissory notes, and shares in Cyprus companies
- § 11:15 Filing system—In general
- § 11:16 —Register of charges to be kept by the Registrar
- § 11:17 —Endorsement of certificate of registration on debentures
- § 11:18 —Entries of satisfaction and release of property from charge
- § 11:19 —Rectification of register of charges or record of mortgages
- § 11:20 —Duty of company with regard to charges and mortgages created by that company
- § 11:21 —Duty of company to register charges existing on property acquired
- § 11:22 —Duty of company to keep copies of instruments creating charges and mortgages
- § 11:23 —Duty of company to keep a register of charges and book of mortgages
- § 11:24 —Registration of enforcement of security
- § 11:25 —Application of companies law to charges and mortgages created by company incorporated outside Cyprus
- § 11:26 Publicity—In general
- § 11:27 —Right to inspect register of charges or record of mortgages held by the Registrar

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- § 11:28 —Right to inspect records held by company
- § 11:29 Priority—In general
- § 11:30 —Distribution of assets in insolvency
- § 11:31 Pre-default rights and obligations—In general
- § 11:32 Consumer protection
- § 11:33 Default and enforcement—In general
- § 11:34 —Receivership
- § 11:35 Insolvency—In general
- § 11:36 —Priority in insolvency
- § 11:37 —Company arrangements
- § 11:38 Conflict of laws and territorial application—In general
- § 11:39 —Choice of law
- § 11:40 —Choice of jurisdiction
- § 11:41 —Procedural requirements
- § 11:42 —Available mechanisms for recognition and enforcement of a foreign judgment
- § 11:43 —Insolvency
- § 11:44 —Reciprocity
- § 11:45 —Enforcement of foreign judgment—Regulation 44/2001
- § 11:46 — —Common law
- § 11:47 — —Statute
- § 11:48 Conclusion

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§ 11:1 Introduction—In general

Cyprus is a former British colony that gained independence in 1960. In 1974, Cyprus was invaded by Turkey and approximately one-third of the country remains under illegal Turkish occupation. All references to Cyprus or the Cyprus government in this chapter refer to the legitimate state and the government of that state.

When Cyprus became independent, the Constitution provided that the laws previously applicable should remain in force in the Republic, until repealed or amended by its laws. Consequently, much of the modern law of Cyprus relating to secured transactions and many other areas closely mirrors English law of the mid-20th century.

In 2004, Cyprus became a member of the European Union (EU). Thus, the primary sources of law in Cyprus are now the EU legislation and the laws passed by the Cyprus legislature, the House of Representatives, which are becoming fully harmonized with the *acquis communautaire* of the EU. Secondary sources include delegated legislation passed by the Council of Ministers and the Common Law

system of case law, introduced in Cyprus by the British in 1935, under the doctrine of *stare decisis*. Cyprus also is a signatory to a large number of international conventions and treaties.

Cyprus is a member of the Commonwealth, the Council of Europe, the International Monetary Fund (IMF), the United Nations (UN), the World Bank, and the World Trade Organization (WTO) and is a founder member of the Organization for Security and Cooperation in Europe. In preparation for EU membership Cyprus made significant structural and economic reforms that transformed its economic landscape and created a modern, open and dynamic business environment.

Key legislation related to secured transactions includes:

1. The Transfer and Mortgage of Immovable Property Law¹ (the “Immovable Property Law”), governing the registration of mortgages over immovable property;
2. The Companies Law, Companies Law (Cap. 113), governing the procedure for the registration of charges created over the assets or undertaking of a company;
3. The Contract Law (Cap. 149), governing the procedure and requirements for the creation of liens and encumbrances generally and the pledge of share certificates, bills of exchange, promissory notes, and bonds; and
4. The Financial Collateral Arrangements Law,² transposing Directive 2002/47/EC on financial collateral arrangements.

Cyprus also is a well-established shipping and ship-management center. Consequently, it has extensive shipping and admiralty legislation. Of special importance is the Merchant Shipping (Registration of Ships, Sales, and Mortgages) Law.³

There is also a legal framework in place⁴ enabling credit institutions to issue covered bonds in line with Directive 2009/65/EC on Undertakings for Collective Investments in Transferable Securities.

§ 11:2 Introduction—Relevant agencies

The following are relevant to secured transactions in Cyprus:

1. The Registrar of Companies (the “Registrar”) — The public official charged with maintaining a register of all companies

[Section 11:1]

¹Law Number 9 of 1965.

²Law Number 43(I) of 2004.

³Law Number 45 of 1963, as amended by Laws Number 32 of 1965, Number 82 of 1968, Number 62 of 1973, Number 102 of 1973, Number 42 of 1979, Number 25 of 1980, Number 14 of 1982, Number 57 of 1986, Number 64 of 1987, Number 28(I) of 1995, Number 37(I) of 1996, Number 138(I) of 2003, Number 169(I) of 2004, and Number 108(I) of 2005.

⁴The Covered Securities Law, Number 130(I) of 2010.

operating in Cyprus and the government department under his control;

2. The Department of Land and Surveys (the “Land Registry”) — The public body charged with maintaining a record of all registered immovable property rights;
3. The Registrar of Trade Marks and Patents (the “Intellectual Property Registry”) — The public body charged with maintaining a record of all registered intellectual property rights; and
4. The Registrar of Cyprus Ships (the “Ship Registry”) — The public body charged with maintaining a register of all vessels registered in Cyprus.

§ 11:3 Introduction—Financing practices

Financing practices in Cyprus are many and varied. They include:

1. Term loan financing for non-operational outlays such as capital projects, real estate purchases, and purchase of other business assets or shares;
2. Inventory and operational equipment acquisition financing via mechanisms, such as finance leases and hire purchase agreements;
3. Inventory and receivables revolving loan finance to provide working capital, typically via bank overdraft or invoice discounting facilities;
4. Recourse and non-recourse factoring of debts to provide working capital;
5. Credit secured via transfer of title to an asset, e.g., sale and leaseback agreements;¹ and
6. Securitization of debts.²

§ 11:4 Objectives of secured transactions regime

The overall aim of the secured transactions regime in Cyprus and its supporting objectives are closely in line with those specified in the United Nations International Trade Law Commission (UNICTRAL) Legislative Guidelines (the “Guidelines”).

Successive Cyprus governments have agreed that a vibrant successful economy provides the best opportunity for improving the lives of its citizens and the security of the country. They also have recognized that an important factor in attaining economic success is the availability of finance to fund investment and growth and, that the ability

[Section 11:3]

¹This may be undertaken for a variety of reasons including freeing up capital to invest in new projects or to provide working capital for a business.

²For example, in 2010 the Bank of Cyprus recently securitized part of its mortgage book to finance a number of specific capital projects.

to offer competitively priced secured lending in a flexible manner is an essential tool in attracting such finance.¹

In principle, any asset can be charged or otherwise encumbered in Cyprus. This includes future and fungible assets. The security most commonly granted over immovable property is the mortgage. The types of security used over movables are normally the common law lien, the pledge, the fixed charge, and the floating charge. Receivables also may be assigned by way of security. It also is possible for more than one party to be given security on the same asset.²

Cyprus has transposed Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions, into domestic law. In recent years, a profound transformation has occurred in the financial sector. A full range of banking and lending services is now available to businesses operating in Cyprus, and this has been reflected in a growth in the availability of consumer credit.³

Security may be used to cover a wide range of transactions although there are some specific exclusions. Section 53 of the Companies Law prohibits companies from giving, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, and any financial assistance for the purpose of or in connection with the purchase of its own shares or shares in its holding company. Importantly, Law Number 99(I) of 2009 amended this section to introduce “whitewash” provisions under which financial assistance by a private company for acquisition of its own shares or of the shares of its holding company is no longer unlawful in cases where:

1. The private company is not a subsidiary of any public company; and
2. The relevant transaction is approved in a general meeting of the company by a resolution passed by holders of more than 90 per cent of all the issued shares of the company.

The general prohibition of the provision of financial assistance by a public company for acquisition of its own shares still exists. Furthermore, the whitewash provisions do not affect the obligation to comply with any other legal obligations and the constitutional documents of the company.

The Companies Law also stipulates a number of circumstances in which security given by a company would be invalid in the event of the subsequent insolvency of the company giving it. In general, however, there are clear and simple procedures to be followed in order

[Section 11:4]

¹UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (a).

²UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (b).

³UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (d).

to effect a valid security arrangement.⁴ There also is a large degree of flexibility allowed in the drawing up of a security agreement and the choice of law governing it.⁵ However, the parties must have regard to the Contract Law and, where an individual is concerned, consumer credit and protection legislation.

The secured transaction regime also is transparent.⁶ Companies must maintain their own internal registers of charges and pledges and must also record them in the public registers. A company creating a charge over any of its property or altering an existing charge is required to send particulars of the charge accompanied by the charge itself to the Registrar of Companies within 21 days after creation or alteration of the charge.⁷

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.⁸ Section 90 requires the charges to be properly stamped to be accepted for registration. Any other person interested in the charge also can submit the particulars to the Registrar of Companies for registration and recover the cost from the company.⁹

Mortgages over vessels registered in Cyprus also must be registered with the Registrar of Cyprus Ships or at a Cyprus consulate overseas. To have legal effect, mortgages, charges, and other rights over immovable property in Cyprus also must be registered with the Department of Lands and Surveys (Immovable Property (Transfer and Mortgage) Law.¹⁰ However, registration is not compulsory.

The intention in securitization of lending is to facilitate business activity. Continuation of business is unlikely to be interrupted unless it becomes necessary for a party to enforce its security.¹¹

In the event of the insolvency of a company there are clear and predictable priority rules set out in the Companies Law. The Bankruptcy Law (Cap. 5) details the situation in respect of personal insolvency.¹²

It is generally possible for the relevant security agreement to be enforced judicially and a judgment for the sale of the secured assets to be obtained. It also is generally possible to enforce a security governed

⁴UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (c).

⁵UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (i).

⁶UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (f).

⁷Companies Law, section 91.

⁸Companies Law, section 92.

⁹Companies Law, section 91.

¹⁰Law Number 9 of 1965.

¹¹UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, 2e).

¹²UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (g).

by another jurisdiction. Importantly, however, most security agreements may be enforced extra-judicially, which usually provides the advantage of a speedier resolution.¹³

For example, in the case of a floating charge over all the assets of a company, a receiver and manager may be appointed over the whole or any part of the assets and may take possession of the company's business and property, carry on its business, and sell any of its assets.

Cyprus law does not draw a distinction between foreign and domestic secured creditors.¹⁴ If correct procedures have been followed, a claim will be regarded as valid. The concept of non-discrimination is enshrined in the Constitution of Cyprus and is a crucial factor in the ability of the country to attract relatively high levels of foreign investment. Additionally, mechanisms exist for the recognition and enforcement of a foreign judgment or arbitration award via:

1. EU Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters;
2. Common Law;
3. Statute; and
4. Bilateral treaties and multilateral conventions.

Regulation 44/2001 applies to all judgments given in civil and commercial matters by the courts of EU member states except Denmark. The idea behind the Regulation was to achieve the free circulation of judgments within the member states by means of a legal instrument that is binding and directly applicable in all member states. The Regulation aims to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the recognition and enforcement procedures for judgments in member states.

Common law rules normally apply to the recognition of judgments in civil and commercial matters that originate in jurisdictions outside the EU.

As a contracting state to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Cyprus is bound to enforce arbitration awards made in foreign states which are parties to the Convention.

§ 11:5 Basic approaches to security—In general

As stated, in principle, any asset can be charged, liened, and otherwise encumbered in Cyprus, thus ensuring maximum flexibility is available to structure a credit transaction and promote trade.

¹³UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (h).

¹⁴UNCITRAL Legislative Guide on Secured Transactions, Key Objectives, (k).

**§ 11:6 Basic approaches to security—Types of security—
Immovable property****In General**

Immovable property is defined as:

1. Land;
2. Buildings or other structures, or fixtures permanently affixed to any land, building, or other structure;
3. Trees, vines, and any other thing planted or growing on land, and any produce from it (before severance);
4. Springs, wells, water, and water rights, whether held together with, or independently of, any land;
5. Privileges, liberties, easements, and any other rights and advantages pertaining or reputed to pertain to any land, building, or other structure; and
6. Undivided shares in any such property.¹

The security most commonly granted over immovable property is a 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.

Fixed Charge

Another form of security is the fixed charge, which is generally regarded as a species 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.

**§ 11:7 Basic approaches to security—Types of security—
Tangible movable property**

In Cyprus law, movable property is defined as any property not falling within the definition of immovable property.

[Section 11:6]

¹Immovable Property (Tenure, Registration, and Valuation) Law, Cap. 224.

The security devices for movables, including financial instruments, are the common law lien, the pledge, and the floating charge.

A lien can be legal under common law or equitable. The type of lien relevant to taking security is the common law lien, which 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.

A loan of money or the performance of a promise can be secured by a pledge, i.e., the delivery of movables or documents of title to the lender or promisee as security for payment of the debt or performance of a promise. The pledgee has the power to sell if the pledgor defaults, but the general ownership of the goods remains with the pledgor.

A floating charge is a security interest, generally over all of the assets of a company, which "floats" until an event of default occurs or until the company goes into insolvent liquidation, at which time the floating charge crystallizes and attaches to all the relevant assets. It gives the secured creditor two key remedies in case of default, namely:

1. The creditor can crystallize the charge, and then realize any assets subject to the charge as if it was a fixed charge; and
2. If the floating charge encompasses substantially all of the assets and undertaking of the company, the charge holder can 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.

§ 11:8 Basic approaches to security—Types of security—Intangible movable property

Under Cyprus law, security can be taken over intangible movable property, such as intellectual property (both registered and unregistered), by:

1. Floating charge on all assets of the company;
2. Assignment;
3. Licensing; and
4. Joint ownership.

§ 11:9 Basic approaches to security—Types of security—Commercial security

As Cyprus is a Common Law country and largely follows English law, all commercial security structures, such as factoring of debtors, sale and leaseback of plant and equipment, retention of title on goods

supplied, and hire-purchase are available. Factoring and hire-purchase are not yet widespread in Cyprus, although their use is increasing as the Cyprus economy expands.

The most common mechanism is the retention of title or “Romalpa” (after the English case of *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Limited*) clause. This is a provision in a contract for the sale of goods that the title to the goods remains vested in the seller until certain obligations (usually payment of the purchase price) are fulfilled by the buyer. In the event of the purchaser’s insolvency, the seller may be able to recover possession of goods that have not been paid for.

However, a recent decision in the English courts,¹ which is of persuasive authority in Cyprus, suggests that it would be difficult to incorporate an effective “all monies” retention of title clause in an agreement dealing with “revolving stock” or where the intention of all parties is that the goods are on-sold immediately.

Thus, it is important to draft a retention of title clause that is appropriate to the type of business being carried out and to ensure the rest of the contract is performed in a way consistent with the retention of title protection that the clause is designed to achieve.

§ 11:10 Basic approaches to security—Types of security— Future and fungible assets security

Security can be taken over future or fungible assets by an equitable fixed or floating charge.

§ 11:11 Creation of security interest—In general

Section 90 of the Companies Law details the steps to be taken by a company to create a valid charge that will be recognized in law by any liquidator or any creditor of the company. The section applies to the following:

1. A charge for the purpose of securing any issue of debentures;
2. A charge on uncalled share capital of the company;
3. A charge on book debts of the company;
4. A floating charge on the undertaking or property of the company;
5. A charge on calls made but not paid;
6. A charge on a ship or any share in a ship;
7. A charge on goodwill, on a patent or a license under a patent, on a trade mark or on a copyright or a license under a copyright;
8. A charge on any other movable property created or evidenced by

[Section 11:9]

¹Bulbinder Singh Sandhu (trading as Isher Fashions UK) v. Jet Star Retail Limited (trading as Mark One) (in administration) and Others [2010] E.W.H.C. B17 (Mercantile).

an instrument, where the company retains possession of such property; and

9. A charge on immovable property, wherever situate, or any interest in it (the expression “charge” does not include any mortgage of immovable property effected under any Law relating to the registration of mortgages of immovable property in force for the time being).

Such charges will be void against the liquidator and any creditor of the company unless the prescribed particulars of the charge together with the instrument, if any, duly stamped, by which the charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration in the manner required by the Companies Law within 21 days after the date of its creation.

Importantly, this is without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under section 90 the money secured thereby becomes payable immediately. Amendments to or assignments of charges also must be registered with the Registrar of Companies.

Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company is not, for the purposes of section 90, to be treated as a charge on those book debts.

Law Number 99(I) of 2009 removed the requirement to register pledges over shares in Cyprus companies created by Cyprus companies, subject to compliance with all other requirements to perfect a pledge over shares in a Cyprus company (see below). In addition, charges that fall within the scope of the Cyprus legislation adopting the EU Financial Collateral Directive need not be registered with the Registrar of Companies.

§ 11:12 Creation of security interest—Charges created outside Cyprus or on property outside Cyprus

Section 90(3) examines the case of a charge created out of Cyprus comprising property that also is situated outside the country. In such circumstances the delivery to and the receipt by the Registrar of a copy verified in the prescribed manner of the instrument by which the charge is created or evidenced shall have the same effect as the delivery and receipt of the instrument itself.

The particulars and instrument or copy are to be delivered to the Registrar within 21 days after the date on which the instrument or copy could, in due course of post, and if dispatched with due diligence, have been received in Cyprus. In practice the Registrar of Companies will accept delivery within 42 days of the execution date of the instrument.

Where a charge is created in Cyprus but comprises property outside

Cyprus, the instrument creating or purporting to create the charge may be sent for registration under section 90 notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

§ 11:13 Creation of security interest—Debentures

Under section 90, the holding of debentures entitling the holder to a charge on immovable property will not be deemed to be an interest in immovable property.

Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it will be sufficient if there are delivered to or received by the Registrar, within 21 days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:

1. The total amount secured by the whole series;
2. The dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined;
3. A general description of the property charged; and
4. The names of the trustees, if any, for the debenture holders.

The particulars must be provided together with the deed containing the charge or, if there is no such deed, one of the debentures of the series. Where more than one issue is made of debentures in the series, particulars of the date and amount of each issue should be sent to the Registrar. An omission to do this shall not affect the validity of the debentures issued.

Where any commission, allowance, or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under section 90 must include particulars as to the amount or rate per cent of the commission, discount, or allowance so paid or made, but omission to do this will not affect the validity of the debentures issued, provided that the deposit of any debentures as security for any debt of the company will not be treated as the issue of the debentures at a discount.

§ 11:14 Creation of security interest—Pledges over bills of exchange, bonds, promissory notes, and shares in Cyprus companies

The requirements for perfection of charges over such documents are

set out in section 138 of the Contract Law. The contract of pledge must be in writing, signed at the end by the pledgor and witnessed by two competent witnesses, who must sign the contract as witnesses.

In addition, for a pledge over shares in a Cyprus company to be valid and enforceable, the pledgee must give notice of the pledge to the company, the company must make a memorandum of pledge in its register of shareholders against the shares concerned, and it must provide the pledgee with a certificate of the memorandum of pledge.

§ 11:15 Filing system—In general

Details of the filing and publicity requirements in respect of charges on a company's assets are found in sections 91–99 inclusive of the Companies Law. The purposes of the filing system are identical to those specified in section IV of the UNCITRAL Guide.

It is, therefore, unsurprising that the majority of the recommendations that are detailed in that section are in evidence in the system in Cyprus. The key features of the filing system or “registry” are summarized below. Information with respect to accessing the system and the conditions and minimal costs associated with this are outlined below.

§ 11:16 Filing system—Register of charges to be kept by the Registrar

The Registrar has the duty of keeping a register of all charges on a company and a record of all mortgages. Specifically, section 93 of the Companies Law requires that the Registrar keep, with respect to each company, a register, and a record in the prescribed form of all the charges requiring registration and of all the mortgages requiring recording, respectively, and must, on payment of such fee as may be specified by regulations made by the Council of Ministers, enter in the register and record with respect to such charges and mortgages the following particulars:

1. In the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in section 90 (see text, below);
2. In the case of any mortgage (a) the date and description of the instrument creating or evidencing the mortgage, (b) the number and date of the certificate of mortgage, (c) the amount secured by the mortgage, (d) short particulars of the property mortgaged, and (e) the persons entitled to the mortgage;
3. In the case of any other charge (a) if the charge is a charge created by the company, the date of its creation and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property, (b) the amount secured by the charge, (c) short particulars of the property charged, and (d) the persons entitled to the charge.

The Registrar is required to issue a certificate of the registration of any charge registered in accordance with the Companies Law, stating the amount thereby secured, and the certificate is conclusive evidence that the requirements as to registration have been complied with.

§ 11:17 Filing system—Endorsement of certificate of registration on debentures

The company must ensure that a copy of every certificate of registration given under section 93 is endorsed on every debenture or certificate of debenture stock which is issued by the company and the payment of which is secured by the charge so registered. This requirement does not apply to any debenture or certificate of debenture stock issued by the company before the charge was created.

Any person who knowingly and willfully authorizes or permits the delivery of any debenture or certificate of debenture stock which is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, is liable to a fine not exceeding EUR855.

§ 11:18 Filing system—Entries of satisfaction and release of property from charge

The Registrar, on evidence being given to his satisfaction with respect to any registered charge that the debt for which the charge was given has been paid or satisfied in whole or in part or a part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, may enter on the Register a memorandum of satisfaction, in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking.

Where the Registrar enters a memorandum of satisfaction in whole, he must, if required, furnish the company with a copy.

§ 11:19 Filing system—Rectification of register of charges or record of mortgages

Section 96 of the Companies Law gives the court power to extend the time for registration of a charge or to order the rectification of any error or misstatement in the recording of the charge if it is satisfied that the omission to register the charge or that the omission or misstatement of any particular was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief.

The company or any person with an interest may apply and the court may set such terms and conditions as it considers just and expedient.

§ 11:20 Filing system—Duty of company with regard to charges and mortgages created by that company

It is the duty of a company to send to the Registrar for registration the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under section 90.

Registration of any such charge also may be effected on the application of any person interested in it (typically, the chargee). Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration since the law places the obligation of registration onto the company.

Additionally, it is the duty of a company to send to the Registrar, within 21 days after the date of every mortgage effected by the company on its immovable property under any law relating to the registration of mortgages of immovable property in force for the time being, particulars thereof for recording, as well as particulars of any cancellation thereof in whole or in part, within 21 days after the date of such cancellation.

The company and every officer of the company will be liable to a default fine of EUR428 if any company makes default in:

1. Sending to the Registrar for registration the particulars of any charge created by the company or of the issues of debentures of a series requiring registration as aforesaid, unless the registration has been effected on the application of some other person; or
2. Sending to the Registrar for recording the particulars of any mortgage effected or cancelled.

§ 11:21 Filing system—Duty of company to register charges existing on property acquired

Where a company registered in Cyprus acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under the Companies Law, it must lodge details of the charge with the Registrar.

Specifically, the company must cause the prescribed particulars of the true charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Registrar for registration in the manner required by the Companies Law within 21 days after the date on which the acquisition is completed.

If the property is situated outside Cyprus and the charge was created outside Cyprus, the last date for filing becomes 21 days after the date on which the copy of the instrument could in due course of post, and if dispatched with due diligence, have been received in Cyprus. In

practice, the Registrar of Companies allows 42 days for filing of charges created outside Cyprus on overseas assets.

If the company is in default in complying with this requirement, the company and every officer of the company who is in default becomes liable to a default fine of EUR428.

§ 11:22 Filing system—Duty of company to keep copies of instruments creating charges and mortgages

Section 98 of the Companies Law requires that every company keeps a copy of every instrument creating any charge requiring registration or any mortgage requiring recording at the registered office of the company.

In the case of a series of uniform debentures, a copy of one debenture of the series is deemed to be sufficient.

§ 11:23 Filing system—Duty of company to keep a register of charges and book of mortgages

Section 99 of the Companies Law requires every company to maintain a register of charges at its registered office. It must enter in it all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company.

In each case, the register must give a short description of the property charged, the amount of the charge and, except in the case of securities to bearer, the names of the persons entitled thereto.

Any officer of the company who knowingly and willfully authorizes or permits the omission of any entry required to be made in pursuance of section 99, is liable to a fine not exceeding EUR428.

§ 11:24 Filing system—Registration of enforcement of security

The Companies Law, in section 97, stipulates that, if any person obtains an order for the appointment of a receiver or manager of the property of a company or appoints such a receiver or manager under any powers contained in any instrument, he must, within seven days from the date of the order or of the appointment under the instrument, give notice of the fact to the Registrar, who is required to enter the fact in the register of charges.

Where any person appointed receiver or manager of the property of a company under the powers contained in any instrument ceases to act as receiver or manager, he must give the Registrar notice to that effect, and the Registrar is required to enter the notice in the register of charges.

Any person failing to comply with the requirements of section 97 becomes liable to a fine not exceeding EUR43 for every day during which the default continues.

§ 11:25 Filing system—Application of companies law to charges and mortgages created by company incorporated outside Cyprus

The provisions outlined in this section extend to charges and mortgages on property in Cyprus which are created or effected, and to charges on property in Cyprus which are acquired, by any company (whether a company within the meaning of the Companies Law or not) incorporated outside Cyprus which has an established place of business in Cyprus.

§ 11:26 Publicity—In general

In Cyprus, the principal means by which transparency of the security position of a company is guaranteed and publicized is via a legal right of inspection of:

1. Records held by the Registrar of Companies; and
2. Records held by each company subject to a charge or mortgage.

This right of inspection is extended to any person who wishes to make use of it.

§ 11:27 Publicity—Right to inspect register of charges or record of mortgages held by the Registrar

The register and record kept in pursuance of section 93 as detailed in the previous section must, in accordance with the Companies Law, be open to inspection by any person on payment of such fee as may be specified by regulations published by the Council of Ministers.

§ 11:28 Publicity—Right to inspect records held by company

Section 100 of the Companies Law requires that the copies or instruments creating any charge requiring registration and the particulars of mortgages requiring recording with the Registrar of Companies, and the register of charges and book of mortgages kept in pursuance of section 99, must be open during business hours to the inspection of any creditor or member of the company without any fee being charged.

The register of charges and book of mortgages also must be open to the inspection of any other person on payment of such fee, not exceeding nine cents for each inspection, as the company may prescribe.

In practice, this right of access may be made subject to such reasonable restrictions as the company in general meeting may impose. However, inspection must be possible not less than two hours in each day.

If inspection of the copies or register or book is refused, every officer of the company who is in default is liable to a fine not exceeding EUR43 and a further fine not exceeding EUR43 for every day during which the refusal continues. If the refusal occurs in relation to a

company registered in Cyprus, the court may by order compel an immediate inspection of the copies, register, or book.

§ 11:29 Priority—In general

In Cyprus, the purpose of provisions on the priority of a security right coincide with those stipulated in the UNCITRAL Guide, namely to:

1. Provide rules for determining the priority of a security right as against the rights of competing claimants in a predictable, fair and efficient way; and
2. Facilitate transactions by which a grantor may create more than one security right in the same asset and thereby use the full value of its assets to obtain credit.

Unless there is a specific agreement between the creditors to the contrary, charges over the same asset have priority over one another according to the date, and time if need be, of registration recorded by the Registrar of Companies or, in the case of ships, the Registrar of Cyprus Ships or a Cyprus consul acting on his behalf.¹ A fixed charge has priority over all other charges.

Contractual subordination of debt is possible and fairly common in secured lending transactions. It is achieved by agreement between all the competing creditors (and usually the debtor). Structural subordination, e.g., where senior debt is concentrated in operating companies with available assets and junior debt is in the parent, is possible subject to the appropriate contractual arrangements. Such arrangements will be effective in the event of insolvency unless they are caught by the unfair preference provisions of the Companies Law.

§ 11:30 Priority—Distribution of assets in insolvency

With the exception of preferential debts, all properly registered secured debts have priority over unsecured debts.¹ The following is the prescribed order of distribution:

1. Preferential debts, these claims being limited² and being defined in section 300 of the Companies Law to include (a) 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, and (b) all sums due to employees including

[Section 11:29]

¹UNCITRAL Legislative Guide on Secured Transactions, section V, A76.

[Section 11:30]

¹UNCITRAL Legislative Guide on Secured Transactions, section V, 84.

²UNCITRAL Legislative Guide on Secured Transactions, section V, 83.

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;³

2. Any amount secured by a floating charge;
3. Unsecured ordinary creditors;⁴
4. Deferred debts, such as sums due to members in respect of dividends declared but not paid; and
5. Share capital of the company.⁵

Within each category of claim, creditors rank equally and abate in equal proportions should there be insufficient funds to pay them in full.⁶

If the charge is void, the debt will rank with other unsecured debts. 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 by reason of the advances.⁷

§ 11:31 Pre-default rights and obligations—In general

The rights and obligations of each party to a security arrangement will normally be detailed in the security agreement. Thus, it can be seen that a large degree of flexibility exists in the system to ensure that parties to a security arrangement can construct an agreement specific to their own needs. Typically, the agreement will specify:

1. A “cooling off” period during which the arrangement may be rescinded;
2. A choice of law clause which specifies the legal system to which the contract is to be subject;¹
3. A statement as to what constitutes satisfactory performance of the agreement;
4. A statement as to what constitutes a default in respect of honoring the agreement;
5. The mechanisms available to all parties for remedying the default and the period allowed;

³Companies Law, section 300(1).

⁴Where there are different classes of creditor, such as subordinated debts, their respective rankings will be determined by the terms agreed between them.

⁵Where 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.

⁶Companies Law, section 300(3).

⁷Companies Law, section 300(2).

[Section 11:31]

¹A foreign choice of law clause will be recognized as long as the choice is freely made and not contrary to Cyprus public policy.

6. The circumstances under which the contract may be enforced;
7. The acceptable mechanisms for enforcement; and
8. The rights of the party against which the enforcement is made.

Under Cyprus law, the agreement constitutes a commercial contract and, as such, it will be subject to the Contract Law. In general, the Cyprus courts will uphold the terms of both standard and non-standard security agreements except in the circumstances outlined below.

They also may judge that an agreement has “implied terms”. These are terms which custom dictates may reasonably be assumed to apply to an agreement even if they are not explicitly stated in the written form of an agreement.

A security agreement will be declared void under the Contract Law if particular circumstances apply. The Contract Law includes a number of provisions invalidating contracts that do not comply with certain basic principles of contract law, as follows:

1. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, fails;
2. There must be consideration for the agreement, failing which it is void unless (a) it is expressed in writing and signed by the party to be charged with the promise and is made on account of natural love and affection between parties standing in a near relation to each other, (b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or (c) it is a promise, made in writing and signed by the party to be charged therewith, to pay wholly or in part a debt of which the creditor might have enforced payment but for any law for the time being in force relating to prescription or the limitation of actions;²
3. An agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind;³
4. An agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the courts or which limits the time

²An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given.

³A contract under which the seller of the goodwill of a business agrees not to compete with the business is valid, however. Similarly, partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within specified local limits.

within which he may thus enforce his rights, is void to that extent;⁴ and

5. Agreements, the meaning of which is not certain, or capable of being made certain.

§ 11:32 Consumer protection

The parties to a security arrangement also must have regard to consumer protection legislation when seeking to draw up an agreement that is enforceable in law. Of particular importance is the Abusive Terms in Consumer Contracts Law.¹ In this context, a “consumer” is a natural person who acts privately and a seller is a natural or legal person who acts in the course of his or her business.

Section 3 of the Abusive Terms in Consumer Contracts Law sets out its scope. It applies to all terms in contracts made between a seller or supplier and a consumer and which have not been subject to individual bargaining. When a term is clear and easily understood, its validity cannot be disputed, especially when it concerns the main subject of the contract and the consideration agreed for the goods or services provided.

A term will be regarded as not having been subject to individual bargaining when it has been previously drafted and the consumer has not been in a position to influence its contents, irrespective of any attempt to do so.

A contract may contain terms that have been individually bargained and terms which have been previously drafted and about which no bargaining has taken place. In such a case, the Law will apply only to those terms that have not been individually bargained. The burden of proof lies on the seller or supplier to prove that a term has been individually bargained.

Section 5 of the Law introduces the notion of an “abusive term” in a contract. It is any term that, despite the obligation of good faith, cre-

⁴This does not invalidate (a) contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects should be referred to arbitration, and that only the amount awarded in such arbitration may be recovered in respect of the dispute so referred. When such a contract has been made, legal proceedings may be brought for its specific performance, and if legal proceedings, other than for such specific performance, or for the recovery of the amount so awarded, are brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract will be a bar to the legal proceedings and (b) any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

[Section 11:32]

¹Law Number 93(I) of 1996, as amended by Law Number 69(1) of 1999 and Law Number 95(I) of 2007.

ates considerable inequality for the consumer between the rights and obligations of the parties. In deciding whether a term is abusive, the court will consider the nature of the goods or services which form the subject of the contract, all the relevant circumstances at the time of entering into the contract, and any other applicable terms or relevant contracts. In deciding whether a term was included in good faith, the factors to be taken into account include the respective bargaining power of the parties, whether the consumer was subject to persuasion to agree to the term, whether the goods or services were supplied following a special order by the consumer, and the degree to which the seller or supplier treated the consumer fairly.

The Annex to the Law contains a non-exhaustive list of terms that may be considered to be abusive. Examples of such terms include:

1. Limiting the responsibility of the seller or supplier in case of death or bodily harm suffered by the consumer that results from an act or omission of the seller or supplier;
2. Imposing on the consumer payment of unfairly large compensation in the event of breach of contract; or
3. Allowing a seller or supplier unilaterally to amend the terms of the contract without serious cause.

Section 6 of the Law provides that, irrespective of contract law principles, an abusive term in a contract between a seller or supplier and a consumer does not bind the consumer. The rest of the contract is valid, unless the contract cannot be fulfilled without the abusive term.

Section 8 gives additional protection by providing that the Law applies in cases where a term of the contract states that the applicable law is the law of a non-EU state and that law affords less protection to a consumer than the Law, or when the consumer usually resides in Cyprus or a member state and the contract was made in Cyprus or a member state.

Finally, section 9 provides the option to file an official complaint with the Director of Competition and Consumer Protection, to consider whether a term is abusive. Such an investigation also may be initiated by the Director without the prior filing of a complaint. The Director may apply to the court for an order prohibiting any term deemed to be abusive and the court may order the cessation of the use of abusive terms or other corrective measures.

§ 11:33 Default and enforcement—In general

In a default situation, it is generally possible for the relevant security agreement to be enforced judicially and a judgment for the sale of the secured assets to be obtained. It also is generally possible to enforce a security governed by another jurisdiction. Most security agreements may be and commonly are enforced extra-judicially. Typical examples are:

1. Floating charge over all the assets of a company — A receiver and manager may be appointed over the whole or any part of the assets and may take possession of the company's business and property, carry on its business, and sell any of its assets;
2. Pledge over share certificates — Subject to the provision of written notice of a reasonable time, the pledgee may put into effect the transfer of the relevant shares and use the proceeds to satisfy its claims; and
3. Mortgage over immovable property — A mortgagee may send a notice to the mortgagor, whose debt is outstanding for more than a month.¹

§ 11:34 Default and enforcement—Receivership

A creditor holding a charge over assets can appoint a receiver to realize the assets subject to the charge and discharge its debt out of the proceeds. If the charge is a floating charge covering substantially all the assets of the company, the creditor can appoint a receiver and manager.

The debenture holders or other creditors of a company can apply to the court for a receiver (who may be the Official Receiver) to be appointed.¹ Alternatively, a secured creditor can appoint a receiver under a specific power contained in the charge.

Within seven days of appointing a receiver, the appointor must notify the Registrar.² 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.³ Special procedures apply to banks and insurance companies.

The effect of receivership is to suspend the directors' powers of management over the assets encompassed by the receivership. The receiver will base his initial decision whether to realize assets piecemeal or as a whole on the statement of affairs provided by the directors.

There are no required procedures regarding disposal of assets. However, a receiver or manager of the property of a company ap-

[Section 11:33]

¹If the mortgagor fails to comply with the notice, the mortgagee may file an application with the Land Registry requesting the sale of the mortgaged plot.

[Section 11:34]

¹Companies Law, section 336.

²Companies Law, section 97.

³Companies Law, section 340.

pointed under the powers contained in any instrument has the power to apply to the court for directions in relation to any particular matter arising in connection with the performance of his functions (section 337(1) of the Companies Law). A prudent receiver will apply to the court for an order validating any proposed substantial disposal.

§ 11:35 Insolvency—In general

The start of an insolvency procedure does not affect a secured creditor's right to enforce its security. However, there are a number of provisions in the Companies Law that can invalidate a charge granted by a company or any other disposition it has made or any debt that it has incurred, namely:

1. A charge that has not been properly registered is void against the liquidator and any creditor of the company;¹
2. Section 301 of the Companies Law extends the “fraudulent preference” provisions of bankruptcy law 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) within six months before the start of its liquidation may be deemed a fraudulent preference against its creditors and be invalid accordingly unless there is full consideration for the company having entered into it;² and
3. A floating charge on the undertaking or property of the company created within 12 months of the start 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, unless it is proved that immediately after the creation of the charge the company was solvent.³
4. Sections 216 and 265 of the Companies Law provide that any transfer of shares made after the commencement of liquidation is void unless approved by the court or the liquidator.

§ 11:36 Insolvency—Priority in insolvency

Unless there is a specific agreement between the creditors to the contrary, charges on the same asset have priority over one another according to the date, and time if need be, of registration recorded by the Registrar of Companies or, in the case of ships, the Registrar of

[Section 11:35]

¹Companies Law, section 90(1).

²In 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.

³Companies Law, section 303. 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.

Cyprus Ships or a Cyprus consul acting on his behalf. The general order of priority for all debts including secured debts has been summarized in the text, above.

§ 11:37 Insolvency—Company arrangements

In Cyprus, a possible alternative to insolvency proceedings is the implementation of a compromise or arrangement between a company and its creditors.

Where a compromise or arrangement is proposed between a company and its creditors, or between the company and its members or any class of them, the company or any creditor or member or, in the case of a company being wound up, the liquidator can apply to the court for an order for a meeting of the creditors or the members of the company to be convened in whatever way the court directs, to consider the proposals.¹

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.

Subject to the approval of the court, any compromise or arrangement passed by a majority in number representing three-quarters in value of the creditors or members present and voting at the meeting of creditors or members will be binding on:

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

However, unless the secured creditor specifically agrees, its security rights, including the right to enforce its security, cannot be compromised.

§ 11:38 Conflict of laws and territorial application—In general

Regulation 593/2008 on the law applicable to contractual obligations (the “Rome I Regulation”) is directly applicable in Cyprus.

A foreign choice of law clause in a security document will be recognized as long as the choice is freely made and not contrary to Cyprus public policy. The parties are generally free to agree upon and choose both the governing law and the forum.

Local law will apply in any event to security taken over immovable property in Cyprus.

[Section 11:37]

¹Companies Law, section 198.

§ 11:39 Conflict of laws and territorial application—Choice of law

The proper law of the contract is the law that the parties intend to apply thereto. Where the parties have expressly chosen the law by which they wish their security contract to be governed, this will be the proper law.

Where no express choice has been made, the intention is to be inferred from the terms of the contract and the surrounding circumstances.

§ 11:40 Conflict of laws and territorial application—Choice of jurisdiction

In situations that fall within the scope of Regulation 44/2001 on the Recognition and Enforcement of Foreign Judgments, the proceedings relating to rights *in rem*, or tenancies of immovable property are within the exclusive jurisdiction of the courts of the EU member state in which the property is situated.

§ 11:41 Conflict of laws and territorial application—Procedural requirements

A charge created by a Cyprus company over property situated outside Cyprus must be registered with the Registrar of Companies.

The provisions with respect to the registration of charges and mortgages extend to charges and mortgages on property in Cyprus which are created or effected by an overseas company which has an established place of business in Cyprus.

§ 11:42 Conflict of laws and territorial application—Available mechanisms for recognition and enforcement of a foreign judgment

The available mechanisms are as follows:

1. Regulation 44/2001;
2. Common Law;
3. Statute; and
4. Bilateral treaties and multilateral conventions.

As explained above, Regulation 44/2001 applies to all judgments given in civil and commercial matters by the courts of member states except Denmark. Common Law rules normally apply to the recognition of judgments in civil and commercial matters that originate in jurisdictions outside the EU. The substantive grounds on which a foreign judgment may be enforced under statute closely reflect the Common Law. In accordance with section 29(1) of the Courts of Justice Law, each court in its civil jurisdiction must apply the Constitution and the laws enacted under it, including all laws that have continued

in force by virtue of article 188 of the Constitution, the Common Law, and the principles of equity, as well as all United Kingdom laws that were in force in Cyprus immediately before independence in 1960, unless these are repugnant to the Constitution or any law made under it.

Of particular importance is article 169 of the Constitution, which provides that conventions or treaties relating to commercial matters, economic cooperation, and *modus vivendi* that Cyprus ratifies will, on the basis of reciprocity, have superior force over domestic law.

**§ 11:43 Conflict of laws and territorial application—
Insolvency**

Regulation (EC) 1346/2000 on insolvency proceedings is directly applicable in Cyprus. Under the regulation, a judgment initiating insolvency proceedings issued by a competent court of an EU member state will be recognized in Cyprus and vice versa.

**§ 11:44 Conflict of laws and territorial application—
Reciprocity**

The acceptance and enforcement in Cyprus of a foreign judgment depends solely on the existence or not of a mutual recognition and enforcement treaty between Cyprus and the country in which the judgment was issued.

A foreign decision emanating from a country with which Cyprus has not signed such a treaty cannot be enforced in Cyprus. Where there is such a treaty, the enforcement of the foreign judgment depends exclusively on the contents and interpretation of the relevant terms of the treaty.

**§ 11:45 Conflict of laws and territorial application—
Enforcement of foreign judgment—Regulation 44/2001**

In Cyprus, judgments are declared enforceable immediately on the filing of both:

1. A certified copy of the judgment; and
2. A certificate of authenticity issued by the court in which the judgment originated.

An appeal against the declaration of enforceability of the judgment must be lodged within one month from service if the judgment debtor is domiciled in the enforcing state or within two months if domiciled in another member state. The recognizing court in Cyprus may grant protective measures such as an injunction based on section 32 of the

Courts of Justice Law¹ against the property of the judgment debtor until the final determination of any appeal.

**§ 11:46 Conflict of laws and territorial application—
Enforcement of foreign judgment—Common law**

A defendant is obliged to acknowledge service of the writ of summons by the judgment creditor within 14 days from the date of service by filing a memorandum of appearance. In the event that the defendant gives notice of intention to defend and subject to a statement of claim having been served, the plaintiff may then apply for summary judgment under Order 18 of the Civil Procedure Rules on the ground that the defendant has no arguable defense to the claim.

At the first hearing of the application, the defendant has the right to object to the application and the court will direct him to file his written opposition and will set the application for hearing. It is necessary for the defendant to demonstrate that he should be given leave to defend the proceedings. This evidence is almost always given by affidavit in which the defendant must satisfy the court that there is an issue or a question in dispute that should be tried or that for some other reason there ought to be a trial.

If the defendant raises an arguable defense, the court will give him leave to defend the action. In the case of a defense that the court regards as unclear or insubstantial, the court may make the grant of leave to defend subject to conditions (often, the payment into court of the entire sum claimed). If the court finds that there is no triable issue, it will award judgment in favor of the plaintiff.

The defendant may appeal to the Supreme Court as of right against an order refusing leave to defend and both the defendant and plaintiff may appeal as of right against an order granting conditional leave to defend.

**§ 11:47 Conflict of laws and territorial application—
Enforcement of foreign judgment—Statute**

Once a foreign judgment has been duly registered, it immediately takes effect as a judgment of a domestic court and all the methods of execution of Cyprus court judgments are available. The filing of an appeal does not prevent the execution of a judgment.

The domestic judgment is regarded as final for execution purposes, even when an appeal is pending, unless a special order for a stay of execution is made by the court. An appeal can be made only on a point of law and generally will concern the right of the court to exercise jurisdiction on the question whether the foreign court has

[Section 11:45]

¹Law Number 14 of 1960.

complied with the requirements of registration. No leave to appeal is required and either party may appeal.

§ 11:48 Conclusion

The secured transaction regime of Cyprus is well developed and reflects many of the key recommendations listed in the UNCITRAL guidelines. This is particularly true in respect of the transparency, clarity, low cost accessibility, and equality of its laws and procedures.

Since commerce is not static, Cyprus will continue its longstanding policy of evolving its legislation and procedures on secured transactions in line with international best practice as befits an EU member state.