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## Enforcement of Pledges and Charges

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### Pledge

A pledge is by its nature a possessory security interest and thus involves the delivery of possession, actual or constructive. A security interest is valid and enforceable once it has attached to the asset and is perfected. A security interest that has attached is enforceable as between the pledgor and pledgee. The effect of attachment is that the security interest fastens on the asset so as to give the creditor rights in rem against the debtor himself, though not necessarily as against third parties.

### Charge

Unlike a pledge, the charge is a non-possessory security. It involves the creation of new proprietary rights in the creditor. The essence of a charge is that the secured property is made liable for the repayment of a debt without there being any transfer of ownership or possession from the debtor (the "**charger**") to the creditor (the "**chargee**"). The debtor retains both ownership and possession of the asset; the creditor obtains neither. Instead the creditor obtains a new form of proprietary interest, a charge, over the secured property. Upon default by the debtor, the creditor is generally entitled by the terms of the security agreement to assume possession of the secured asset, sell it, and recoup the outstanding debt from the proceeds of sale.

### Priority

The concept that a person who obtains a proprietary interest in an asset will take priority over all subsequent proprietary interests in the asset is the basic

principle. Registration can affect notice.

An exception to the general rule is that in a dispute between an equitable and a legal interest, the legal interest will take priority if certain criteria are satisfied, even if the legal interest is created after the equitable one. A person who obtains a legal interest in the asset concerned for valuable consideration and without notice of an earlier equitable interest obtains an 'absolute, unqualified, unanswerable defence to that equitable interest.

Therefore, a pledge, as a legal interest, will take priority over an earlier charge unless the charge has been refused.

### Registration

In order to be enforceable as against creditors or a liquidator a pledge and a charge must be perfected. The perfection requirement is such as to give notice to the public of the existence of the charge and is distinct concept from attachment.

Pursuant to Section 90 of the Cyprus Companies Law, Cap 113, pledges and charges are registrable only if the pledgor or chargor is a Cypriot company.

Charges/pledges must be registered with the Registrar of Companies (a) within 21 days, if executed in Cyprus, or (b) within 21 days after the date on which a copy of the charge could in due course of post and if **dispatched** with due diligence have been received in Cyprus, if executed outside Cyprus.

The effect of the registration is to perfect the pledge/

charge, i.e. to ensure that they are not rendered void against the liquidator or any creditor of the Company.

### Pledges- Enforcement and Procedure

The Deed of Pledge will usually provide for the circumstances in which the Pledge and the security created thereunder becomes enforceable e.g. the occurrence and continuation of an event of default.

A creditor can look to the security for the purpose of discharging the obligations owing to it at the time of an event of default. Enforcement under a pledge is effected through implementation of the documents delivered under the pledge, in particular the instruments of transfer and the share certificates.

The enforcement of the pledge takes place without reference to any other person or without the need for court order. It is not usual or indeed required to appoint a receiver or receiver/manager since the pledge is enforced through implementation of the documents delivered under the pledge (viz. the instruments of transfer and the share certificates) which allows the pledgee or whomever it nominates to take ownership of the pledged shares. However, the pledgee owes a duty to act reasonably and if enforcing by way of sale to another party, owes a duty to obtain the best price possible. A pledgee, however, does not owe a duty to wait until conditions improve. The “best price possible” is the best price obtainable on the day of enforcement. If the shares are listed then this is obviously the average price of the day. In the case of a private company, it is the best price the pledgee could obtain acting reasonably – i.e. the price a willing buyer is prepared to pay.

If the pledgor / borrower does not agree with the price obtained then it can be challenged in the courts, however the pledgor / borrower will have to prove the pledgee acted unreasonably.

Any and all costs incurred in the enforcement of the pledge are for the account of the pledgor and are recoverable out of the sales proceeds on enforcement.

On enforcement, the pledgee owes a duty to account to the pledgor for any surplus realised.

It is not uncommon to provide for the appointment of a receiver for the purposes of enforcement.

### Pledges- Enforcement and Procedure

Enforcement of charges is different given that a charge is a non-possessory security.

The chargee’s rights may be enforced by a sale of the property usually by a court order (even though most charge agreements provide for such sale without recourse to the courts, it is not expected that a chargor will give possession upon request).

The chargee (or the court) normally exercises these powers of sale (and any other powers given to the chargee) by the appointment of a receiver to look after the chargee’s interests.

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