

Corporate Finance/M&A - Malta

Structuring leveraged buy-outs: benefits of financing through Malta

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[Introduction](#)
[Asset-backed lending](#)
[Certainty of results](#)
[Comment](#)

Introduction

In practical terms, leveraged buy-outs may shift a substantial proportion of the transaction risk from the prospective buyer, which invests a small proportion of the funding required as consideration for the acquisition of the target, to the financing credit institution, which would (through debt finance) fund the remaining, larger portion of the consideration payable by the potential acquirers of the target.

Within this context, potential financiers require reassurance that their lending is being undertaken in a sufficiently sophisticated jurisdiction that understands the underpinnings of M&A transactions and can provide the necessary tools to ensure that the stakeholders in such transactions achieve their respective objectives.

Over the years the Maltese legislature has invested significantly in ensuring that parties to a leveraged buy-out attain their respective objectives by making available a plethora of legal instruments specifically designed or adapted for such purposes.

Asset-backed lending

A common adage is that credit drives commerce. However, as true as this may be, borrower-lender relationships are characterised by a degree of well-placed suspicion, in particular in relation to whether the borrower will at all times during the term of the loan facility be in a position (fundamentally) to repay the loan granted to it by the lender. Such concerns may be managed through secured lending.

Maltese law offers a wide array of potential security interests that may be granted by borrowers or their guarantors to lending banks, including:

- a general hypothec, described as a floating type of security that attaches not to a specific asset but rather to all the property (both present and future) of the security grantor;
- security over specific assets, generally granted in the form of special hypothecs over specific immovable assets; and
- pledges, whether on shares, bank accounts or receivables.

Recent positive additions to the security interests in the form of security by title transfer granted under the Civil Code (Cap 16) and the irrevocable mandate by way of security may also be adopted for the benefit of lending banks in asset-backed lending.

While most of these security packages necessitate registration of the security interest in a public registry or a registry of companies, a lending bank would, on the basis of such security interest (no matter whether the security interest requires registration), have a preferred claim against the provider of such security in the case of enforcement of the security following an event of default under the loan facility agreement.

The legislature's inclination to facilitate the operation of lending transactions can also be seen through the adaptation of trust law into Maltese law, in particular the possibility of engaging a security trustee to hold the security granted to it for the benefit of a number of lenders. The notion of security trustee simplifies and streamlines the granting and enforcement of security within syndicated lending scenarios.

It is not uncommon that in leveraged buy-out transactions, security interests are granted

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over the assets of the target itself. Therefore, such transactions may be plagued by financial assistance considerations which may, if not adequately dealt with, undermine the security provided by the borrower and/or its guarantors. In this regard, the Companies Act (Cap 386) provides inroads to such restrictions through statutory whitewash procedures, which are applicable within pre-determined contexts through the implementation of minor formalities.

Certainty of results

Loan agreements and security agreements do not operate in a vacuum and their strength is assessed on the extent to which it may be safely predicted how such contractual arrangements will operate within any specific jurisdiction. Malta has a hybrid legal system - on the one hand, its civil law based on the Napoleonic Code brings certainty and predictability of result within the legal system; on the other, the common law concepts introduced in the legal system (eg, in relation to company law) promote efficiency and expediency. This ensures that regardless of the level of sophistication of the transaction, any funding transaction will operate in accordance with its terms.

Comment

Addressing these legal considerations in a leveraged buy-out in Malta is relatively straightforward. Local advisers can offer a highly developed skill base, fluency in English and accessibility, thereby ensuring that the transaction objectives are adequately met within the more general commercial constrictions of a transaction. In this general context, Malta is considered to be an important jurisdiction for the implementation and financing of buy-outs.

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