

# Taking and enforcing security in Europe

European Law Firm

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## Introduction

This PDF summarises the key issues in taking and enforcing security in the main European jurisdictions. Additionally, overleaf is a comparison of the major lending and enforcement issues in the US and England as against those which exist in continental Europe.

The information in this PDF is stated as at August 2008 and is also available in a wall chart to enable you and your colleagues to easily compare the position in the various jurisdictions. Please [click here](#) to view the wall chart.

The PDF is a very brief summary of the principal security and related issues in each of the countries referred to and is intended only as a general guide. It does not provide a comprehensive or complete statement of the law relating to the issues discussed.

If you have any queries please contact any of the named individuals on the [back page](#), as this overview does not replace the specialist legal advice that Taylor Wessing provides to stakeholders in businesses in Europe.

## Summary of comparative issues between US / England and continental Europe

### **Taking security**

In the US and in England, security is normally taken by appropriating an asset to secure a debt ie, no transfer or removal of the asset from the security-giver is required. This is not always possible in continental Europe.

### **Present and future assets**

In the US and England, it is possible to obtain security over existing and future assets. This is often not the case in continental Europe. Where assets are constantly changing, there is often a requirement to file updated details on a regular basis.

### **Registration and filing**

The US and England have systems for filing and registering security. Searches for pre-existing security interests can be made on public registers. By contrast, in a number of continental European jurisdictions it is not possible either to file or search for security interests over many asset classes.

### **Formalisation**

In the US and England, requirements for formalisation of security interests are very limited and normally confined to registration on a public register and paying relevant filing fees (mostly nominal). Contrast the approach in most continental European jurisdictions where often the relevant security document must be notarised in order to make it a "public document". This can involve notarisation fees linked to the asset's value.

### **Guarantees and financial assistance**

In continental European jurisdictions (but less so in England) upstream guarantees can be problematical. In particular, their value often has to be limited to the net asset value of the guaranteeing company. Additionally, throughout Europe there are prohibitions on the giving of financial assistance by a company in connection with the acquisition of its shares, or those of its parent, by another person. In England this no longer applies to private companies but it is still relevant for public companies and their subsidiaries.

### **Enforcement of security – Pre-insolvency**

In both the US and England the self-help principle applies in relation to enforcement of security and a security-holder can take steps itself to enforce its security eg, through a receiver or similar. In continental Europe enforcement of security is normally managed through the court and assets are realised by public auction or a court-administered sale process.

### **Enforcement of security – Insolvency**

In England the senior secured creditor retains great control over the bankruptcy procedure as England does not recognise the concept of debtor-in-possession or similar financing, nor will the incumbent management usually remain in office.

Contrast the main continental European jurisdictions where the insolvency process is largely court-driven. In many continental European jurisdictions, the senior secured lender's interests are given less prominence than in the US and England and the interests of groups such as employees may take primacy.

### **Retention of Title and Quasi-Security Interests**

In the US, retention of title (or consignment liens) can be protected by registration under the UCC. There is no register in England on which such a retention of title clause can be registered. It is, however, difficult in England for a seller to establish a retention of title right in an asset that it has supplied, as it will be defeated once the supplied goods are converted into other goods, or sold to a third party. Once goods are on-sold, this normally gives rise to a receivable free of the claim. Contrast the position in other European jurisdictions, particularly Germany where extended ROT rights allow the original seller of goods recourse into the proceeds of their on-sale to a third party.

## Belgium

- As the concept of trust does not exist, it is not possible to grant rights of mortgage or pledge to a security trustee.
- The solutions that have been developed so that rights of mortgage and pledge can be granted for the benefit of a syndicate of banks include the creation of a parallel debt owing to the security trustee equal to the aggregate debt owing to the lenders, in addition to agency structures. These structures allow the lenders to transfer their loan participations without, in general, affecting the rights under a mortgage and pledge.
- Upstream guarantees, if carefully structured and subject to corporate benefit rules and the prohibition on financial assistance, can be given by Belgian companies.

Asset type	What forms of security can be granted	Comments
Real estate	Mortgage	Notarial deed of mortgage and registration is required. Registration duties calculated on the amount of secured debt due.
Shares	Shares pledge	If registered, a statement of the pledge or notification should be entered in the share register.
Bank accounts, receivables and contractual rights	Receivables pledge	Needs to be notified in order to be enforceable against the underlying debtor.
Plant and machinery	Pledge with a mortgage over real property	If secured by means of a mortgage, a registration in the relevant mortgage register will be required.
Intellectual property	Pledge	It is difficult to enforce a pledge over copyrights.
Business/goodwill	Business pledge	Similar to floating charge. Can only be granted to licensed banks.

- When granting a court order for the commencement of insolvency proceedings, the insolvency court appoints an insolvency practitioner. In the case of a moratorium, such an insolvency practitioner is called an administrator.
- The priority of claims of creditors in an insolvency are as follows:

Costs and indebtedness incurred by the insolvency practitioner during the insolvency proceedings including the insolvency practitioner's fees and certain liens that arise by operation of law (eg, certain tax and social security liens)



Secured creditors



Claims over certain assets including costs incurred to preserve an asset belonging to the bankrupt estate



Unsecured creditors

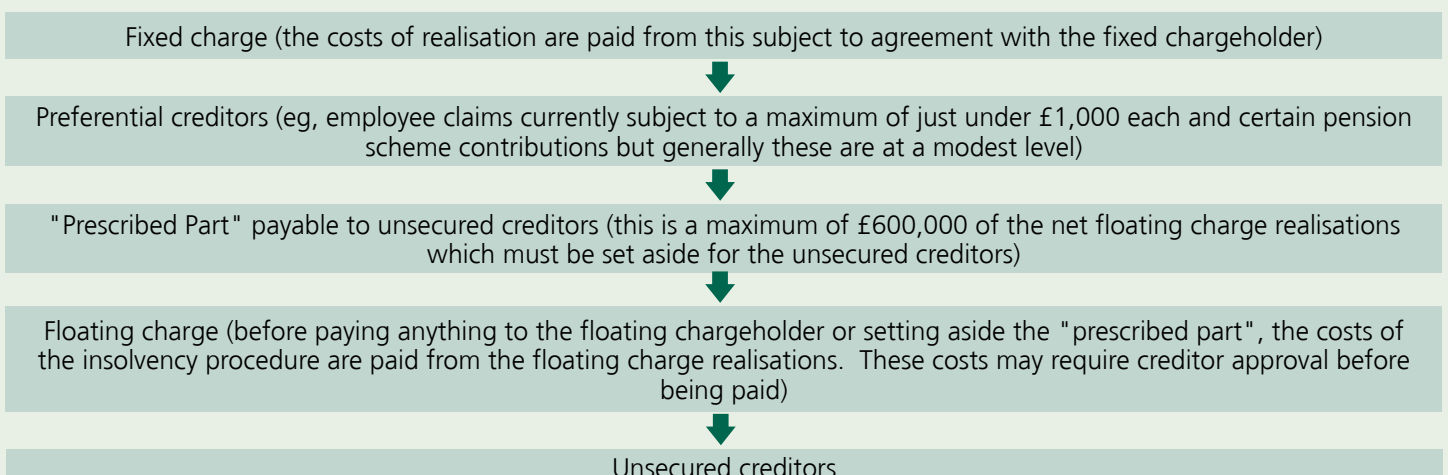


## England and Wales

- The security trustee concept is recognised.
- Main forms of security are fixed and floating charges. To be a fixed charge, the chargee must establish control over the asset concerned. Security can be taken over any asset (present or future) as long as it is identifiable but strict controls must be in place to maintain fixed charge status, otherwise the security will be "re-characterised" as floating security. There are filing requirements.
- Upstream guarantees secured by fixed and/or floating charges can be granted by third parties provided the directors reasonably believe that it is in the company's best interests.

Asset type	What forms of security can be granted	Comments
Real estate	Legal mortgage	A legal mortgage must be registered at the Land Registry as well as Companies House in order to be valid against third parties.
Shares	Legal or equitable mortgage	An equitable mortgage is often more desirable as legal title is not transferred. Normally with an equitable mortgage, a share certificate and undated stock transfer form is provided to the lender.
Bank accounts, receivables and contractual rights	Fixed or floating charge	Charge will require registration at Companies House. Normally a lender will take a fixed security interest by way of assignment of the receivable itself and the account, but the financier must have sufficient control to maintain the fixed charge.
Plant and machinery	Fixed or floating charge	Charge to be registered at Companies House. To be a fixed charge, control needs to be exercised by the lender. It is not necessary for the lender to take possession. The asset can be marked with a plaque or other notice to further evidence the security interest.
Intellectual property	Fixed or floating charge	Registration at a specific intellectual property registry required.
Business/goodwill	Fixed or floating charge	Security over the business as a going concern is normally taken by way of floating charge (see below).

- A "debenture" usually refers to an instrument creating fixed and/or floating charges over all, or substantially all, of the assets of the company.
- A floating chargeholder may appoint an administrator on an event of default of the underlying loan as long as the floating charge covers substantially all of the assets of the company. The court has relatively little involvement in the procedure.
- In the absence of agreement between chargeholders, the order of priority between competing fixed charges and competing floating charges is determined based on which was created first (as long as it was registered at Companies House within 21 days of creation).
- The priority of claims on an insolvency are as follows:



## France

- There is no concept of security trustee. The concept of parallel debt can be built into the loan agreement by contractual stipulation that all the lenders (and not solely the agent) shall be joint creditors. Provided the agent is also a lender, it can then receive repayment of the whole of the loan and also manage and enforce securities (held by each lender) in respect of the whole of the loan on behalf of the syndicate.
- Subject to certain conditions, such as that the guarantee must not be disproportionate and not exceed a percentage (to be calculated on a case by case basis) of the net worth (or other financial criteria) of the company giving it, upstream guarantees can be given.
- A *pacte comissoire* ("PC") creates the possibility for a creditor to take ownership of the charged asset, in case of default, without taking enforcement action through the courts.

Asset type	What forms of security can be granted	Comments/PC: Possibility of <i>pacte comissoire</i> (contractual appropriation)
Real estate	Mortgage	The mortgage must be prepared by and executed in front of French notary public (costly). Possible PC.
Shares	Pledge (different rules if SA or SARL/SCI)	No notarisation is required. Pledge of SCI, SARL shares needs registration (fixed low cost). Possible PC.
Receivables (excluding contractual rights)	Pledge - assigned by way of security under the <i>Dailly</i> law	With a <i>Dailly</i> assignment (only in favour of EU credit institutions) or a pledge, notification to a third party debtor is not necessary to ensure a valid security interest over the receivables.
Bank accounts	Pledge	Security over the sums standing to the credit of the account opened with the account holder.
Plant and machinery	Pledge (governed by French Civil Code)	Possession is not required for valid security. Pledge needs registration (fixed low cost). Possible PC.
Intellectual property	Pledge	A notarised pledge agreement describing the pledged rights needs to be entered into. Pledge needs registration.
Business/goodwill	Pledge	Although floating charge concept is not recognised, pledge of business as a going concern can attach to the assets (other than real estate) which the company uses to enable it to be run as a going concern. Pledge needs registration (fixed low cost).

- Insolvency proceedings are administered by the court for the benefit of all creditors.
- The insolvency process may be commenced by the court or upon the request of the creditor(s).
- The priority of claims of creditors on an insolvency are as follows:

*Dailly* assignment followed by secured creditors with rights to retain moveable and immovable assets



Certain preferential claims from employees for wages



Post-filing creditors followed by judicial fees and claims of the Public Treasury



Secured creditors with a pledge over plant and machinery having financed the assets



Other secured creditors



Unsecured creditors

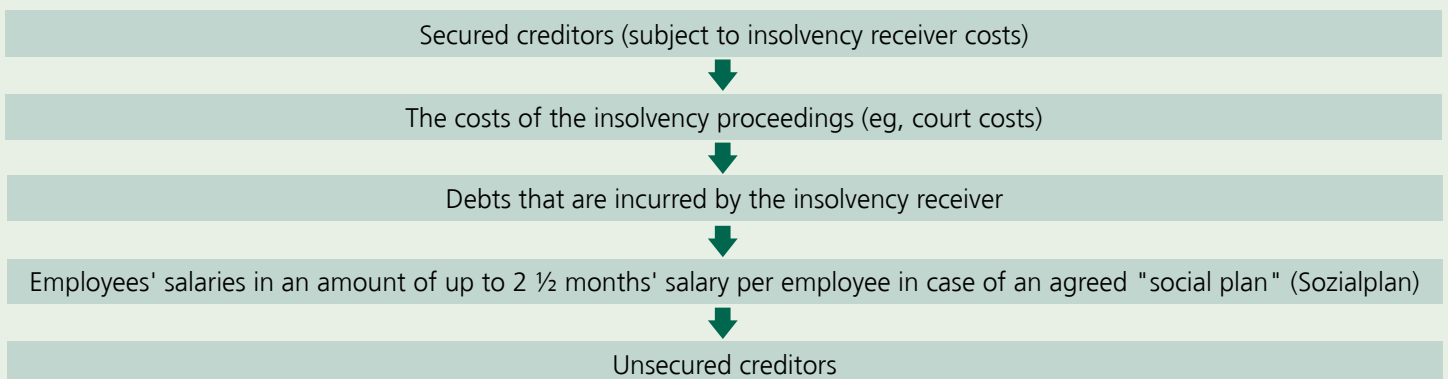


## Germany

- A sole chargee may act as trustee on behalf of itself and other lenders with regard to most forms of security interest (excluding pledges).
- Upstream and cross-stream guarantees and security are subject to the rules on "Maintenance of Capital".
- There are notarisation requirements with regard to some security interests. Apart from the register on mortgages and land charges, registers on existing security do not exist.

Asset type	What forms of security can be granted	Comments
Real estate	Mortgages or land charges	The land charge is preferred to a mortgage because it can secure future debts. Both security interests can only be granted by notarial deed and need to be registered in the Land Register.
Shares	Pledge	GmbH shares can only be pledged by notarial deed.
Receivables and contractual rights	Assignment by way of security/pledge	Pledges require notice to the counterparty.
Bank accounts	Pledge	Require notice to the bank. Restrictions on payments or transfers can be imposed by lender.
Moveable property (including plant and machinery)	Pledge/transfer of title by way of security	Pledges are considered inappropriate as they would require the lender to take possession.
Intellectual property	Pledge	Registration is not compulsory but recommended. Enforcement of the pledge takes place by public auction.
Business/goodwill	Not possible – no concept of floating charge	

- Specific rules apply to the enforcement of mortgages and land charges.
- Upon enforcement, assets not belonging to the bankrupt's estate can be separated and recovered by their owners (Aussonderungsrecht).
- The secured creditors (including pledgees and creditors secured by a transfer of title by way of security or assignments by way of security) have a right to preferential satisfaction out of the proceeds of the sale of the security granted (Absonderungsrecht).
- If the insolvency receiver enforces security on moveable assets (other than pledges) and distributes the proceeds to the creditor, it can deduct 4% of the proceeds for the ascertainment of the security and 5% of the proceeds for the enforcement procedure. If the actual costs deviate substantially, these rates would be adjusted.
- The priority of claims of creditors on an insolvency are as follows:

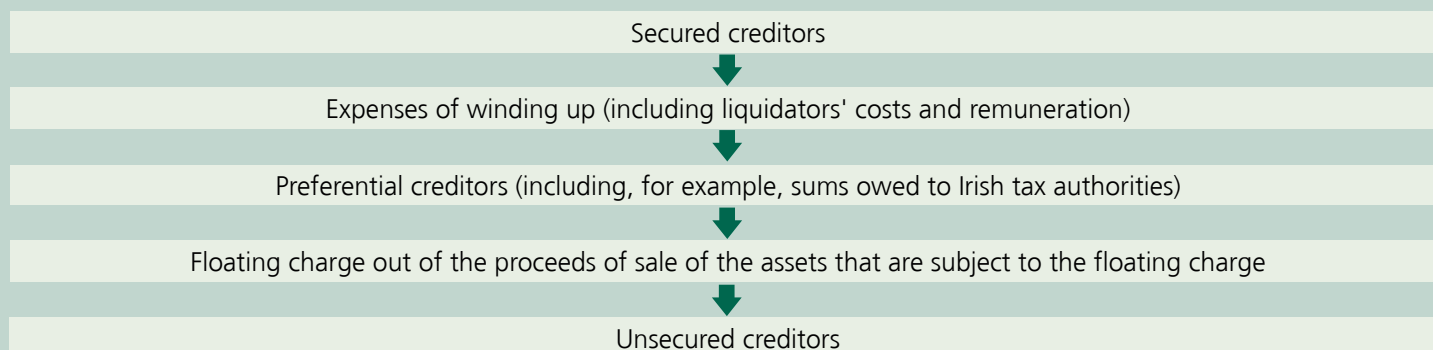


## Ireland

- The security trustee concept is recognised.
- The customary forms of security are mortgages, assignments and charges. There are broadly similar concepts of taking security (ie, fixed and floating charges) as in England.
- There is no general prohibition on the granting of guarantees (whether upstream or otherwise) by an Irish company.
- There are a number of formalities and other issues which must be observed to ensure that the security is valid and enforceable. These are similar to the formalities required in England (ie, filing within 21 days of the creation of charge).
- A security document will also normally include a power of attorney given by the grantor of the security interest whereby the holder of the security interest may sign any documentation or perform any acts on behalf of the grantor as may be required pursuant to the terms of the security document.

Asset type	What forms of security can be granted	Comments
Real estate	Mortgage or charge	Land is divided into "registered land" and "unregistered land" where the place of registration and the form and procedure for registration differ in each case.
Shares	Legal mortgage Equitable mortgage Pledge of bearer shares	Broadly similar principles as in England.
Plant and machinery	Legal charge	Involves the transfer of title to such assets to the creditor, subject to the equity of redemption. Accordingly, mortgages or assignments can be used to create security over assets.
Bank accounts, receivables and contractual rights	Fixed or floating charge	Broadly similar principles as in England.
Intellectual property	Legal charge	Broadly similar principles as in England.
Business/goodwill	Debenture	Broadly similar principles as in England.

- Ireland is generally a creditor-friendly jurisdiction which gives secured creditors priority over other creditors and allows them to realise their security outside the normal liquidation process.
- Enforcement methods will depend upon the nature of the security package. The relevant security documentation will normally permit the chargeholder on the occurrence of an "event of default" to appoint a receiver to realise the security.
- The priority of claims of creditors in an insolvency are as follows:



## Italy

- There is no concept of security trustee. The secured creditors must be party to the security documents or represented by a security agent acting in the name of, and on behalf of, the secured creditors on the basis of a power of attorney.
- An Italian company can provide upstream guarantees, subject to compliance with corporate benefit rules.
- Syndication may involve significant indirect tax costs, especially in case of loans secured by a mortgage.

Asset type	What forms of security can be granted	Comments
Real estate	Mortgage	The mortgage is created by registration of a notarial deed with the local real property registration office.
Shares	Pledge	If the shares are registered shares, the certificates representing the shares should be pledged with an endorsement by way of security and authenticated by the public notary and, upon request, delivered to the pledgor. The shareholder's register should also be annotated. A specific regime applies to dematerialised shares. The pledge is created by means of a specific annotation on the depositary ledger.
Receivables and contractual rights	Pledged or assigned by way of security	The pledge agreement must be registered and is subject to stamp taxes.
Bank accounts	Pledge	Security is created over credit balance in the bank account.
Plant and machinery	Special privilege ( <i>privilegio speciale</i> ) or mortgage	Special privilege may be granted only if the following conditions are met: <ul style="list-style-type: none"> <li>■ the security interest is granted to secure loans of a term of more than 18 months; and</li> <li>■ the secured loans are granted by Italian banks or non-Italian banks licensed to carry on business in Italy. Mortgage taken over real property can be extended to cover plant and machinery.</li> </ul>
Intellectual property	Pledge	No possession of assets charged by the pledge is required.
Business/goodwill	Not possible - no concept of floating charge	

- Insolvency proceedings are administered by the court for the benefit of all creditors.
- There is no concept of non-court appointed receivership and no concept of a secured creditor being able to appoint a person who will realise the secured assets with a view to repaying the secured debt or selling the business as a whole.
- Any creditor, whether secured or unsecured, must file a petition with the relevant insolvency court in order to be admitted to the insolvency procedure.
- Save in case of regulated entities that may be subject to special provisions, the priority of claims of creditors on an insolvency are as follows:

Costs and expenses relating to the insolvency procedure



Any person or entity which has a "general privilege" or "special privilege" (eg, court costs, mandatory social contributions and credits of the state for indirect taxes)



Secured creditors which have a priority right over the proceeds deriving from the assets securing their credits



Unsecured creditors (and any secured creditor to the extent its outstanding debt has not been satisfied by the proceeds deriving from the secured assets)

## Netherlands

- As the concept of trust is not recognised it is not possible to grant rights of mortgage or pledge to a security trustee.
- The solutions that have been developed, so that rights of mortgage and pledge can be granted to a lender assuming a role like a security trustee, include the creation of a parallel debt owing to the security trustee equal to the aggregate debt owing to the lenders and the appointment of the security trustee as a joint creditor with each of the lenders. These structures allow the lenders to transfer their loan participations without affecting the rights under a mortgage and pledge.
- In principle, Dutch law does not prohibit the grant of upstream guarantees by Dutch companies.

Asset type	What forms of security can be granted	Comments
Real estate	Mortgage	Notarial deed of mortgage and registration with the <i>Kadaster</i> .
Shares	Pledge	Pledge on registered shares requires execution of notarial deed of pledge. Articles of Association should be checked.
Receivables and contractual rights	Pledge	Requires notarisation or registration of the pledge agreement.
Bank accounts	Disclosed pledge	Execution of a deed of pledge and notification to the bank creates a disclosed pledge.
Plant and machinery	Possessory pledge or non-possessory pledge	Requires a notarial or private deed of pledge. Possessory pledges are generally considered impractical. If created by private deed, registration with tax authorities is required (for date stamping only).
Intellectual property	Pledge	Notarial or private deed of pledge. If created by private deed, registration with tax authorities is required (for date stamping only). Registration of the security with relevant IP registers binds third parties.
Business/goodwill	Not possible - no concept of floating charge	

- The concept of a floating charge is not recognised. Each class of assets must be identified and separate security documents are required for each asset class. General descriptions of certain collateral in the security documentation make it possible to take security in a way that is similar but not as all-embracing as the English floating charge.
- No registration is required except for real estate and certain other assets that are subject to their own security regimes. However, a non-possessory pledge (or, in relation to receivables, a silent pledge) requires registration with the tax authorities for date stamping purposes unless the pledge is contained in a notarial deed. Registration with IP registers of pledge of IP rights is not required in order to perfect the security, but does bind third parties.
- In principle, all the creditors rank *pari passu*, unless they have a certain preference such as a right of mortgage, a right of pledge or preferential rights. Mortgagees and pledgees are, in principle, entitled to enforce their security rights outside the insolvency of the grantor of the security.
- The priority of claims of creditors in an insolvency are as follows:

Secured creditors (subject to certain exceptions)



Estate claims and costs ie, claims for costs incurred after bankruptcy and costs of bankruptcy proceedings



Preferential claims including bankruptcy filing costs, claims by tax authorities and claims by the National Institute for Social Insurance



Non-preferential or common claims



## Spain

- Spanish law is silent as to the concept of a security trustee holding security on behalf of a syndicate of lenders. There are, however, means to construct certain types of security (ie, pledges) in such a way as to allow a member of the banking syndicate to take the security and enforce it in the name and on behalf of all the members of the syndicate.
- It is possible for a Spanish company to grant upstream guarantees.
- The concept of floating charge is not recognised. No security can be granted over goodwill.

Asset type	What forms of security can be granted	Comments
Real estate	Mortgage	Must be by notarised deed and registered at the Land Registry. Attracts stamp duty, the amount of which varies by region.
Shares	Pledge	Permits the pledge of existing issued shares only. A pledge cannot extend to future shares.
Receivables and contractual rights	Pledge	Pledge must be formalised as a public deed granted before a notary public.
Bank accounts	Pledge	Security is perfected by way of a notarised agreement. Written notice to the account holding bank is required.
Plant and machinery	Chattel mortgage	Registerable in the registry of moveable property. May attract stamp duty.
Intellectual property	Chattel mortgage	Registerable in the registry of moveable property. May attract stamp duty.
Business/goodwill	No security can be granted	

- Security interests as a whole can be "separated" and "reserved" for the benefit of a certain creditor. The secured creditor, while preserving its full claim against the rest of the assets of the debtor, will have a privileged right enforceable against the relevant asset.
- Enforcement of a mortgage is regulated by a procedure culminating in a public auction of the property, with the proceeds of the sale applied towards the satisfaction of the liability.
- If secured obligations are not satisfied out of the proceeds of enforcement, the secured creditors will rank as common creditors of the insolvent estate in respect of the remaining unpaid amounts.
- In respect of insolvency proceedings, a moratorium on enforcement can apply.
- The priority of claims of creditors on an insolvency are as follows:

Privileged credits, including credits secured with a mortgage or pledge, credits held by Tax Authorities or Social Security Authorities, amounts due to companies' employees for the last 30 days



Ordinary creditors



Subordinated creditors, including credits subordinated by contract or by law to all other creditors of the insolvent party

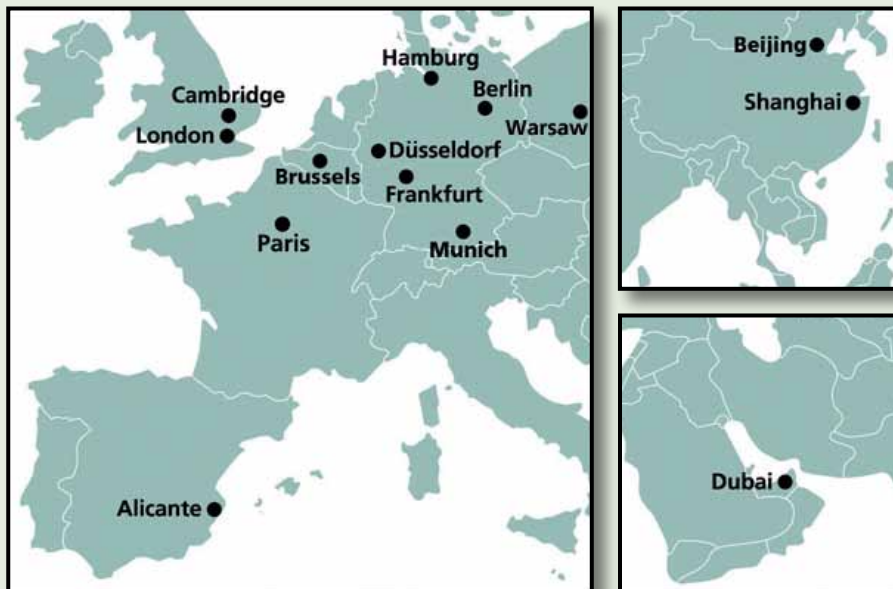
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