

# CHINA BUSINESS 商 LAW JOURNAL 法

June 2013 | Volume 4, Issue 6

2013年6月 | 第4辑第6期

## 中国 PE 化蛹成蝶

在不断演变的行业中求生存

## PE metamorphosis

Surviving the transformation of private equity



www.cblj.com

专家剖析：  
探讨《劳动合同法》修正案

In perspective: Expert views on  
Labour Contract Law changes

资源领域外的曙光：  
中国与拉美关系的新潜力

Beyond resources: Redefining  
China's ties with Latin America

律师风采：惠普  
总法律顾问分享成功心得

Profile: HP's general counsel  
shares secrets of success

# 对股份的占有担保权益

## Assistance crucial with shares pledge agreements in Cyprus



Nick Tsilimidos  
L. Papaphilippou & Co  
律师事务所  
律师  
塞浦路斯  
Associate  
L. Papaphilippou & Co  
Cyprus

**质**押指的是，一方当事人（出质人）将任何可以实际（或推定）交付的资产移交给另一方当事人（质权人）实际占有，作为清偿债务或履行承诺的担保。在涉及塞浦路斯私人公司股份的质押合同中，用于质押的资产包括明确表明股份所有权的原始股权凭证。

股权质押主要由塞浦路斯法律第 149 章《合同法》规管。塞浦路斯《合同法》有关条款意在将发展成熟、历史悠久的英国普通法相关原则编纂成法。此外，塞浦路斯《合同法》与前英联邦国家类似立法具有明显的相似之处，这似乎能合理地表明在跨境融资交易中使用股权质押合同的可靠性。

### 可靠方式

股权质押合同是确保债权人能获得债务清偿或延期付款的一种非常可靠的方式。在执行股权质押合同时，出质人将股权凭证作为担保交付给质权人。由于仅仅是将股权凭证交付给质权人占有，因此被质押股份的所有权仍然属于出质人。如果出质人违反股权质押合同中的条款（或者持续违约），那么质权人（或质权人指定的任何其他人）将成为被质押股份的登记持有人。

为了保证股权质押合同具有法律效力并且具有可执行性，股权质押合同需要严格遵守有关在资产上设立担保物权及登记的法定手续。具体来说，股权质押合同需要采用书面形式，出质人需要在至少两名有行为能力的见证人的见证下签署合同。

尽管塞浦路斯《合同法》未要求质权人在质押合同上签字，但是为了谨慎起见，我们建议双方当事人都在合同上签字。

股权质押合同生效之后，质权人需要向

股份被用作质押标的物的公司提供关于股权质押的通知以及股权质押合同的核证副本。

### 备忘录

公司收到上述文件后，将在其内部保管的股东名册中加入一份针对被质押股权的备忘录，并向质权人出具一份通知，表明上述备忘录已经放入股东名册中。

在股东名册中加入备忘录的原因主要是，可以通过通知的形式提醒公司管理人员小心未经授权的被质押股权的转让行为。塞浦路斯《合同法》没有具体规定通知或备忘录所需采用的格式和 / 或用语。

### 辅助文件

股权质押合同是为了保护质权人的利益而签订的担保文件，因此这类合同侧重保护质权人的利益也就不足为奇了。

一系列作为股权质押合同附件的必要辅助文件意在促使快速、透明的质押合同执行机制的形成，从而使得质权人无需任何进一步的同意或法院的干预就可以将被质押股份转到自己的名下。

尽管所有的辅助文件都由出质人签署，但部分文件将由质权人确定日期，由质权人决定出质人的违约行为是否应该且何时应该执行担保。

“ **股权质押主要由塞浦路斯《合同法》规管** ”

## L PAPAPHILIPPOU & CO LLC

17 Ifigenias street  
2007 Strovolos, P.O. Box 28541  
2080 Nicosia, Cyprus

电话 Tel: +357 22 27 10 00  
传真 Fax: +357 22 27 11 11

电子邮件 E-mail: nt@papaphilippou.eu

www.papaphilippou.eu



LEADING. EVOLVING. ACHIEVING.

根据每次融资交易的需求，股权质押附带的辅助文件主要包括：

1. 已签字但未注明日期的转让文件，包括出质人为了质权人利益而转让质押股份给质权人等内容；
2. 已签字但未注明日期、同意股份转让的董事会决议以及根据（1）中转让文件进行的质押股份登记；
3. 不可撤销的、有关出质人为质权人利益而质押股份的委托授权书；
4. 未注明日期的公司董事和秘书辞职信，该董事和秘书持有的股份应是股权质押合同之标的物；
5. 公司秘书以及每位董事的授权书和担保书。

### 准备质押合同

聘请塞浦路斯合格的法律专业人士协助准备有效并具可执行性的股权质押合同，这样做有非常重要的价值。除了就是否需要在塞浦路斯注册股权质押合同以及是否需要合同上盖章等问题寻求专业意见之外，债权人还应该就法人实体是否具有签订股权质押合同的行为能力寻求法律意见。

### 审查公司章程

此外，债权人应当进一步彻底、主动地审查股份作为质押标的物的公司所订立的公司章程。如果与股权质押合同的规定不一致，优先购买权、董事根据其绝对酌情权拒绝登记股份转让的权利、需要绝大多数股东通过决议同意的保留事项等，都可能会成为不谨慎的债权人在执行质押合同时和在此之后无法逾越的障碍。■

A pledge describes a contractual relationship whereby the physical possession of any asset capable of actual (or constructive) delivery is delivered by one person (the pledgor) to another (the pledgee) as security for payment of a debt or performance of a promise. In the context of a pledge agreement concerning the shares of a private company incorporated in Cyprus, such assets comprise the original shares certificate which evidences title to such shares as therein expressly mentioned.

A shares pledge is predominantly regulated by the Contract Law of the Republic of Cyprus, whose applicable provisions purport to codify the developed and long established UK common law principles in the field of bailment. In addition, the striking similarities of the Contract Law to similar enactments across ex-Commonwealth countries, plausibly explains the credibility enjoyed by the shares pledge agreement in cross-border financing transactions.

### Trusted medium

The shares pledge agreement comprises a much trusted medium for creditors in securing a loan or a deferred payment. On execution of the shares pledge agreement, the pledgor hands over to the pledgee the share certificate of the shares used as security. The ownership of the pledged shares remains with the pledgor, as it is only the possession of the shares certificate that is delivered to the pledgee. The pledgee (or any other person nominated by the pledgee) shall become the registered owner of the pledged shares once, and if the pledgor is in default (or in continuous default) of the terms stipulated in the shares pledge agreement.

In order for a shares pledge agreement to be valid and enforceable between the parties thereto, certain statutory formalities relating to the attachment of the security interest to the asset and its perfection would need to be strictly adhered to. In particular, a shares pledge agreement would need to be expressed in writing and be signed by the pledgor in the presence of at least two competent witnesses.

### Prudent practice

Although Contract Law does not require the signature of the pledgee on the contract of pledge, prudent practice

would invariably advise for the signatures of both parties thereupon.

Once executed, a notice of such pledge, along with a certified copy of the shares pledge agreement, would need to be delivered by the pledgee to the company whose shares have been the subject matter of the pledge.

### Memorandum

Upon receipt of the aforesaid, the company enters a memorandum against the shares pledged in the register of members it maintains internally and delivers to the pledgee a certificate declaring that the said memorandum has in fact been entered therein.

The rationale behind the memorandum recorded in the register of members is primarily to caution the officers of the company by way of notice from procuring any unauthorised transfers of the pledged shares.

No specific format and/or wording of the notice or the memorandum is provided by Contract Law.

### Security document

As the shares pledge agreement is a security document intended to serve and protect the interest of the pledgee, it comes as no surprise that it is drafted pro-pledgee.

A bundle of essential ancillary documents annexed to the shares pledge agreement purport to facilitate and complement the prompt and transparent enforcement mechanics of the contract of pledge, thereby enabling the pledgee to transfer the pledged shares into its name without the need of any further consents or intervention of the court.

Whilst all ancillary documents therein contained are signed by the pledgor, many will remain to be dated by, and at the option of, the pledgee, should and when an event of default trigger the enforcement of the security.

### Bundle of ancillaries

Depending on the needs of each financing transaction, the bundle of ancillaries annexed to the shares pledge may include inter alia:

- i. a signed, yet undated, instrument of transfer concerning the transfer of the pledged shares from the pledgor in favour of the pledgee;

“ *A shares pledge is predominantly regulated by the Contract Law of the Republic of Cyprus* ”

- ii. a signed, yet undated, board resolution approving the transfer and registration of the pledged shares evidenced by the instrument of transfer mentioned in point (ii);
- iii. an irrevocable proxy and power of attorney in respect of the pledged shares granted from the pledgor in favour of the pledgee;
- iv. undated resignation letter of the directors and secretary of the company whose shares are the subject of the shares pledge agreement;
- v. a letter of authority and undertaking from the secretary and each director of the company.

### Preparing an agreement

The assistance of a legal professional licensed to practise the laws of the Republic of Cyprus will prove invaluable in the context of preparing a valid and enforceable shares pledge agreement.

Apart from opining on the need to register and stamp the share pledge agreement in the Republic of Cyprus, legal comfort ought to be sought by the creditor as to the capacity of the body corporate to validly enter into the shares pledge agreement.

### Articles of association

In addition, the articles of association of the company whose shares are pledged should further be thoroughly and proactively examined pre-execution.

Pre-emption rights, director's right to decline the registration of a transfer of shares at their absolute and sole discretion, as well as reserved matters requiring an increased majority threshold for shareholder resolutions may, amongst others, become insuperable obstacles upon, or after, enforcement for the unwary creditor if not tuned alongside the ambit of the shares pledge agreement. ■

Nick Tsilimidos 是塞浦路斯  
L Papaphilippou & Co 律师事务所律师  
Nick Tsilimidos is an associate at  
L Papaphilippou & Co in Cyprus