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# Banking & Finance

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## **LAW AND PRACTICE:**

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law and Practice

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**Matheson** was established in 1825 in Dublin and now has offices in Cork, London, New York, Palo Alto and San Francisco. Matheson's Finance and Capital Markets team consists of more than 45 lawyers and advises financial institutions and corporations involved in arranging and executing all forms of finance and capital markets transactions in Ireland. The firm advises all of the major Irish banks and financial institutions, corporate borrowers and many of the world's leading international banks, investment managers and investment funds, securities and derivatives trading houses, broker dealers, insurance companies, al-

ternative finance providers, and other financial services firms in relation to their lending, borrowing, finance and capital markets transactions and arrangements. The firm is actively involved in numerous industry organisations and trade bodies and has been instrumental in proposing, drafting and advising on many changes to finance and capital markets legislation in Ireland. Matheson is often involved in innovative transactions, from advising on the first Sukuk bond issued under Irish tax law to advising on Europe's first marketplace lending securitisation.

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## 1. Loan Market Panorama

### 1.1 The Impact of Recent Economic Cycles and the Regulatory Environment

The availability of credit continued to increase in 2018, particularly for businesses engaged in commercial real estate. The source of this credit, however, has shifted away from solely traditional lenders to a mixture of banks, mezzanine lenders and non-bank lenders. After the financial crisis, increased regulatory pressure on banks as a whole to deleverage and reduce their loan books left a liquidity gap in the market, which non-bank lenders took advantage of.

The most significant effect on the Irish loan market will undoubtedly be Brexit. It is impossible to predict exactly how the loan market in Ireland will be affected by the planned exit of the UK from the EU. A potential loss of "passporting" rights arising from Brexit does raise concern for lenders based in the UK, but many have opened or are in the process of opening branches in Ireland to avail of the "passporting" advantages within the EU.

Another interesting development is the growing adoption of Irish law as the governing law of international finance contracts in preference to English law.

### 1.2 The High-yield Market

Irish entities in various industry sectors may be involved in high-yield bond transactions, often as borrowers and guarantors, and in certain circumstances as high-yield bond issuers.

Irish incorporated special purpose vehicles (SPVs), often referred to as "Section 110 companies", are normally used as high-yield bond issuers in certain European high-yield transactions, often to avoid covenant breaches or local law restrictions on guarantees of securities. Section 110 companies are named as such because Section 110 of the Taxes Consolidation Act 1997 provides for special tax treatment for "qualifying companies". Favourable tax laws allow these structures to be, in most cases, tax neutral (with no annual minimum profit or "spread" required at the SPV level) and a "quoted eurobond" exemption, together with numerous double taxation treaties, allows interest on securities to be paid gross. A minimal share capital requirement makes incorporating an Irish SPV an easy process.

European high-yield bonds are normally marketed as private placements, primarily to attract US investor interest as well as participation from European investors. Such transactions are usually led through London or the USA and so New York law or English law are typically the governing laws of such transactions. To the best of our knowledge, no high-yield bonds have been governed by Irish law to date.

Whereas lenders in loan financings would tend to be traditional banks and other financial institutions, investors in high-yield bonds would typically be institutional investors (including investment banks, insurance companies, pension funds, hedge funds, investment managers and mutual funds) looking for higher rates of return.

### 1.3 Alternative Credit Providers

There has been a continued increase in the prominence of alternative credit providers in the Irish market since the financial crisis. The alternative credit providers group include a diverse collection of direct lenders, debt funds and debt arms of hedge funds and buy-out houses. This selection allows borrowers to be more selective when choosing lenders and results in more liquidity as well as more competitive pricing and terms.

### 1.4 Evolution of Banking and Finance Techniques

There was a continued growth in the asset-based lending market in Ireland during 2018. With Brexit fast approaching and the need for more commercial and residential properties in Ireland (particularly in Dublin), this form of finance has benefited borrowers, with competitive pricing, but also lenders, by offering a lower credit risk. With increased regulation for lenders (for example, the capital requirements regulations), some lenders consider this a sensible form of lending from the perspective of capital adequacy.

Real Estate Investment Trusts (REITs) are recognised as important vehicles for property investment in over 30 jurisdictions throughout the world. Since the enactment of the Finance Act 2013, Irish incorporated REITs can be listed on the main market of a recognised stock exchange in an EU Member State and have the effect of attracting fresh capital into the Irish property market.

### 1.5 Recent or Expected Legal, Tax, Regulatory or Other Developments

There is nothing of fundamental significance; however, certain lenders have a new reporting obligation to the Central Bank of Ireland (the “Central Bank”) pursuant to the Credit Reporting Act 2013 (the “Act”), in order to enable the Central Bank to maintain a Central Credit Register (the “Register”). The Register is intended to ensure transparency and diligence in lending. Both consumers and lenders have access to a credit report, which gives a snapshot of a consumer’s lending position at any given time. Phase 1 of implementing the Register began on 30 June 2017; from this date, information on all consumer loans of EUR500 or more is to be sub-

mitted to the Register. Phase 2 of implementing the Register will focus on business lending and began on 31 March 2018. The Act applies to both regulated and unregulated lenders.

## 2. Authorisation

### 2.1 Requirements for Authorisation to Provide Financing to a Company

The Central Bank of Ireland is responsible for prudential regulation and supervision of credit and financial institutions. Wholesale lending to companies generally does not require authorisation, provided the lender does not take deposits, carries on investment services or provides services to consumers. Traditional banks, those which create securities and fall within the definition of a banking business, are required to hold a banking licence.

A bank authorised in another EEA member state (the home state) can passport its services through establishing a branch in Ireland, or by providing its services in Ireland (the host state) on a cross-border basis.

## 3. Structuring and Documentation Considerations

### 3.1 Restrictions on Foreign Lenders Granting Loans

There are no restrictions on foreign lenders from granting loans in Ireland. However, there are restrictions on lending to consumers and mortgage lending.

### 3.2 Restrictions on Foreign Lenders Granting Security

There are no restrictions on granting security or guarantees to foreign lenders, save where such restrictions are contained in the chargors/guarantors constitutional documents.

### 3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions, controls or other concerns regarding foreign currency exchange, save that a person (legal or natural) shall not operate as a Bureau de Change Business in the absence of an authorisation from the Central Bank of Ireland under Part V of the Central Bank Act 1997 (as amended from time to time).

### 3.4 Restrictions on the Borrower’s Use of Proceeds

Generally the borrower is required to use the proceeds from loans or debt securities for the “purpose” as set out in the relevant credit agreement. If a borrower uses the proceeds of financing for any purpose other than that set out in the credit agreement, this would result in an event of default (however so defined), allowing the lenders to accelerate any outstanding loans and terminate unused commitments (and, if necessary, to enforce any available collateral).

### 3.5 Agent and Trust Concepts

The agent concept is well recognised and established in Ireland. In a syndicated loan arrangement (of which there is more frequency in the market), the borrower usually grants a mandate to a “lead bank”, which then arranges for a syndicate of banks to be set up to provide the necessary finance to the borrower. The liability of the agent is usually limited by the underlying documentation appointing the agent.

The concept of a trust (and trusts created under the law of another jurisdiction) is also recognised in Ireland. A security trustee can enforce its rights in the courts in Ireland, usually in accordance with the terms of the relevant security document. However, the rights of the security trustee may also be subject to legislative or other public policy considerations.

### 3.6 Loan Transfer Mechanisms

Secured debt is traded in Ireland, usually by means of assignment, transfer or novation. An assignment of security should be notified to the security provider (or in accordance with the terms of the underlying security document). A transfer or novation can be effected with the security provider as a party to the transfer or novation. In the case of a transfer or novation, appropriate registrations should be carried out in the Irish Companies Registration Office and/or Land Registry/Registry of Deeds (as applicable). Typically, Loan Market Association standard documentation is relied on, which contains standard language in relation to novations and transfers.

### 3.7 Debt Buy-back

This will depend on what is commercially agreed between the lender(s), borrower(s) or sponsor(s), but there is no express restriction under Irish law to agree terms relating to the buy-back of debt.

### 3.8 Public Acquisition Finance

Certain funds provisions in credit agreements originate from the requirements of the Irish Takeover Rules which governs the takeover of any public limited company incorporated in Ireland. The Irish Takeover Rules requires that a bidder must announce a bid only after ensuring that it can fulfil in full any cash consideration (if any is offered) and after taking all reasonable measures to secure the implementation of any other type of consideration. A financial adviser also must stand behind any bid and confirm that the relevant bidder has certain funds – ie, that the funding will be available on the completion of the acquisition of the securities to pay the full amount due. This position must be confirmed in the Rule 2.5 announcement and the offer document.

Certain funds provisions are specifically negotiated for the relevant public acquisition finance transaction and tend not to be standard provisions contained in other acquisition finance transactions. Whether short or long form documentation is to be used will normally depend on the credit requirements of the relevant lenders. Although the main provisions

of the finance documents are set out in the offer document, such details are not required to be publicly filed or registered in Ireland.

## 4. Tax

### 4.1 Withholding Tax

A company making a payment of yearly interest which has an Irish source is subject to withholding tax at a rate of 20%. There are, however, a number of exemptions under Irish law with respect to withholding tax, which would need to be assessed on a case-by-case basis.

### 4.2 Other Taxes, Duties, Charges or Tax Considerations

#### Documentary taxes

Stamp duty for mortgage deeds executed on or after 7 December 2006 is now abolished.

#### Registration fees

With the introduction of the Companies Act 2014 the registration of a Form C1 (Registration of a Mortgage or charge created by Irish company) must be completed online. The registration cost (including the registration of Forms C1A and C1B) is EUR40.

In the case of registered external companies, the cost of registering Form e-F8 and Form e-F8A (Registration of particulars of a charge on property in the State created by a company incorporated outside the State) is EUR40; there is no cost to register Form e-F8B.

The registration of a Form C6 (Declaration of satisfaction of a charge) or Form C7 (Declaration of Partial satisfaction of a charge) with the Irish Companies Registration Office costs EUR15 and there is no e-filing option available for these forms.

Registration at the Circuit Court usually amounts to no more than EUR1 for each registration. The registration cost at the High Court is stamp duty of EUR15.

In relation to intellectual property, as trade mark attorneys are used to make the registrations, their costs differ quite substantially depending on whether local as well as international filings are to be made.

The cost of registering the security in the Registry of Deeds is EUR50 for each deed registered.

The cost of registering security in the Land Registry is now EUR175, following the introduction of the Land Registry Fees Order 2012, which came into effect on 1 December 2012.

**Notaries' fees**

There is no set fee for the services of a notary in Ireland. A proper professional fee is usually paid dependent on the time spent, the skill of the notary in question and the level of responsibility.

**4.3 Usury Laws**

Protection against excessive interest rates in Ireland is afforded to borrowers and consumers by the Consumer Credit Act 1995 as amended by Section 35 of the Central Bank and Financial Services Authority of Ireland Act 2003 (as amended).

Lenders should also be aware of the treatment of default interest under Irish law. The recent judgments handed down by the Court of Appeal in July 2018 (*Sheehan v Breccia/Flynn* and *Benray v Breccia*) address whether under Irish law an obligor's agreement to pay default interest was unenforceable because it was not a "genuine pre-estimate of loss caused by such default". Essentially, the court held that if a default interest provision is contained in the lender's standard terms and conditions, it will be considered to be a penalty and therefore unenforceable. It would thus be pragmatic for lenders to include a bespoke negotiated term in the credit agreement relating to default interest (rather than relying on the default interest provisions contained in the standard terms and conditions) in order to give the lender the best chance of such provisions not being considered a penalty.

**5. Guarantees and Security****5.1 Assets Typically Available and Forms of Security****Real estate**

Real estate includes real property as opposed to personal property. It includes:

- any piece of land and the buildings on it;
- the airspace above the land, the ground below it and any natural resources on it;
- anything fixed, immovable or permanently attached to land;
- title to land can be freehold or leasehold in nature and can be registered or unregistered.

**Common forms of security**

The following forms of security can be taken over real estate:

*Legal mortgage:* Before the implementation of the Land and Conveyancing Law Reform Act 2009 (2009 Act), the mechanism for creating a legal mortgage over land varied as between registered and unregistered land. However, legal mortgages after 1 December 2009 are now covered by the same rules, irrespective of whether the land is registered or unregistered in nature.

*Equitable mortgage:* The 2009 Act has not had any effect on the creation of equitable mortgages. If a mortgagor only has an equitable interest in the land, only an equitable mortgage can be created. It is generally agreed that an equitable mortgage may be created in Ireland in a number of ways:

- first, where money is advanced on the assumption that a mortgage has been created;
- second, where the mortgagor holds an equitable interest only in the land at the time of creating the mortgage;
- third, where there is an agreement for a legal mortgage; and
- fourth, by the deposit of title deeds.

*Fixed charge:* This is a specific charge on the specific property of, for example, a company, such as on the land and buildings of the company, as security for a loan. A fixed charge can be contrasted with a floating charge. A fixed charge invariably involves the vesting of a legal interest in the chargee at the time of the transaction. A fixed charge over land essentially prevents the borrower from disposing of the land without the lender's consent or the discharge of liabilities owed to the lender.

*Floating charge:* A floating charge over land is quite unusual, and is more appropriate or usual in respect of other assets such as stock.

**Formalities**

It is generally agreed that registration is the "operative perfection mechanism in respect of security interests in land". The specific formalities in relation to real estate in Ireland depend on whether the land is registered or unregistered. There are no specific time limits in respect of registration in the Registry of Deeds ([www.prai.ie/registry-of-deeds-services/](http://www.prai.ie/registry-of-deeds-services/)) or Land Registry ([www.landregistry.ie](http://www.landregistry.ie)). The 2009 Act introduced compulsory first registration in respect of sales of interests in unregistered land, applicable to all counties as of 1 June 2011.

Registration requirements with the Companies Registration Office also exist in respect of Irish corporate bodies. If a company has created a mortgage or charge over real estate, a relevant filing must be lodged with the Companies Registration Office within 21 days of the creation of the security. Section 412 (3) of the Companies Act 2014 provides that the priority of a charge will be determined by the date and time of receipt by the registrar of a fully filed charge submission. The date of creation of the deed of charge no longer determines its priority.

Details of mortgages or charges created by a company must be delivered to the Companies Registration Office within 21 days either of the creation of the charge or of notice to create the charge. Failure to register the charge within 21 days has the effect of making the charge void against a liquidator of the company and any creditor of the company.

If a company has failed to comply with Section 409 of the Companies Act 2014, an application can be made under Section 417 of the Companies Act 2014 to the High Court for an order extending the time for registration. If an omission or misstatement of any particular charge is noticed after registration, an application for an order rectifying the particulars can also be made to the court.

When the Companies Registration Office is satisfied that the statutory requirements have been met, a certificate of charge is issued. The certificate is conclusive evidence that the requirements of the Companies Act 2014 have been complied with.

### **Tangible movable property**

Tangible movable property in Ireland could include trading stock (inventory), agricultural stock, goods, plant, machinery and vessels such as aircraft or ships.

### **Common forms of security**

The following forms of security can be taken over tangible movable property.

A fixed charge attaches to a specific asset or class of assets on creation.

Under a floating charge: the security “floats” over the asset and remains dormant until some further step is taken by or on behalf of the chargee. This enables the borrower to deal with the asset over which the charge is created in the ordinary course of business, until the floating charge crystallises into a fixed charge. Crystallisation of a floating charge into a fixed charge may occur on the occurrence of a specified event or on insolvency of the borrower.

A floating charge becomes a fixed charge, and is said to crystallise, on the occurrence of certain events. These could be such as when a receiver is appointed, or a winding up commences, or if the chargee intervenes when entitled to do so. An automatic crystallisation clause is one stipulating that a floating charge will crystallise on some specific event occurring. Note that floating charges have certain weaknesses, including:

- they have weak priority against purchasers (who are not on notice of any negative pledge contained in the floating charge) and chargees of the assets concerned and against lien holders, execution creditors and creditors with rights of set-off;
- they rank after certain preferential creditors, such as claims of employees and certain taxes on a winding-up;
- they rank after certain insolvency remuneration expenses and liabilities;
- the examiner of a company has certain rights to deal with the property covered by the floating charge;
- they are affected by Section 597 of the Companies Act 2014 (Circumstances in which a floating charge is invalid); and

- they rank after fixed charges.

### **Formalities**

In relation to general registration requirements, see above. Specific formalities apply in relation to different categories of assets, as follows.

- *Agricultural stock*: A fixed and or/floating mortgage can be created over agricultural stock provided the chattels in question comply with the terms of the Agricultural Credit Act 1978 (as amended) and are the absolute property of the mortgagor. Specific rules apply in relation to registration. If capable of being registered, and in order to be effective, the security interest must be registered in accordance with the terms of the Agricultural Credit Act 1978. Essentially, the security must be registered within one month of creation with each Circuit Court in each district where the mortgagor’s land on which the chattels are situated, is located.
- *Aircraft*: A mortgage or fixed charge can be created over aircraft. The registration requirements in respect of aircraft are twofold:
  - (a) first, where certain conditions are met, registration of the interests of relevant parties may be required under the terms of the Convention on International Interests in Mobile Equipment (Cape Town Convention);
  - (b) second, the regular Irish Companies Registration Office filings are required. Registrations are made on a priority basis. Notice of the security interest should also be affixed to the aircraft.
- *Ships*: Security over a ship must be done by way of statutory ship mortgage. Any security created over a vessel must be registered with the appropriate Registrar for Shipping. The Registrar for shipping registers statutory ship mortgages on a priority basis. Notice of the security interest should also be affixed to the vessel.
- *Movable plant and machinery*: Security over movable plant and machinery would typically be done by way of a fixed or floating charge. Registration should be made at the Companies Registration Office and notification by affixing the security interest to plant or machinery.

### **Financial instruments**

Financial instruments are defined in Directive 2002/47/EC on financial collateral arrangements (Financial Collateral Directive), as amended by Directive 2009/44/EC and Directive 2014/59/EU, which has now been transposed into Irish law as including:

- shares in companies and other securities equivalent to shares in companies;
- bonds and other forms of instruments giving rise to or acknowledging indebtedness if these are tradable on the capital market;
- any other securities that are normally dealt in and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or ex-



change or which give rise to a cash settlement (excluding instruments of payment).

### **Common forms of security**

Common forms of security are:

- legal mortgage;
- equitable mortgage;
- fixed charge;
- floating charge.

Note that there are certain advantages (and disadvantages) of creating a legal mortgage as opposed to an equitable mortgage in the creation of security under Irish law.

### **Formalities**

In general, note that any ancillary documentation should be sought in connection with any security over shares. This may include stock transfer forms and the original share certificates. It is market practice to register the creation of security over shares (in a foreign company only) at the Irish Companies Registration Office. An affidavit and stop notice can also be served on the company whose shares are being charged to put them on notice that the shares have been charged.

### **Claims and receivables**

The most common types of claims and receivables under Irish law over which security is granted include bank accounts and rent.

### **Common forms of security**

It is generally not common to take security over receivables in Ireland except by way of floating charge. However, security can also be created by way of:

- a mortgage in the form of a security assignment;
- a fixed charge.

### **Formalities**

First, the parties must ensure that the contract creating the trade receivable does not contain a prohibition on assignment.

A security assignment over receivables is registrable as a fixed charge over book debts and must be registered with the Irish Companies Registration Office within 21 days. Note that a Section 1001 filing should be made with the Irish Revenue Commissioners within this 21-day period, in accordance with the terms of Section 1001(3) of the Taxes Consolidation Act 1997.

### **Cash deposits**

#### **Common forms of security**

The most common forms of security over cash deposits are:

- security assignment;
- fixed charge;

- floating charge.

### **Formalities**

Where a fixed charge or assignment has been created by a company, a Section 1001 notice in relation to book debts must also be filed with the Irish Revenue Commissioners, under Section 1001(3) of the Taxes Consolidation Act 1997. The Irish Revenue Commissioners must be notified of the creation of the charge over book debts within the same 21-day period, and acknowledgement received from the Irish Revenue Commissioners that they have received the notification and updated their records accordingly.

For a security assignment, to create a legal as opposed to an equitable security interest, a notice of the assignment of the bank account must be served on the account holding bank informing it that the account has been assigned. There is no timeframe within which this notice must be served. It is not necessary to require the bank to acknowledge the notice.

Fixed charges on bank accounts can be re-characterised as floating charges if the requisite prohibition on dealing with the account and the monies in the account is not adequately provided for in the security document notice to the account bank.

Under the Companies Act 2014, a charge created over an interest in cash or money credited to an account of a financial institution or any other deposits does not require registration with the Irish Companies Registration Office.

### **Intellectual property**

The most common types of intellectual property over which security is granted in Ireland include:

- patents;
- trade marks;
- copyright.

### **Common forms of security**

The most common forms of security granted over intellectual property are:

- legal mortgage;
- equitable mortgage;
- fixed or floating charge (depending on the notion of intellectual property).

For example, in relation to patents, a mortgage and/or charge may be taken. A charge can also be taken over any other form of intellectual property right.

### **Formalities**

Registration is required at the Irish Companies Registration Office within 21 days of creation. Registration can also be required with the following entities, where relevant:

- Irish Patents or Trade Marks Office;
- European Patent Organisation;
- The Patents Office;
- regional intellectual property offices such as the EPO or EUIPO, as appropriate.

Certain local laws may take precedence over Irish law when it comes to fulfilling registration requirements. In addition, note that both patents and trade marks can be registered, however copyright arises automatically and is not registered.

### Filing fees

The filing fees in respect of the various assets referred to above (ie, real estate, tangible movable property, financial instruments, claims and receivables, cash deposits, intellectual property) are set out in **4.2 Other Taxes, Duties, Charges or Tax Considerations**, above.

## 5.2 Floating Charges or Other Universal or Similar Security Interests

A floating charge over all present and future assets is commonly accepted by lenders as a form of security in Ireland.

## 5.3 Downstream, Upstream and Cross-stream Guarantees

It is possible for an Irish incorporated entity to provide such guarantees, provided that the provision of such a guarantee does not breach (i) any term or guarantee limit contained in its constitutional documents, (ii) Section 239 of the Companies Act 2014 (Prohibition of loans, etc, to directors and connected persons) or (iii) Section 82 of the Companies Act 2014 (Financial assistance). In respect of (i), a shareholder's special resolution will be required to be executed amending the guarantee limit contained in the constitutional documents and, together with a Form G1, filed in the Companies Registration Office. In respect of (ii) and (iii), the relevant obligor will need to conduct a Summary Approval Procedure ("SAP"). SAP is discussed below in more detail.

## 5.4 Restrictions on Target

Under Irish law, it is not lawful for a company to give any financial assistance for the purpose of an acquisition made or to be made by any person of any shares in that company, or, where the company is a subsidiary, in its holding company (Section 82 of the Companies Act 2014). The statutory prohibition is broadly drafted, with the main rationale being the preservation of a company's capital and shareholder/creditor protection.

Financial assistance may only be given in limited circumstances, such as where it falls within one of the legislative exceptions or where a SAP has been followed under Section 202 of the Companies Act 2014.

SAP replaces the "whitewash" procedure (involving the swearing of a statutory declaration by a majority of the directors of a company as to the solvency of the company)

that was previously available as an exception to a breach of Section 60 of the Companies Act 1963. SAP is a means by which companies can engage in certain restricted activities by ensuring that the persons those restrictions protect provide consent. There are seven "restricted activities" for which the SAP can be used to validate, including financial assistance. The directors' declaration no longer takes the form of a statutory declaration and therefore it does not need to be witnessed by a solicitor. In addition, the directors are required to set out the circumstances in which the transaction or arrangement is entered into and the benefit that will accrue to the company. Failure to deliver the directors' declaration to the Companies Registration Office within 21 days invalidates the activity in question.

The Companies Act 2014 has removed the requirement for an auditor's report from the whitewash procedure. This requirement had previously rendered the whitewash procedure unavailable in practice as auditors had been advised by their representative bodies not to give such reports.

The Companies Act 2014 has amended the previous regime in relation to financial assistance in that the prohibition against financial assistance has been narrowed, such that the giving of financial assistance is not prohibited if the acquisition of shares is not the principal purpose of the financial assistance. The Companies Act 2014 also provides for the giving of assistance for the purpose of acquiring the shares where it is only an incidental part of some larger purpose of the company, and the assistance is given in good faith and in the interests of the company.

## 5.5 Other Restrictions

The various restrictions (and related costs, if any) in relation to the granting of security or guarantees has been set out above.

## 5.6 Release of Typical Forms of Security

In the case of fixed security, the chargee executes a deed of release. In the case of floating security, the security giver can deal with the secured assets in the ordinary course of business until such time as the floating security crystallises into a fixed charge.

A Form C6 (full release) or Form C7 (partial release) needs to be registered with the Irish Companies Registration Office. This can be completed by the chargor – on receipt of this, the Companies Registration Office practice is to notify the person(s) entitled to the charge that a memorandum of satisfaction has been received for registration. The person(s) entitled to the charge then has 21 days to lodge an objection to the registration of the memorandum of satisfaction. If no objection is received, the satisfaction is registered and the security released. Alternatively, Form C6 or Form C7 can be completed by the chargee and no notification is necessary, and the satisfaction is simply registered.

## 5.7 Rules Governing the Priority of Competing Security Interests

### Contractual subordination

Contractual subordination is possible and common in Ireland. It occurs where the senior lender and the subordinated lender enter into an agreement as a result of which the subordinated lender agrees that the senior debt will be paid out in full before the subordinated lender receives the payment of the subordinated debt. The subordinated lender is contractually subordinated to the senior lender.

### Structural subordination

Structural subordination is also possible depending on the particular terms of a transaction. Structural subordination arises where one lender (the senior lender) lends to a company in a group of companies which is lower in the group structure than another lender (the subordinated lender).

### Inter-creditor arrangements

Inter-creditor arrangements are common in Ireland, depending on the nature of the particular transaction. Typical parties include a senior lender, a junior lender, inter-group lender and a borrower. Typical terms in an inter-creditor agreement include provisions as to priorities, standstill, representations and warranties, covenants and other standard clauses.

## 6. Enforcement

### 6.1 Circumstances in Which a Secured Lender Can Enforce Its Collateral

The circumstances in which a lender can enforce its loan, guarantee or security interest under Irish law are largely dependent on the terms of the underlying loan and as set out in the security documentation. Typical events of default that are often contained in loan agreements in Ireland might include:

- non-payment by the borrower of the principal amount or interest when due;
- non-compliance, such as a failure to observe the covenants or comply with the representations and warranties as set out in the loan agreement;
- cross-default;
- insolvency, such as the appointment of an examiner, receiver or liquidator, or the occurrence of some other specified insolvency event that may be affecting the borrower;
- material adverse change, such as a change in the financial condition of the borrower.

The normal methods of enforcement are for the security holder to appoint a receiver pursuant to the terms of the charge deed or for the charge-holder to become a mortgagee in possession of the charged asset. Generally speaking, it is not necessary to obtain a court order to appoint a receiver. In the case of real property, it may be necessary to obtain a

court order for possession if the security holder wishes to go into direct possession. Once possession is obtained it is not generally necessary to get a court order for sale.

Enforcement may be prevented by the appointment of an examiner to the company (that has created the security). The examiner is appointed by the court where a creditor, shareholder or the company petitions the court and the court is satisfied that there is a reasonable prospect that the appointment of an examiner will facilitate the company or part of the company's business surviving as a going concern.

The examiner is typically appointed for 70 days (but this may be extended to 100 days or in exceptional cases, longer), during which time the examiner will endeavour to put a scheme of arrangement in place where the company's creditors write off part of the amounts owing to them and the company continues to trade. Under the Companies Act 2014, the proposed examiner must be qualified for the purposes of Section 519 of the Companies Act 2014.

## 6.2 Foreign Law and Jurisdiction

### Choice of foreign law

The Rome I Regulation and Rome II Regulation have force of law in Ireland and the purpose of both regulations is not to harmonise the actual law of EU states that applies to contractual and non-contractual obligations respectively, but to harmonise the rules that determine what law applies to contractual and non-contractual disputes, with the aim of ensuring that the courts in the EU apply the same law to the same international dispute, thereby reducing the risk of forum shopping. The choice of foreign law as the governing law of the contract, will therefore be upheld by the courts of Ireland, provided that the relevant contractual or non-contractual obligation is within the scope of the relevant regulation.

### Submission to a foreign jurisdiction

Pursuant to the provisions of the Brussels Regulation Recast (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) the submission by an Irish natural person, or a company incorporated in Ireland to the jurisdiction of the courts of another EU Member State will be upheld in the Irish courts.

### Immunity

Waivers of immunity are effective under Irish law.

## 6.3 A Judgment Given by a Foreign Court

Provided that neither Article 45 (Refusal of recognition) or Article 46 (Refusal of enforcement) of the Brussels Regulation Recast is applicable, and subject to compliance with the provisions of the Brussels Regulation Recast, any judgment given by a foreign court or an arbitral award against a com-

pany would be recognised and enforced in Ireland, without a retrial of the merits of the case.

### 6.4 A Foreign Lender's Ability to Enforce Its Rights

There are no other matters under Irish law which might impact a foreign lender's ability to enforce its rights under a loan or security agreement.

## 7. Bankruptcy and Insolvency

### 7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

As mentioned above, there are two main company rescue procedures: examinership and company voluntary arrangements (CVAs).

Examinership is the main rescue procedure for companies nearing insolvency. The emphasis is on introducing a scheme of arrangement that assists the survival of the company as a going concern. To aid this process, the company is granted court protection so that, in effect, the rights of the creditors and other third parties against the company are frozen for a period of time (which is a maximum of 100 days, plus the time required by the court to make the decision). It is commenced by a petition to the court by any of the directors, creditors or shareholders.

The Companies (Miscellaneous Provisions) Act 2013 was signed into law on 24 December 2013 and has introduced what has become colloquially referred to as "examinership-lite". Section 2 of this act gives jurisdiction to the Circuit Court for examinership petitions for small private companies that meet certain criteria. Small private companies can apply directly to the Circuit Court to have an examiner appointed rather than applying to the High Court. This measure is intended to make examinership more accessible and cost-effective for small private companies. This procedure has been incorporated into Part 10 of the Companies Act 2014.

A CVA is a court-sanctioned procedure to enable a company in financial difficulty to reach a compromise or arrangement with its creditors and avoid liquidation. As a secured creditor is free to enforce its security while the CVA is pending, it is rarely used in practice.

### 7.2 Impact of Insolvency Processes

Security may be set aside in certain circumstances on the beginning of insolvency procedures. There will also be a stay of execution concerning the appointment of an examiner.

### 7.3 The Order Creditors Are Paid on Insolvency

The priority in which claims are paid is broadly as follows:

- remuneration, costs and expenses of an examiner sanctioned by the court under Section 554 of the Companies

Act 2014 are paid in full before any other claim, secured or unsecured, in any receivership or winding up of the company;

- fixed chargeholders (assets that are subject to a fixed charge belong to the security holder and not to the company and, accordingly, whether or not the liquidator deals with them is at the behest of the secured creditor);
- expenses certified by an examiner under Section 529 of the Companies Act 2014 rank after claims of fixed charge holders (Section 554(3), Companies Act 2014);
- costs and expenses of the winding up (priorities in relation to costs in a liquidation are set out in the Rules of the Supreme Court, Order 74, Rule 128).
- fees due to the liquidator;
- any claim under Section 16(2) of the Social Welfare (Consolidation) Act 1993 – any sum deducted by an employer from the remuneration of an employee in respect of an employment contribution due by the employer and unpaid by it does not form part of the assets of a limited company in a winding-up; a sum equal to that deducted is paid into the Social Insurance Fund ahead of all preferential debts (super-preferential claim);
- preferential debts – for example, rates and taxes, wages and salaries (Section 621, Companies Act 2014);
- floating charges, ranking in the order of their creation;
- unsecured debts, ranking *pari passu* (equally) with each other;
- deferred debts, ranking *pari passu* with each other.

Within each ranking, all claims in one category receive full payment before any remaining proceeds are distributed to creditors in the following category. When proceeds are insufficient to meet claims of one category in full, payments for that category are pro-rated.

Note that it is possible for the secured creditors to agree among themselves the order of application of the proceeds of the enforcement of their security so far as their secured claims are concerned.

### 7.4 Concept of Equitable Subordination

We do not have this concept in Ireland. It is almost exclusively a US doctrine, although it has been adopted in other jurisdictions in the EU in special situations.

### 7.5 Risk Areas for Lenders

The following are some potential risk areas from the lender's perspective, should a borrower, security provider or guarantor become insolvent.

#### Financial assistance

This was discussed above in **5.4 Restrictions on Target**.

#### Corporate benefit

The directors of an Irish company have a duty to act in what they consider to be the best interests of the company they direct. The transaction must be for the company's commer-

cial benefit and these requirements should be recorded in the board minutes of the company.

Directors must ask whether they can justify their company providing security for another company's obligations (in terms of corporate benefit). The risk of giving third party security must be balanced against the actual or potential rewards. A parent company might justify giving security for a subsidiary's borrowings (downstream security) because it will, directly or indirectly, hope to receive dividends from the subsidiary or will benefit from any enhanced value in that subsidiary as a shareholder.

Alternatively, a subsidiary might justify supporting its parent (upstream security) because of the support it receives from its parent in, for example, its marketing terms.

However, there are authorities to suggest that:

- security can still be given, even where there is insufficient corporate benefit (*Rolled Steel Products Limited v BSC* [1985] All ER 52; *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250) if:
  - (a) the company's shareholders unanimously agree; and
  - (b) the company is not insolvent at the time and does not become insolvent as a result of the transaction;
- a company can sacrifice its short-term interests for the good of the group (*Re PMPA Garage (Longmile) Limited* [1992] ILRM 337).

Additionally, the granting of security, and the liability incurred in respect of which the security was given, must be within the objective of the company as set out in its memorandum of association, otherwise it will be ultra vires and therefore void. However this is no longer a requirement for LTD companies under the Companies Act 2014, which has abolished the ultra vires doctrine in respect of such companies. The Companies Act 2014 also codifies most of directors' common law fiduciary duties.

It is now also a requirement for the directors of an Irish company to regard the interests of its employees (Section 224, Companies Act 2014). Under Section 1112 of the Companies Act 2014, there is an obligation on the directors of private limited companies to ensure that the person acting as company secretary has the necessary skills and resources to discharge his or her statutory duties.

Under the Companies Act 2014 the duties of a director have been codified to reflect common law principles. The principal fiduciary duties have been listed in Section 228 of the Companies Act 2014. A director is now required to make a statement acknowledging their duties under the law (Section 223, Companies Act 2014). Section 225 of the Companies Act 2014 requires a director to make a compliance statement when the company's balance sheet total for the year exceeds

EUR12.5 million and the amount of its turnover for the year exceeds EUR25 million.

## Loans to directors

A company is prohibited from providing security in favour of a person who makes a loan (or a quasi-loan) to, or enters into a credit transaction with, a director of that company or its holding company, or a person connected to that director (Section 239, Companies Act 2014). There are a number of exceptions, including where the loan (or quasi-loan) is made to, or credit transaction is entered into with, a member of the same group. These transactions can sometimes be summarily approved in certain cases, but caution must be exercised as the Summary Approval Procedure is limited and is not available in every instance.

## Usury

The outcome of the Breccia case was discussed above.

## Others

Other laws to consider include the following.

- Section 610 of the Companies Act 2014, which relates to fraudulent or reckless trading. Fraudulent trading essentially means the carrying on of the business of a company with intent to defraud creditors or for any fraudulent purpose.
- If, in the course of a winding up, it appears that any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose (fraudulent trading), that person may be exposed to personal liability for all or any part of the debts or other liabilities of the company. Fraudulent trading can attract both civil and criminal liability.
- Civil liability can be imposed on any person for "reckless trading" where it appears, in the course of winding up or examinership proceedings, that while an officer of a company he was knowingly a party to the carrying on of any business of the company in a reckless manner or was engaged in fraudulent trading. Such a person may also be held personally responsible for all or part of the debts and liabilities of the company.
- Section 238 of the Companies Act 2014. Subject to certain exceptions, Section 238 prohibits a company from acquiring assets from, or disposing of assets to, a director of the company, or of its holding company, or to a person connected with such a director, unless the company's shareholders and, in some cases, the shareholders of its holding company approve the acquisition or disposal. The consequences of a breach of Section 238 are that:
  - (a) the transaction is voidable at the instance of the company; and
  - (b) any director and, if applicable, person connected with him, who has entered into the transaction must account for any gain made by him and reimburse the company for any loss made by it.

### 8. Project Finance

#### 8.1 Introduction to Project Finance

Project finance as a technique has been used to finance large capital-intensive energy and infrastructure projects in Ireland since the early 1970s. Project finance is essentially a loan arrangement whereby finance is raised on a non-recourse, or limited recourse, basis by a special purpose vehicle, with the repayment of the financing dependent on the cash flows generated from the project post-completion. It is underpinned by a robust legal framework in which sponsors, lenders and government parties rely on both the appropriate level of regulation as well as certainty regarding contract law. Therefore, Ireland is a very mature environment for project finance; of late, it has attracted a large amount of interest from investors on both the sponsor and equity side.

Such financing is now being offered by non-bank lenders, thus making the availability of credit to fund such projects more accessible. Project finance in Ireland is not subject to any specific legal framework, but will primarily depend on the sector within which the project falls (there are different regulations for healthcare, educational, and highway construction, for example).

#### 8.2 Overview of Public-private Partnership Transactions

The public-private partnership (“PPP”) is the most widely used project finance infrastructure model in Ireland. Essentially, this involves a public service or asset being funded and operated by the private sector under a long-term concession granted by the relevant public authority.

The government or public authority may provide certain advantages to the project company by way of a guarantee, a grant or use of a state asset for free or less than market value. It should be noted that in certain circumstances, such arrangement may be prohibited by the State Aid Rules.

#### 8.3 Government Approvals, Taxes, Fees or Other Charges

The relevant government approvals, licences and statutory controls required for a project will depend on the specific nature of each project. The tax regime governing project finance transactions is generally the same as for other commercial loan transactions. Certain tax exemptions do apply in respect of certain sectors.

The transaction documents do not need to be registered or filed with any governmental body, save to the extent that such documents create security. In that instance, the relevant security filings will need to be made (as outlined above). The governing law of the transaction documents will, in the vast majority of cases, be the laws of Ireland – however, depending on who the lending pool are, the transaction documents may be governed by English law.

#### 8.4 The Responsible Government Body

With respect to natural resources, the Natural Resources Section (“NRS”) of the Department of Communications, Climate Action & Environment is the relevant authority in Ireland. There is specific primary legislation in Ireland regarding mining, including the Planning and Development Act 2000, the Minerals Development Act 1940 and the Minerals Development Act 1979. As regards oil and gas, the primary legislation is the Petroleum and Other Minerals Development Act 1960, the National Oil Reserves Act 2007 and the Petroleum (Exploration and Extraction) Safety Act 2015.

#### 8.5 The Main Issues When Structuring Deals

A project finance deal will normally involve a number of lenders that provide funds to the project. Any potential issues which may arise will be dependent on the type of project that is being financed, so any risk should be assessed and allocated between the parties involved.

The project company will be required to adhere to both Irish and EU laws and regulations (including competition law) which are specific to the sector in which the project is centred. There are no particular restrictions on foreign investment in Ireland; restrictions may apply to foreign investors in relation to certain regulated sectors, but this would need to be assessed on a case-by-case basis.

#### 8.6 Typical Financing Sources and Structures for Project Financings

The typical source of financing for PPPs in Ireland would be from bank financing and bond issuances.

#### 8.7 The Acquisition and Export of Natural Resources

As mentioned above, the NRS is the relevant authority in Ireland which deals with natural resources and any policies relating to the acquisition and export of natural resources. The objective of the NRS is to sustainably exploit and manage Ireland inland fisheries, geological resources and oil and gas reserves. Any potential issues or considerations would need to be assessed on the basis of which natural resource is being extracted and comply with the primary legislation outlined in **8.4 The Responsible Government Body**, above.

#### 8.8 Environmental, Health and Safety Laws

The Health and Safety Authority is the main body in Ireland responsible for health and safety laws. The primary legislation would be the Safety, Health and Welfare Act 2005 (as amended from time to time), the Chemicals Acts 2008 and 2010, the Safety Health and Welfare (Offshore Installations) Act 1987, the Safety in Industry Act 1980, the Factories Act 1955 and the Dangerous Substances Act 1979 and 1972. The Health and Safety Authority also ensure that various regulations and orders are adhered to and have issued various codes of practice (for example, in relation to chemical agents, working on roads, safety in roof work).

As regards the environment, the national statutory body in Ireland is the Environmental Protection Agency (“EPA”). The EPA is an independent public body established under the Environmental Protection Agency Act, 1992. The other main instruments from which the EPA derives its mandate are the Waste Management Act 1996, the Protection of the Environment Act 2003 and the Radiological Protection (Miscellaneous Provisions) Act 2014.

## 9. Islamic Finance

### 9.1 Overview of the Development of Islamic Finance

The Irish government continues to build on the steps contained in the Finance Act 2010 to support and provide equivalent taxation treatment for Shari’a-compliant transactions. Implementation of the International Financial Services Strategy (IFS 2020) launched in 2015, of which Islamic finance is a part, is well underway with specialised subcommittees established and due to report to the government shortly on the progress and implementation of the action points. In April 2018, Matheson advised on the first issuance and listing of a Sukuk bond that complies with the Shari’a financing provisions of Irish tax law. The Sukuk bond, issued by an Irish special purpose company, marks the first Islamic finance issuance pursuant to Section 267N of the Irish Taxes Consolidation Act 1997 (as amended) and raised over USD150 million.

### 9.2 Regulatory and Tax Framework for the Provision of Islamic Finance

In 2010, Irish tax legislation was amended to introduce the concept of “specified financial transactions” into Irish law. The amendments, set out in Section 267N of the Irish Taxes Consolidation Act 1997 (as amended), were intended to facilitate financial transactions structured to be Shari’a-compliant, thereby encouraging the use of Irish companies when structuring cross-border Islamic finance issuances.

### 9.3 Main Shari’a-compliant Products

The Irish Government and the Central Bank of Ireland have not yet created a framework in relation to the use of Shari’a-compliant products and transactions.

### 9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

The Irish Government and the Central Bank of Ireland have not yet created a framework in relation to the use of Shari’a-compliant products and transactions.

### 9.5 Recent Notable Cases

There has been no substantial case law on this matter in Ireland of which we are aware.

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