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# Banking & Finance 2021

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# ISLE OF MAN

## Law and Practice

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## **1. LOAN MARKET PANORAMA**

### **1.1 Impact of Regulatory Environment and Economic Cycles**

Whilst the Manx economy is not immune to global economic cycles, in recent years it has performed better than a number of the world's largest economies in terms of GDP growth (including many of those in the G7). GDP in the Island increased by 3.2% during the 2018/2019 financial year (which is the latest figure currently available), although recent events outside the Island's control, as highlighted below will have affected the Island's GDP adversely since 2019. Sectors such as IT, e-gaming and financial services have been significant drivers to such domestic economic growth, and are likely to remain so for the foreseeable future.

However, the Isle of Man has been faced with many of the same challenges and uncertainties that have been adversely affecting the performance of the UK economy (which is its largest trading partner) and other advanced economies. These include, dealing with the consequences of Brexit and, of course, dealing with the impact and consequences of the COVID-19 pandemic, increasing political uncertainty in the UK and slowing global growth. Spending by the Isle of Man government and other initiatives aimed at boosting local investment and enterprise (such as measures designed to ameliorate the effects of the COVID-19 lockdowns on individuals and businesses and providing incentives to hi-tech companies and financial institutions to locate on the Island) have helped to counteract such wider headwinds, maintain a measure of economic growth and protect local employment opportunities.

#### **The Isle of Man and the EU**

The Isle of Man is not and has never been a member state or an associate member of the

European Union (EU), and consequently the Isle of Man does not and has never made any financial contribution to the EU. From 1 January 2021 the UK departed from the EU. Prior to this date the Island enjoyed free access to EU markets for goods and products by virtue of Protocol 3 the UK Treaty of Accession. Currently Isle of Man businesses wishing to trade with the EU have to surmount the same additional hurdles as UK-based businesses. With regard to VAT, although the Isle of Man and the UK form a common VAT area, since 1 January 2021 the UK and the Isle of Man have been outside the EU common VAT area and so the effect of EU rules mean that trade between the UK/Isle of Man common VAT area and the EU common VAT area is subject to VAT.

#### **The Isle of Man and the UK**

The Isle of Man continues to be served by all of the main UK clearing banks and, in addition, has recently seen the emergence of other international banks and alternative lenders (see **1.4 Alternative Credit Providers**). In 2016, the Isle of Man introduced the Alternative Banking Regime (ABR) framework to provide new banking opportunities for banking businesses on the Isle of Man.

#### **Transactions and Compliance**

The number of transactions in the Isle of Man loan market over the last year has probably not been as high as in previous years due to the impact of the COVID-19 pandemic. The International Stock Exchange (TISE) has established an Isle of Man office and seeks to attract more listings from "trading companies". Among other things, such a listing potentially provides Isle of Man entities with access to the high-yield debt market (see **1.3 The High-Yield Market**).

In keeping with many other well-regulated jurisdictions, banks in the Island face increasing compliance responsibilities, with the Isle of

Man Financial Services Authority (FSA) and the Isle of Man government being fully committed to demonstrating a high degree of compliance with the applicable international standards relating to Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) issues.

## Lending

The majority of lending to Isle of Man structures is made by UK, Irish and other European banks, and by alternative lenders (particularly in respect of commercial property), so factors that affect new loan origination in such markets are of direct relevance to Manx borrowers. For example, it is common for lending by UK-based lenders to corporate borrowers in this jurisdiction to be based on Loan Market Association (LMA) form – and English law governed – loan documents.

### 1.2 Impact of the COVID-19 Pandemic

The COVID-19 pandemic and its impact upon the global economy has affected the loan market in the Isle of Man, but perhaps to a lesser extent than in larger countries.

### 1.3 The High-Yield Market

There have not been many examples of the high-yield market competing with bank lending to finance assets held through structures established in this jurisdiction. In this regard, in recent years the TISE has seen high-yield as an area of notable growth (eg, 59 high-yield bonds were listed on the TISE during the first half of 2021).

### 1.4 Alternative Credit Providers

In recent years, the local loan market has seen an increase in alternative credit providers, to both individual and corporate borrowers. Such providers of new finance include P2P lenders who have established Isle of Man operations in order to offer an alternative to traditional bank lending models.

Whilst corporate lending in the Island (ie, one corporate entity lending to another) is not regulated by the FSA per se (compared to, say, “deposit taking”), all alternative credit providers in this jurisdiction need to register with the FSA under the Isle of Man Designated Business Act 2015 (so are subject to the Island’s AML/CFT Code), and any providers also offering loans to individuals and/or sole traders would also need to register with the Isle of Man Office of Fair Trading (OFT) under the Isle of Man Moneylenders Act 1991.

In our experience, debt funds, pension funds, insurance companies and others who specialise in commercial real estate lending, and who may utilise the services of a third-party servicer to provide general loan administration and facility agent and security agent services, now offer real competition to traditional bank lenders. This is especially so for smaller to medium-sized transactions (ie, deals below GBP50 million).

### 1.5 Banking and Finance Techniques

Lenders are increasingly focusing on the robustness of their credit underwriting practices in relation to both refinancing existing, and providing new credit facilities. This is partly manifesting itself into a clearer understanding of their position as a secured creditor and their potential restructuring and enforcement options. In this regard, the Isle of Man is a relatively creditor-friendly jurisdiction, which provides the investor base with well-used remedies in an enforcement scenario.

### 1.6 Legal, Tax, Regulatory or Other Developments

As previously stated in **1.4 Alternative Credit Providers**, lending by non-bank entities to either corporates or individuals is currently not regulated by the FSA in the Isle of Man. This is in contrast to other activities such as deposit taking, money transmission services and the operation

of a credit union, which are all regulated activities for the purposes of the Island's financial services legislation and, consequently, require a licence from the FSA if they are carried on in or from the Isle of Man (unless an exemption or exclusion applies).

Whilst a credit provider lending to individuals and/or sole traders in the Island must be registered with the OFT pursuant to the provisions of the Isle of Man Moneylenders Act 1991, and there is currently no equivalent in this jurisdiction of the High Net Worth Individual (HNWI) exemption that exists in the UK in respect of certain consumer credit agreements, this does not subject such an entity to any equivalent regulatory oversight. However, such loan providers will be "designated businesses" that are overseen by the FSA for compliance with the Island's AML/CFT Code. As far as is known, there is no initiative by the Isle of Man government to regulate such non-bank lending.

### **Categories of Banking Licence**

In time, the ABR is expected to have a positive impact on the depth of the loan market in the Isle of Man. Pursuant to the ABR, the Island now offers three alternative categories of banking licence: Class 1(1), Class 1(2) and Class 1(3). The former was previously the only banking licence available on the Island and is a full deposit-taking licence, which permits a holder to accept deposits from any person.

There are currently approximately ten holders of Class 1(1) licences, including large retail operations such as Lloyds, Barclays, RBSI and HSBC. A Class 1(2) licence permits the holder to accept deposits from restricted depositors, such as corporates, trusts and high net worth individuals meeting certain criteria. In contrast to Class 1(1), Class 1(2) applicants are not required to be part of an established banking group. A Class 1(3) licence is also aimed at attracting new

overseas banks that wish to establish a representative office in this jurisdiction. The activities of a Class 1(3) licence holder are restricted, and a representative office may not carry on deposit-taking business in the Island.

The FSA keeps constantly under review the Island's legislation pertaining to itself and its regulatory functions. However, it does not appear as though any of these reviews will affect the loan market in this jurisdiction.

### **1.7 Developments in Environmental, Social and Governance (ESG) or Sustainability Lending**

In the Isle of Man, as elsewhere, sustainable finance and green lending are hot topics as more borrowers and lenders recognise the potential benefits of green and sustainability-linked loan products for their businesses. However, as most lending to Manx lenders is driven by off-Island lenders it will likely be the case that the drive to sustainability linked loans to Isle of Man borrowers will be the result of changes emanating from the metropolitan jurisdictions.

## **2. AUTHORISATION**

### **2.1 Authorisation to Provide Financing to a Company**

Banks that are also undertaking "full deposit-taking" activities in or from the Isle of Man are required to hold a Class 1(1) licence issued by the FSA. In accordance with its stated licensing policy, the FSA will not issue such a licence to a new start-up Class 1(1) deposit-taking business that is not part of an established group of companies with an existing deposit-taking business within that group, due to the inherent risks to depositors. However, a new start-up Class 1(2) deposit-taking business may be permitted by the FSA, if it is part of a substantial, established group (whether based outside or in the Island),

and subject to the relevant competency and experience of the proposed key persons, and adequate financial resources being available to support the establishment of its business.

As previously stated, the requirements for a non-bank lender (ie, one that is not accepting deposits or conducting investment business in this jurisdiction) will depend on the lending activity being undertaken. If they are providing finance to a Manx company (ie, one incorporated in this jurisdiction), they will not need to be registered with the OFT (as there is an express exemption from the need to do so). However, if they were to provide finance to an individual resident or sole trader operating in this jurisdiction, regardless of the quantum of such financing and/or the worth of the individual or sole trader concerned, they would first need to register as a money lender with the OFT.

## 3. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

### 3.1 Restrictions on Foreign Lenders Granting Loans

There are no Isle of Man law restrictions that prevent a foreign lender from making a loan to a company incorporated in this jurisdiction (whether such company is governed by the older Manx companies legislation, contained in the Isle of Man Companies Acts 1931-2004, or by the more modern regime principally set out in the Companies Act 2006). Such a lender will not need to be licensed, qualified or otherwise entitled to carry on business in, or otherwise registered with any governmental or other authority of, the Isle of Man.

There are, however, Isle of Man law restrictions on foreign lenders granting loans to individuals

and/or sole traders (see **1.6 Legal, Tax, Regulatory or Other Developments**).

### 3.2 Restrictions on Foreign Lenders Granting Security

There are no statutory restrictions under Manx law that would prevent a corporate borrower in the Isle of Man granting security or guarantees to foreign lenders, although with regard to the latter, similar considerations of corporate benefit will apply as they do under English law, particularly where a borrower is giving an “upstream” or “cross-stream” guarantee to a lender (whether domestic or foreign).

### 3.3 Restrictions and Controls on Foreign Currency Exchange

There are no foreign currency restrictions or controls in existence in this jurisdiction in relation to the exchange and remittance of sterling or any other currency from the Isle of Man, nor is there any legislation in place whereby such controls may be imposed.

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

Banks that are licensed by the FSA (eg, as full or restricted deposit takers) and other lenders regulated by the OFT are required by Manx law to ensure that the proceeds of loans made by them are not applied in a manner that would contravene Manx law in relation to matters such as financial sanctions. Financial sanctions are prohibitions and restrictions put in place by the United Nations, the EU, the UK and the Isle of Man, with the aim of maintaining or restoring international peace and security. Such sanctions can, among other things, limit the provision of certain financial services to specific individuals or entities, and also target those persons and organisations involved in international terrorism. The Isle of Man government’s policy with regard to financial sanctions is to maintain the lists of



those affected so that they correspond to those adopted by the UK.

As previously mentioned, much of the lending to Isle of Man corporates is by UK, Irish and other European banks, which in each case will need to comply with their own domestic regulatory obligations regarding financial sanctions, anti-bribery and corruption and AML/CFT regulations.

### **3.5 Agent and Trust Concepts**

Both agent and trust concepts are recognised in the Isle of Man in substantially the same way as they are under English law. As already touched upon, bank financing to an Isle of Man corporate (particularly one holding UK commercial property) often involves a UK bank utilising LMA form English law governed loan documents, although some of the related security documents will usually be governed by Manx law (eg, charges over shares in Manx obligors, charges over local bank accounts and assignments of subordinated intra-group debt governed by Manx law). Pursuant to such finance documents, there will typically be provisions whereby a facility agent and a security agent/trustee will act, and hold security, on behalf of, amongst others, the lender(s) and any hedge counterparty. To the extent such agency and trust arrangements are established under – and governed by – English law, there is no reason why they would not be recognised and enforced by the Manx courts. Consequently, there are no structures commonly used in this jurisdiction as an alternative to the trust structure.

### **3.6 Loan Transfer Mechanisms**

Such mechanisms will be set out in the facility agreement, which will usually provide that an existing lender may assign any of its rights or transfer by novation any of its rights and obligations to a new lender (an LMA style loan agreement will include schedules containing a form of transfer certificate and assignment agree-

ment). Assignments and novations under Manx law operate in the same way as under English law (with regard to the former, the relevant Manx statute governing assignments is based on section 25(6) of the Supreme Court of Judicature Act 1873 in England, which is the forerunner of Section 136 of the Law of Property Act 1925 in England). For the sake of completeness, in addition to such an assignment or novation, the commercial risk of an existing loan could be transferred to a new lender by means of sub-participating the same or entering into certain types of derivative contract (including a total return swap).

Likewise, in respect of a facility agreement governed by Isle of Man law, the main transfer methods would be assignment and novation.

As the transferee of all or part of the existing loan to a Manx corporate borrower, the new lender will typically become a “secured party” for the purposes of the finance documents and, as a result, benefit from the security (including any Manx law security) granted to the security agent/trustee, which is being held on trust for such parties. Therefore, at least in relation to any Manx law governed security, there is no question of new security having to be granted, thereby resetting hardening periods and jeopardising the priority of security.

### **3.7 Debt Buy-Back**

Under English law LMA syndicated loan agreements, it is possible for the option of debt buy-back by the borrower or sponsor to be included. As a matter of Manx law, an Isle of Man-based borrower and a lender (whether located inside or outside of this jurisdiction) are free to contractually agree such buy-back terms in their loan agreements.

## 3.8 Public Acquisition Finance

The City Code on Takeovers and Mergers (the “City Code”) is issued and enforced by the Panel on Takeovers and Mergers (the “Panel”), and applies to all offers for companies that have their registered offices in either the UK, the Channel Islands or the Isle of Man if, among other things, any of their securities are admitted to trading on a regulated market (eg, the Main Market of the LSE or the TISE) or a multilateral trading facility (eg, AIM) in the UK, or on any stock exchange in the Channel Islands or the Isle of Man.

The City Code is based upon six General Principles, which are applied by the Panel in accordance with their spirit in order to achieve their underlying purpose, and also contains a series of rules. Pursuant to General Principle 5, as reinforced by Rule 2.7(a), an offeror must only publicly announce a bid for a Manx company to which the City Code applies “after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.” In light of these “certain funds” rules, the Panel does not normally allow financing conditions to be a feature of an offer for a Manx company.

## 4. TAX

### 4.1 Withholding Tax

All payments to be made by a Manx borrower to a corporate lender (whether located inside or outside of this jurisdiction), including, without limitation, payments of principal and interest, may be made without deduction of any Isle of Man withholding tax.

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

There are no stamp, registration or other duties or fees payable, or other tax considerations, in

the Isle of Man that apply to lenders making loans to (or taking security and guarantees from) corporate entities in this jurisdiction, other than security filing fees payable to the Isle of Man Companies Registry (the “Registry”) (currently GBP25 per security document) and, where security is being taken over real property situated in the Island, certain fees payable to the Isle of Man Land Registry (in the case of registered land) or the Deeds Registry (in the case of unregistered land) (currently GBP40 per security document).

## 4.3 Usury Laws

There are no usury laws or other rules applicable in the Isle of Man that may restrict the amount of interest a secured creditor can charge.

## 5. GUARANTEES AND SECURITY

### 5.1 Assets and Forms of Security

The assets typically available as collateral to secured lenders in the Isle of Man are essentially the same as those in most other common law jurisdictions. With the exception of security over real property situated in the Island, the form of Manx law security over such assets is substantially similar to the corresponding form under English law.

#### Perfecting a Security Interest

The steps necessary to perfect a security interest depend upon on a number of factors, including the type of security interest created (mortgage, charge, pledge, contractual lien) and the nature and/or location of the assets in which such security interest is created. The only relevant perfection requirement under the laws of this jurisdiction, in relation to collateral other than real property situated in the Island or an Isle of Man registered ship or aircraft, is the requirement under the Isle of Man Companies Act 1931 (the “Companies Act 1931”) or the Isle



of Man Companies Act 2006 (the “Companies Act 2006”) (as the case may be) to register certain types of charge granted by an Isle of Man company.

In relation to collateral providers that are Isle of Man companies incorporated under the Isle of Man Companies Acts 1931-2004, certain kinds of charges are registrable under Sections 79-92 of the Companies Act 1931 (the “1931 Registration Provisions”). However, the 1931 Registration Provisions will only be relevant if the charger is legally and beneficially interested in the property that is the subject of the security interest.

The basic requirement of the 1931 Registration Provisions is that, if a charge falls within at least one of the categories specified in Section 79 of the Companies Act 1931 (and subject to certain other conditions specified below), then “prescribed particulars” of the charge, and the charging instrument itself (or a certified true copy thereof), must be delivered to the Registry within one month of creation (or a slightly longer period in certain circumstances), together with the prescribed filing fee (currently GBP25).

The consequences of failure to present a registrable charge to the Registry for registration within one month after the creation of the charge are that:

- the charge is void against a liquidator of the Manx company creating the charge and against any creditor of that company; and
- the liabilities secured by the charge become immediately payable.

In addition, failure to register a registrable charge is a criminal offence under the Companies Act 1931. The 1931 Registration Provisions apply regardless of whether or not the charged assets are located in the Isle of Man and also apply to a foreign company, which should, pursuant to the

provisions of the Isle of Man Foreign Companies Act 2014 or previously Part XI of the Companies Act 1931, have registered its branch in this jurisdiction, if the charged assets are located in this jurisdiction.

## **Collateral Providers**

In relation to collateral providers that are Isle of Man companies incorporated under the Companies Act 2006, certain kinds of charges are registrable under Sections 136-142 of the Companies Act 2006 (the “2006 Registration Provisions”), but again only where the charged property is legally and beneficially owned by the company.

The basic requirement of the 2006 Registration Provisions is that “prescribed particulars” of the charge should be delivered to the Isle of Man Registrar of Companies (the “Registrar”) within one month of creation, together with the prescribed filing fee (currently GBP25). Again, these provisions apply to a Manx security provider incorporated under the Companies Act 2006, regardless of where the assets being charged are located.

The consequence of failure to present a registrable charge to the Registrar for registration within one month after the creation of the charge is that the charge is void against a liquidator of the company creating the charge and against any creditor of the company. Where a Manx company creates a charge but fails to register the application, late registration of the charge may be made to the Registrar at any time prior to the commencement of the winding up of that company. However, the rights of the secured lender under a late registered charge are without prejudice to the rights of any party acquired during the period between the date of creation of the charge and the date of its registration.

In relation to security created over real property situated in the Isle of Man, further registrations

will be required at the Isle of Man Land Registry (in the case of registered land) or the Deeds Registry (in the case of unregistered land).

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

Manx law permits floating charges, which operate in substantially the same way as under English law.

## 5.3 Downstream, Upstream and Cross-Stream Guarantees

It is possible for entities in the Isle of Man to give downstream, upstream and cross stream guarantees. The board of directors of a Manx company must act at all times in the best interests of its shareholders as a whole (both present and future), and thereafter in the interests of its creditors. As a consequence, issues of corporate benefit (which will be a question of fact to be determined by a company's board of directors exercising their commercial judgment) will be relevant where upstream and cross stream guarantees are being provided to lenders. In such circumstances, it is usual for a lender to also require a shareholder resolution to be passed approving the giving of such a guarantee, which will put the matter beyond all doubt, provided the Manx company in question is and will remain solvent at the relevant time.

## 5.4 Restrictions on Target

For the type of Manx company incorporated under the Companies Act 2006 (ie, those companies whose registration number ends in the suffix "V"), there is no distinction made between private and public companies and no prohibition on financial assistance at all (although such a company would need to be able to pass a prescribed solvency test if, inter alia, it intended to incur a debt to or for the benefit of a shareholder in relation to shares held by such shareholder). For the other type of Manx company incorporated under the Companies Act 1931 and subse-

quent Acts (ie, those companies whose number ends in the suffix "C"), the only prohibited financial assistance is:

- that provided by a public company or a subsidiary for the acquisition of shares in the public company; or
- that provided by a public company for the acquisition of shares in its private holding company.

Any Manx public company and each of its officers who contravene such statutory prohibitions commits a criminal offence under the Isle of Man Companies Act 1992.

## 5.5 Other Restrictions

There are no general restrictions or significant costs in connection with the grant of security or guarantees by corporate entities in this jurisdiction. For the sake of completeness, certain entities regulated by the FSA may be required to obtain its consent or notify it before creating a charge on any of its assets.

## 5.6 Release of Typical Forms of Security

This is usually done by way of a deed of release in a similar form to the type that would be used where English law security was being released. The one exception to this is where security over real property in the Island is being released, in which case the form of required wording is different (in addition to which, appropriate forms will need to be registered at the Isle of Man Land Registry for registered land, or at the Deeds Registry for unregistered land). In all cases where the security provider is a Manx company, the release of security will usually be recorded at the Registry (there is no set time limit within which this has to happen, and there is currently a GBP10 filing fee payable per security document).

## 5.7 Rules Governing the Priority of Competing Security Interests

The Isle of Man laws relating to priorities between secured creditors are complex, but the basic principles are as follows:

- secured claims take precedence over unsecured claims; and
- secured claims take priority in the order in which the security interest was created.

Therefore, Manx common law rules (not the order of registration) generally determine the priority of competing Manx law security interests. In a similar way to English law, the priority of competing fixed and floating security interests is usually determined based on the “first in time rule” mentioned above, provided that such security was registered within the applicable one-month filing period. A fixed charge (or mortgage) will rank ahead of a floating charge, except when the fixed charge (or mortgage) is obtained after the creation of a floating charge and the holder of the fixed charge (or mortgage) obtained it knowing that it violated the terms of the existing floating charge.

Where there is competition between a “legal” security interest and an “equitable” security interest, the legal security interest will take precedence over the equitable security interest irrespective of the time of creation, provided the legal security interest was taken without knowledge of the equitable security interest, and subject also to any registration requirements. Put briefly, a “legal” security interest, in this context, is one where the secured creditor has a security interest coupled with legal title to the charged assets (for example, it is registered as the owner of registered securities) while an “equitable” security interest is one where the secured creditor has a security interest without legal title (which, instead, continues to be held

by the collateral provider or is held by a third party, such as a nominee or bare trustee).

### Exceptions and Qualifications

There are a number of exceptions and qualifications to the above general rules, including where the security is granted over an asset requiring registration in a specialist register. Examples include real estate situated in the Island, intellectual property owned by Manx companies but registered in the UK (eg, trade marks), and ships and aircraft registered in this jurisdiction. The priority of such security will generally be determined by the order of registration in the applicable specialist register. With respect to the priority of mortgages and fixed charges over real estate, the rules are particularly complex and differ for registered and unregistered land.

Contractual subordination is used in this jurisdiction, usually by all relevant parties entering into an intercreditor agreement or deed of priorities, and there is no requirement for such documents to be governed by Manx law. In the usual course, there is no reason why contractual subordination provisions would not survive the insolvency of a borrower incorporated in the Isle of Man.

## 6. ENFORCEMENT

### 6.1 Enforcement of Collateral by Secured Lenders

As mentioned in greater detail in **7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency**, the only two insolvency proceedings a Manx company may be subject to are liquidation and receivership. With regard to the latter, the Isle of Man has no legislative provisions regarding the appointment and powers of receivers, its law being essentially that of England before the introduction of the Insolvency Act 1986 and the Enterprise Act 2002.

## Appointing a Receiver

The most common method of enforcing security in the Isle of Man is to appoint a receiver, who must be an individual but does not need to be a licensed insolvency practitioner, or for a secured lender to itself exercise a power of sale. The power to appoint a receiver, and any powers that such a receiver may exercise, will be provided in the relevant Manx law security documentation, and are therefore matters of contract that do not require any recourse to the local courts. Any such charge over the assets of a Manx company should therefore have detailed and carefully considered provisions concerning, among other things, the circumstances in which security can be enforced and the powers granted to both the secured creditor and any receiver appointed by him. Under Manx law (save in respect of mortgages registered over Isle of Man ships), there are no statutory powers of sale a secured lender can avail themselves of, although a public official called a coroner does have such powers.

Well-drafted Manx law security documentation will provide that any receiver appointed by the secured lender will be the agent of the chargor (who will therefore be solely responsible for his acts). This position makes the Isle of Man a very creditor-friendly jurisdiction (certainly compared to most civil law jurisdictions), as it is possible, for example, for a floating charge holder to appoint a receiver out of court over the whole of a company's property with immediate effect, and for its interests to be given primacy over those of both the company and any unsecured creditors.

The appointment of a receiver over a Manx company by a secured creditor does not prevent the Isle of Man courts from making a winding up order in respect of that company, but the receivership of that company continues and the receiver's management of the charged assets takes precedence over that of the liquidator. Conversely, a winding up order would not pre-

vent a receiver being appointed, although court permission would be required to take possession of the charged assets, as any liquidator in post is an officer of the court and would be already in possession (although such permission should be granted by the Isle of Man court "as of right"). There is no public body in the Isle of Man that is available to act as liquidator, akin to the Insolvency Service in the UK. There are occasions when the FSA deems that a liquidation of a Manx company is in the public interest and, in such circumstances, such a liquidation could conceivably be funded (at least in part) out of public funds. If the Manx company is insolvent and a creditor petitions the Isle of Man court for its winding up, it is usual for a potential liquidator to require the petitioning creditor to underwrite the ordinary costs of the liquidation until any unsecured/free assets of the company can be sold.

## Other Options

If the applicable Manx law security documentation does not provide for the appointment of a receiver, a secured lender may sue for their debt and place the matter in the hands of a coroner (who is a court officer), who will arrest and sell the charged property (usually land in the Island) at a public auction and without a reserve. One advantage of a sale by the coroner is that it "overreaches" any subsequent charges on the charged property (whilst a sale by a receiver does not).

## 6.2 Foreign Law and Jurisdiction

The Isle of Man Contracts (Applicable Law) Act 1992 (the "Contracts Act") has been passed but not all of its provisions have yet been brought into force. When operative, the Contracts Act will incorporate Article 3 of the Rome Convention into Isle of Man law, bringing it into line with English provisions. Currently, however, there are no plans to bring into force the provisions of the Contracts Act, which would incorporate

the Rome Convention into Isle of Man law, so the Rome Convention does not apply in the Isle of Man.

At present, therefore, choice of law in a contract is governed by common law principles. A bona fide express choice of governing law by the parties to any contract will be valid and enforceable, although the parties' choice of law may, in certain circumstances, be limited – for example, as a result of the application of mandatory rules of a country, if at the time the contract is entered into all the other elements of the contract are connected with that one country. The parties' choice may also be limited by certain mandatory rules of the forum jurisdiction, and if the application of a rule of foreign law would be manifestly incompatible with Isle of Man public policy.

Notwithstanding any provisions of the contract containing an agreement to the effect that the Isle of Man courts are an appropriate forum or purporting to permit concurrent proceedings, in certain circumstances an Isle of Man court may favourably entertain an application for a stay of proceedings on the basis that an Isle of Man court is not the appropriate forum, and may stay or dismiss proceedings if concurrent proceedings are being brought elsewhere and a court or forum other than the Isle of Man courts is the appropriate forum; an Isle of Man court in certain circumstances may favourably entertain an application for proceedings to be held before it on the basis that it is the appropriate forum.

Any foreign state may choose to waive its right to sovereign immunity by submitting to the jurisdiction of the Isle of Man courts.

### **6.3 A Judgment Given by a Foreign Court**

A foreign judgment would not be enforced by an Isle of Man court without a retrial or re-examination of the matters thereby adjudicated

upon if such judgment were obtained by fraud or in a manner contrary to natural justice, or if the enforcement thereof were contrary to Isle of Man public policy; such enforcement may also be withheld if the relevant judgment were not a final and conclusive money judgment, being both unrelated to taxation and free of conflict with any other judgment in the same cause of action.

The Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 makes provision for the enforcement in the Island of certain judgments given in superior courts of those jurisdictions that give reciprocal treatment to judgments of the Manx courts. Presently, qualifying judgments of the higher courts of the United Kingdom, Guernsey, Jersey, the Netherlands, the Netherlands Antilles, Israel, Italy and Suriname may be enforced in the Isle of Man.

In order to qualify for enforcement under the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968, the correct procedures under the laws of the Isle of Man (including registration of the judgment with the Isle of Man courts) must be complied with, and the judgment of the foreign superior court must be:

- for a money judgment (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty);
- final and conclusive;
- wholly unsatisfied (or if partially satisfied, only for the balance of the judgment debt); and
- enforceable by execution in the originating country.

There are a number of grounds upon which an application to set aside registration is likely to be successful.

Under Section 4 of the Civil Jurisdiction Act 2001, judgements of the County Courts of England and Wales are potentially enforceable, subject to the provisions of the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968.

## **The New York Convention in Relation to Arbitral Awards**

Subject to compliance with the 10 June 1958 New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards, an arbitral award obtained against the company in an arbitration proceeding and a judgment obtained against a Manx company in an action based on or in connection with the relevant document will be enforced by the Isle of Man courts without re-examination or re-litigation of the matters thereby adjudicated. An award made in pursuance of an arbitration agreement in a foreign country (being a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958) may be enforced with the leave of the Isle of Man court, and a judgment entered in terms of the award and such leave shall not be refused, except in certain prescribed circumstances.

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

Where obligations under a document are to be performed in a jurisdiction outside the Isle of Man, they may not be enforceable in the Isle of Man courts to the extent that their performance would be illegal under the laws of that other jurisdiction or contrary to the public policy of and in the Isle of Man.

Whether or not a valid security interest has been created in respect of an asset will normally be determined in accordance with the *lex situs* of the asset and, to the extent that the *lex situs* is other than the laws of the Isle of Man, no opinion is expressed thereto. Any provision of a loan or

security document that purports to permit the retention of security after the discharge of the liabilities secured thereby may not be effective as a matter of Isle of Man law.

The validity, performance and enforcement of the documents may be limited by laws relating to bankruptcy, insolvency, liquidation and reorganisation, or by similar laws of general application relating to or affecting the rights of creditors, including those concerning preferential creditors under the Preferential Payments Act 1908 (as amended by the Preferential Payments (Amendment) Act 2016). Enforcement may be limited by general principles of equity; equitable remedies are available only at the discretion of the court, and are not available where damages are considered to be an adequate remedy.

## **7. BANKRUPTCY AND INSOLVENCY**

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

The term “insolvency” is a generic one and has no specific meaning in Isle of Man legislation, which is not consolidated, but spread across a series of Acts of Tynwald. There is no equivalent in Isle of Man law to the UK’s Law of Property Act 1925 or the Insolvency Act 1986 (as amended by the Enterprise Act 2002). Manx law does not provide for many of the insolvency procedures that exist in England, and in particular does not recognise the concept of an administrator or an administrative receiver, nor provide for company voluntary arrangements. The only insolvency procedures to which an Isle of Man company could be subject under the laws of the Isle of Man are winding up/liquidation (including provisional liquidation), schemes of arrangement and receivership. A company can be wound up by the court, voluntarily, or subject to the supervision of the court.



Isle of Man law makes provision for companies to compromise with creditors. A scheme of arrangement can be proposed between a company and its creditors, and the company, a creditor or a member of the company – or (in the case of a company being wound up) a liquidator – may apply to the court to order a meeting of creditors to consider the proposal. If a majority in number representing 75% in value of the creditors or class of creditors agree to any arrangement or compromise, such arrangement is binding on all the creditors or class of creditors if sanctioned by the court. The court will sanction a scheme of arrangement if it is reasonable, if the interests of all the parties are considered, and if the classes of creditors were fairly represented at the meeting considering the proposed scheme, for which due notice was given.

To be effective, any scheme of arrangement approved by the court must be registered with the Registry. Recent case law suggests that the Isle of Man courts would be reluctant to grant adverse costs orders against parties proposing a scheme of arrangement that failed to gain the approval of creditors, as this could operate as a disincentive to the parties to look for an alternative to the winding up of a company.

## 7.2 Impact of Insolvency Processes

As the Isle of Man does not have the concept of administration or CVAs, there is no moratorium on a lender's rights to enforce its loan or any security or guarantee. As mentioned in **6.1 Enforcement of Collateral by Secured Lenders**, the making of a winding up order would not prevent a receiver being appointed by a secured creditor in respect of the assets of an insolvent Manx company.

## 7.3 The Order Creditors Are Paid on Insolvency

In every winding up, all debts payable on a contingency and all claims against the company

must be proved. The court may delegate the fixing of the time limit for the proof of claims to the liquidator, but may overrule the time limit and has the authority to grant an extension to the time limit if it sees fit. In the case of insolvent companies, the same rules regarding the rights of secured and unsecured creditors, the debts provable and the valuation of annuities and contingent and future liabilities provided for under the Isle of Man Bankruptcy Acts 1892 to 1903 apply.

Foreign and local creditors receive equal treatment in Isle of Man insolvency proceedings. The priority of payments in the insolvency of an Isle of Man company whose assets have been charged is thought to be as follows:

- creditors holding a fixed security (to the extent of their security);
- preferential creditors (as set out below);
- creditors holding a floating charge (to the extent of the charge);
- expenses of the winding up, including the liquidator's remuneration;
- unsecured creditors; and
- company shareholders.

Such order is only "thought to be", as the Isle of Man courts have not considered the ruling of the House of Lords in *Buchler v Talbot* [2004] UKHL 9, which determined that the expenses incurred by a liquidator in winding up an insolvent company were not payable out of the assets comprised in a crystallised floating charge in priority to the claims of the charge holder. Given the similarities in the respective statutory provisions, there would appear to be no reason why the Isle of Man courts would not follow the ruling in *Buchler*, which overturned the earlier decision in *Re Barleycorn Enterprises Ltd* [1970] Ch 465, which held that liquidation costs were paid in priority to debts secured by a floating charge. The Isle of Man has not enacted a statutory pro-

vision equivalent to section 176ZA of the United Kingdom Insolvency Act 1986, which allows liquidation costs to be paid out of assets subject to a floating charge if the company's other assets are insufficient to meet them, reversing Buchler in part. As set out in the priority of payments above, it is usual practice in the Isle of Man for a liquidator to require the costs of liquidation to be underwritten before a liquidation is undertaken.

### **Retention or Reservation of Title**

Any seller of goods to an insolvent company who has utilised a "retention or reservation of title" clause in their sales contract (or, as they are commonly referred to in England, a "Romalpa clause") will be able to recover the goods without needing to participate in the winding up procedure, if full payment has not been made. This is because such a seller will have retained ownership of the goods, despite the insolvent company taking possession of them, thereby taking priority over banks and other secured creditors of the insolvent company, who would, prevail over the unpaid seller's right to the price of the goods if ownership of the goods had passed to the buyer (in such circumstances, the seller would instead rank as an unsecured creditor in the winding up process).

### **Fixed Charge and Floating Charge Assets**

By virtue of the Preferential Payments Act 1908 (as amended by the Preferential Payments (Amendment) Act 2016) and the Recovery of Rents Act 1954, certain preferential debts are payable in the winding up of an Isle of Man company in priority to other creditors, save for certain secured debts. In the case of a secured creditor, the realisations from the disposal of assets will be applied differently, depending upon whether the proceeds of sale relate to floating charge assets or fixed charge assets.

Where assets disposed of are subject to a fixed charge, the proceeds are paid over to the

secured creditor after the deduction of any costs or expenses relating to disposal (ie, the receiver's costs and expenses).

However, where the assets disposed of are floating charge assets then, firstly, the receiver's costs and expenses must be deducted and, secondly, sums due to certain prescribed preferential creditors must be deducted (and paid to the preferential creditors) before accounting to the secured creditor. This is provided by Section 78 of the Companies Act 1931, which applies when the company is not at the time in the course of being wound up, together with Section 3 of the Preferential Payments Act 1908 (as amended by the Preferential Payments (Amendment) Act 2016), which imposes an obligation upon any receiver who is appointed to discharge the preferential debts out of assets coming into his or her hands.

In addition, landlords are entitled to arrears of rent arising in the past 12 months in preference to all creditors, except for those with fixed security and those who are preferential creditors under the Preferential Payments Act 1908.

### **7.4 Concept of Equitable Subordination**

There is no concept of equitable subordination under Isle of Man law. Shareholders who have debts will be allowed to enforce them subject to the rules regarding deemed distributions.

### **7.5 Risk Areas for Lenders**

Unlike the law of England and Wales, Isle of Man law does not provide for a liquidator to pursue transactions at undervalue or extortionate credit transactions. However, there are statutory provisions relating to fraudulent preference and the avoidance of floating charges.

Any act done or suffered to be done by a company within the four months prior to the commencement of the winding up of that company

may be set aside as a preference by a liquidator. A preference will occur if the act done or suffered is with a view to putting any creditor of the company in a better position than they would have been in if the act had not been done or suffered, in the event of the company going into insolvent liquidation. There is no concept of “connected persons” in the Isle of Man for these purposes.

A floating charge on the undertaking or property of a company created within six months of the commencement of the winding up of that company shall be invalid, unless it can be proved that the company was solvent immediately after the charge was created, except to the amount of any cash paid to the company in consideration for the charge, together with interest on that amount. The aim of the provision is to invalidate floating charges that have been given for no consideration.

By virtue of the Isle of Man Fraudulent Assignments Act 1736, any assignment or disposition of property by a debtor entered into with a view to defrauding his creditors is void and of no effect. There must be intention to defraud the creditor concerned, and transactions entered into on an arms’ length basis are unlikely to constitute transactions that are capable of being avoided under this statute.

## **8. PROJECT FINANCE**

### **8.1 Introduction to Project Finance**

Project finance is the model in which large infrastructure, public utilities, energy or industrial projects that typically require fairly substantial investment capital are financed through either a non-recourse or limited recourse financial structure involving various parties: a special purpose vehicle, the sponsor(s), financial institutions (which may consist of a single lender or a consortium), the government of the jurisdiction of

the special purpose vehicle, off-takers, suppliers and contractors.

The funding and management of infrastructure projects in the Isle of Man do not generally follow the traditional model and methods adopted in other jurisdictions (such as the UK and Ireland). Significant infrastructure projects are mostly undertaken directly by the Isle of Man Department of Infrastructure (a department of the Isle of Man government), with interested organisations invited to submit their tenders (for services) via the government’s procurement portal.

The Manx government has a statutory duty to budget for a surplus and has therefore been in a position to establish a number of reserve funds to provide for and substantially underwrite major infrastructure projects required to be undertaken on the Isle of Man without the need for commercial lenders or institutional investors. Notable projects undertaken by the Isle of Man government over the years have included the development of a power station (which uses natural gas supplied via an inter-connected undersea gas pipeline that runs between Scotland and Ireland, financed via a government bond issue), a water treatment works and the reconstruction of the Douglas promenade.

The Isle of Man does not have any specific legislation relating to project finance. The applicable/relevant legislation would depend solely on the specific project and sector to which the transaction relates.

### **8.2 Overview of Public-Private Partnership Transactions**

Due largely to the fact that almost all of the risk, management responsibility and funding of infrastructure projects are undertaken independently by the Isle of Man government, there are not many instances of public-private partnership (PPP) transactions in the Isle of Man, as typi-

cally seen and undertaken in other jurisdictions. The most recent significant PPP transaction was a not-for-profit transaction for the purposes of driving inward investment towards the promotion and support of the Isle of Man's video and digital media sector.

The Isle of Man government, however, is fairly active in operating various schemes and capital grants aimed towards the growth and development of the Manx economy, and the opportunity exists to develop projects in conjunction with PPP.

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

Approvals, permits and licences required to be obtained in the Isle of Man for any project undertaken in or from the Isle of Man will depend largely on the laws applicable to that specific project and industry sector.

The tax treatment of project finance transactions in the Isle of Man would not differ from that of commercial loan transactions. For Manx companies, the standard rate of corporate income tax is 0%, and there is no capital gains tax, stamp duty or withholding tax in the Isle of Man.

Where a registrable security interest has been created, filings of the nature described in **5.1 Assets and Forms of Security** may need to be submitted at the Registry and/or the Isle of Man Deeds Registry. Other than this, the transaction documents do not need to be registered or filed with a governmental body.

The governing law of transaction documents for projects in the Isle of Man would generally be the laws of the Isle of Man (although this is not a formal requirement).

### **8.4 The Responsible Government Body**

The main government department responsible for the development of infrastructure, construction and public transport in the Isle of Man is the Department of Infrastructure.

### **8.5 The Main Issues when Structuring Deals**

Due to the complex and long-term nature of project finance transactions, the risks involved need to be identified in the first instance and allocated to the parties best placed to undertake such risks. The special purpose vehicle (ie, the project company) involved should be a Manx corporate vehicle with limited liability protection, such as a company limited by shares (incorporated under either the Isle of Man Companies Acts 1931-2004, or the Companies Act 2006), a limited liability company (incorporated under the Limited Liability Companies Act 1996, as a form of company based on the Wyoming model company wherein a partnership-like membership structure is combined with limited liability protection for its members not unlike a conventional company) or a protected cell company (incorporated under the Protected Cell Companies Act 2004, being a company that has the power to create one or more cells, each with its own assets, liabilities, business activities and risk).

Foreign investment and investors are actively encouraged and welcomed in the Isle of Man, and there are no restrictions in relation to either. As the Isle of Man is not part of the EU, no EU law (such as EU competition law) would be relevant to any project finance transactions in the Isle of Man.

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

Funding sources available to Manx special purpose vehicles would not be any different from those available to UK project companies, and would include commercial lenders, export credit

agencies, international institutions and project bonds investors. There are no prohibitions in the Isle of Man on lenders and investors relying on either non-recourse or limited recourse financing, or requiring contingent equity and/or completion guarantees from the sponsors. The applicable gearing ratio for project financing in the Isle of Man would be no different from that in the UK.

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

Mining was once an important industry in the Island, with deposits of zinc ore and lead ore being mined at numerous sites. Today, the remaining minerals are owned by the Isle of Man Government, which also manages the extraction thereof, although there are no current commercial mining operations in the Island.

The Isle of Man Government has actively encouraged private sector firms to explore the possibility of developing a tidal array in certain areas around the coast of the Island, granting a survey licence to an offshore tidal developer in the hope that it will be able to lease parts of the Island's seabed for renewable energy generation. The government is also actively encouraging other forms of renewable energy generation, such as wind turbines situated in the Island's territorial seas (which stretch 12 miles off its coast and include hydrocarbon, coal and mineral rights). The Island's territorial seas were purchased by the Isle of Man government from the UK in 1991 for GBP800,000, and their ownership is vested in the Department of Infrastructure.

A hydrocarbon exploration company has recently been awarded a licence from the Isle of Man government to explore natural gas opportunities within part of the Island's territorial seas off its east coast, but as yet it is thought that no reserves have been identified.

The Island is a net exporter of electricity, some of which is generated from a waste-to-energy facility. The UK's Export Control Act 2002 and the associated order made thereunder (ie, the Export Control Order 2008) have been made part of Isle of Man law. Whilst the Isle of Man Treasury can issue an export licence, businesses are encouraged to contact the UK's Export Control Organisation (part of the Department for International Trade) for such a licence. The enforcement of export controls is the responsibility of Customs and Excise in the Island.

### **8.8 Environmental, Health and Safety (EHS) Laws**

The main body of environmental laws in the Isle of Man consists of the Public Health Act 1990, the Water Pollution Act 1993, the Flood Risk Management Act 2013 and the Marine Infrastructure Management Act 2016, amongst other pieces of primary and secondary legislation. The Town and Country Planning Act 1999 and the Building Control Act 1991 are the key sources of primary legislation relating to planning and building control approvals required in relation to development carried out on land in the Isle of Man. The regulators of environmental issues in the Isle of Man are the Department of Environment, Food and Agriculture (the "Department") and the Environmental Protection Unit (EPU). According to the Department's online materials, the EPU is responsible for the regulation of air pollution, noise, land contamination, development on Greenfield land, and water pollution.

Health and safety falls under the remit of the Department and the Health and Safety at Work Inspectorate (the "Inspectorate"). The Isle of Man's health and safety legislation differs from the UK's, despite the UK's Health and Safety at Work etc Act 1974 being applied to the Island by an Order in Council. Much of the Isle of Man's Health and Safety law has been implemented by secondary legislation, including the Con-

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struction (Design and Management) Regulations 2003 (CDM Regulations) and the Management of Health and Safety at Work Regulations 2003. Notwithstanding this, the Department has indicated that “UK legislation is best viewed as an illustration of good practice. UK legislation and guidance may be helpful in explaining the general duties imposed by the 1974 Act.” The Inspectorate also issues leaflets and information sheets published by the UK’s Health and Safety Executive.



**Cains** has a banking and finance team that provides legal services to domestic and international banks, other global financial institutions, alternative lenders, private equity sponsors, investors and various borrowing entities. The practice regularly advises on complex multi-jurisdictional finance transactions, including commercial real estate, acquisition and structured finance. Clients include leading UK, US, Irish and global banks and other alternative lenders (including private equity and debt funds) that provide senior, mezzanine, bridge, secured and unsecured debt facilities, and a wide range of

domestic and international borrowers. The firm is widely known for handling regulatory and compliance issues encountered by Isle of Man licensed banks and other financial institutions (including those providing money transmission services) and on complex cross-border restructurings (including via schemes of arrangement), project finance, asset finance and capital markets transactions (including international debt issues, sovereign bond issues, initial public offerings and securitisations), bilateral and syndicated loans, derivatives and sales of performing and non-performing loan portfolios.

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