

# International **Comparative** Legal Guides



## Project Finance **2020**

A practical cross-border insight into project finance

**Ninth Edition**

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## Project Finance **2020**

**Ninth Edition**

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**Milbank LLP**

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# Ireland

Arthur Cox



Matt Dunn



Charlotte Upton

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Historically, project finance activity in Ireland has been driven by the needs of the energy sector and PPP programme; project finance transactions tend to come in waves when supported by favourable public policy.

Onshore wind transactions have been one of the mainstays of the Irish project finance market over the past five years: there were 368 operational windfarms on the island of Ireland by the end of 2019, with approximately 3.7GW of installed capacity in aggregate. Domestic and international commercial lenders have been active in financing onshore wind projects, with involvement from development financial institutions such as the European Investment Bank (EIB) and KfW.

The Renewable Energy Feed-In Tariff (REFIT) schemes have supported the growth in renewable energy projects by incentivising suppliers to enter into fixed (or floor) price PPAs by effectively providing such suppliers with a one-way hedge against market prices falling below a particular level (depending on the REFIT scheme, technology and project size) for a period of up to 15 years. The Irish government in February 2020 announced the final terms and conditions of the new Renewable Energy Support Scheme (RESS) which will involve a series of auctions into which “shovel-ready” energy projects will be able to bid their proposed electricity price, with successful projects being those whose price is at or below the clearing price required to meet the capacity being auctioned. The RESS 1 stage of the scheme will operate as a two-way contract for difference referencing a strike price determined through the relevant auction process (which will remain constant over the term of RESS 1 support).

Once it is operational, the introduction of RESS is likely to result in lower pricing for renewable energy projects, potentially giving rise to interest in using other types of debt (in addition to traditional senior project financings) in order to enable sponsors to meet their targeted returns on investment for new projects. The RESS scheme is also expected to affect the project finance market in various other ways: for example, there will also be a focus from sponsors on fixing financing costs prior to participating in auction processes as part of the process of modelling costs used for formulating their bids offered in auctions. There may also be a requirement for developers to offer local communities the right to invest in renewable energy projects (though this will not apply to the first round of RESS auctions).

Outside of renewable energy transactions, a range of PPP transactions have been financed in Ireland, primarily involving health-care, social infrastructure (education and courts), energy and transport projects. The National Development Plan 2018–2027 (NDP) sets out plans for investment of approximately EUR116 billion to meet Ireland’s infrastructure and investment requirements over the above period. While government funding has been allocated for the majority of the planned projects, the NDP states that all large-scale projects included in the NDP should continue to be assessed for suitability for procurement by PPP and/or alternative financing, particularly in respect to concession-based projects which offer for the potential for user charges.

Various PPP transactions which were signed in the immediate aftermath of the global financial crisis have been refinanced in 2016–2020 as the availability and commercial terms of debt financing have improved significantly, enabling projects to take advantage of improved pricing available from incumbent financiers or to agree new terms with an entirely new lender group, and to release refinancing gains (to the extent available). For example, the Convention Centre Dublin PPP closed a refinancing in December 2019 and BAM PPP completed refinancings of two schools’ PPPs and one road PPP in 2019.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Significant project financings in Ireland in recent years include:

**Oweninny Power:** AIB, BNP Paribas and MUFG provided commercial debt facilities alongside EIB financing to fund the development and financing of the 89MW Phase 1 of the Oweninny Windfarm, which will be, once developed, Ireland’s largest wind development project being developed through a joint venture between ESB and Bord na Mona. Phase 2 will further increase the installed capacity to 172MW, making it by far the largest windfarm on the island of Ireland, with the potential for significant further development on the site. Oweninny Power is the first Irish wind project to be co-financed by the EIB, which is providing 50% of the funding part of the Investment Plan for Europe and backed by the European Fund for Strategic Investments.

**Dublin Waste-to-Energy:** this project, led by Covanta, entered commercial operation in early 2017 and was refinanced shortly afterwards, with senior secured and junior secured facilities provided by commercial banks (AIB, Bank of Ireland, Helaba and Natixis) alongside institutional investors which made available fixed and floating rate tranches, with all the facilities being subject to a common terms agreement. The Dublin WtE facility is capable of processing over 600,000 tonnes of municipal waste

*per annum* as well as generating approximately 60MW of electricity. The project company has entered into waste supply contracts with multiple commercial waste collection companies alongside a concession agreement with Dublin City Council (acting on behalf of four local authorities) which will provide additional revenue support in certain circumstances. This is a unique project in terms of the mixed merchant/concession arrangement.

**Courts Bundle PPP:** this project, for BAM PPP to construct, refurbish and maintain seven court buildings, was financed by way of secured bank debt arranged by MUFG, alongside private registered notes provided by Talanx, and constituted one of the first “bank/bond” PPP financings to be put in place in Ireland following the global financial crisis. There have since been further PPP financings involving a mix of financing sources, including the refinancing of the **N17/N18 Roads PPP** built and operated by the Direct Route consortium (formed by Marguerite, Strabag, InfraRed, John Sisk & Son, Lagan and Roadbridge) which involved commercial loan facilities provided by Bank of Ireland, Natixis and Societe Generale alongside private placement financing provided by Aviva, AG Insurance, Munich Re and Massachusetts Mutual/Barings.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Yes, an Irish corporate obligor will typically grant an all-assets debenture. Where the Irish obligor owns assets outside of Ireland, applicable local law security is generally also taken. Both fixed and floating security can be taken from an Irish corporate obligor by way of an all-assets debenture. Security granted pursuant to a debenture must be registered at the Companies Registration Office (CRO) (as detailed in question 2.6 below) with separate filings in respect of security over real property being required with the Property Registration Agency and with other asset registries in respect of security over certain other classes of assets.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security can be taken over real property (including land, buildings and plant and machinery which are fixed or permanently attached to land). Security over registered or unregistered land can only be done by way of charge by deed, and it is not possible to create a legal charge over future-acquired real estate in Ireland. Future-acquired real estate should be the subject of a separate charge by deed when it is acquired.

Security over tangible moveable property (such as plant, machinery and equipment) may be created by way of a fixed or floating charge pursuant to a debenture (as described above).

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A security interest over contractual rights is generally created by way of a security assignment, and can be created by way of a fixed or floating charge where the rights are receivables. In

the absence of the security trustee/chargee exercising control over the proceeds of any receivables, a charge over those receivables will be a floating charge. As stated in question 5.2 below, floating charges will rank behind fixed charges and preferential creditors in an insolvency. In order to ensure that any assignment takes effect as a legal, rather than equitable assignment, express written notice must be given to the relevant debtors (in addition to such assignment being in writing and absolute (rather than being expressed to be created by way of charge only)).

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, both fixed and floating security can be created over bank accounts. When taking security over bank accounts, consideration should be given as to whether fixed security (precluding the chargor from dealing with the account) should be taken, or whether floating security is to be taken (whereby the chargor is permitted to deal with the account). Where the bank account is held with the chargee/security trustee, security is generally taken by way of charge. In other cases, it is usually taken by way of assignment.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes, the most common approach for taking security over shares is to take an equitable charge, under which the chargor remains the registered shareholder, but must deliver its original share certificates, together with signed but undated share transfer forms (with the name of the transferee left blank for use on enforcement) to the chargee/security trustee. It is also possible (but quite rare) for a legal mortgage to be taken, under which title to the shares is transferred to the chargee/security trustee (and re-assigned to the chargor once the secured liabilities have been repaid).

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Where a charge is created by an Irish company over most classes of assets (subject to certain exceptions including charges created over shares and/or bank accounts only (and not also over other classes of assets)), particulars of that charge must be filed with the CRO within 21 days of the date of creation of such charge, using a Form C1 (the “one-stage” procedure) or a Form C1A and Form C1B (the “two-stage” procedure).

Where the charge is created by a company incorporated outside Ireland, with a registered branch in Ireland, a similar requirement to deliver particulars of that charge to the CRO applies. In that case, again both a “one-stage” and a “two-stage” procedure are available. The relevant forms are a Form F8 (“one-stage” procedure) and Forms F8A and F8B (“two-stage” procedure).

The CRO filing fee is EUR40 per Form C1, C1A, F8 and F8A. There is no filing fee for a Form C1B or F8B.

Where any person creates a charge over registered land in Ireland, that charge must be registered in the Land Registry section of the Property Registration Authority. The filing fee is EUR175.

Where any person creates a charge over unregistered land in Ireland, that charge must be registered in the Registry of Deeds section of the Property Registration Authority. The filing fee is EUR50.

If an Irish company creates a fixed charge security over book debts, a notice under section 1001 of the Taxes Consolidation Act 1997 should be served on the Irish Revenue within 21 days of the creation of the charge to avoid the chargee being held liable for any arrears of VAT, pay-as-you-earn tax, local property tax and pay-related social insurance that the company may have at that date. There is no fee payable in relation to such notice. An updated notice must also be served where there is a change to the chargeholder (for example where a security agent is replaced).

Additional registration and filing requirements may be required in relation to security granted over certain types of assets such as intellectual property, ships, aircraft or agricultural stock.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The fees payable for the main types of filings/registrations are as set out above. These requirements can generally be completed in short order, save that registrations of charges over registered land may be more time-consuming.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Generally, regulatory or similar consents are not required with respect to the creation of such types of security interests in Ireland. However, since a person must be licensed to own electricity transmission and distribution assets (other than interconnectors) and only ESB is licensed to own them, enforcement of security over such assets is not possible, practically speaking.

## 3 Security Trustee

### 3.1 Regardless of whether your jurisdiction recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Irish law recognises the concept of a “trust” as well as the role of a security trustee or security agent and will allow such person to enforce security on behalf of the group of creditors and apply the relevant proceeds in accordance with a contractually-agreed payment waterfall. Where the security has been registered, and the identity of the security trustee changes, there is a requirement to make filings with the relevant registries to reflect such change of security trustee.

### 3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Such alternative mechanisms are not required under Irish law, though they may be included in Irish law intercreditor agreements or security trust deeds to the extent required as a result of

the use of security documents governed by the laws of certain civil jurisdictions (such as security over offshore bank accounts).

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

There is no requirement for a security agent/charge to conduct a public auction for the purpose of enforcing security over the assets of an Irish company, though common law duties will apply in respect to the manner of such enforcement action and the proceeds realised therefrom.

As set out in question 5.4 below, a security agent or chargee may avail to various out-of-court procedures to enforce its security. Another creditor or other third party may seek injunctive relief from the Irish courts to prevent a secured creditor exercising its enforcement rights, but where the relevant security has been validly granted and (where applicable) registered, and the secured creditor has complied with its common law duties and the requirements of the Land and Conveyancing Law Reform Act 2009 (where applicable), the courts would be unlikely to grant such relief in relation to security over project company assets.

Where creditors are seeking to exercise their power of sale over the shares of a project company, there may be a requirement to make a notification under the Competition Acts 2002 to 2014 (and comply with the related merger control procedures) where the aggregate turnover in Ireland of the undertakings involved in the transaction exceeds certain thresholds (and comply with the relevant competition legislation).

In certain cases, licences and permits awarded to project companies may be personal to such companies and not capable of being transferred to third parties.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Foreclosure (being for the purposes of Irish law, the process of a chargee taking ownership of a secured asset free from the charger's rights in respect of the secured asset (including its equity of redemption)) is generally not available in Ireland following the implementation of the Land and Conveyancing Reform Act 2009.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Please see question 5.5 below regarding the examinership regime and schemes of arrangement.

Under section 608 of the Companies Act 2014, the Irish High Court may order any person who appears to have “use, control or possession” of the property (or the proceeds of sale of that property) of a company that is being wound-up, where the property was disposed of (including by way of security) and the effect

of that disposal was to “perpetrate a fraud” on the company, its creditors, or its shareholders, to deliver that property to a liquidator, creditor or contributory of the company, or to pay a sum to the liquidator in respect of that property.

Under section 602 of the Companies Act 2014, where a company is being wound-up, a disposal of the company’s property after the winding-up process has started without the liquidator’s consent will be void unless the High Court orders otherwise.

**5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g. tax debts, employees’ claims) with respect to the security?**

■ **Unfair preference**

Under section 604 of the Companies Act 2014, any one of a variety of steps (including the making of a payment, or the granting of security) made by a company which is unable to pay its debts as they fall due in favour of one of its creditors, with a view to giving that creditor a preference over the company’s other creditors, will be deemed to be an unfair preference and invalid if a winding-up of the company begins within six months – where the creditor is a “connected person”, that six-month period is extended out to two years.

■ **Invalid floating charges**

Under section 597 of the Companies Act 2014, a floating charge created by a company will be invalid if it is created within the 12 months prior to the beginning of the winding-up of the company, unless it is demonstrated that the company was solvent immediately after it granted the charge. The 12-month period is extended to two years if the floating charge is created in favour of a “connected person”. This provision underlies the importance of obtaining representations as to solvency from obligors in an acquisition financing.

■ **Order of distribution of assets on insolvency and preferential creditors**

On an insolvency, the liquidator appointed to the company is under a statutory duty to collect and gather in the company’s assets, realise those assets, and distribute them in accordance with the ranking of creditors listed below. Assets that are subject to fixed security in favour of a creditor of the company are not available to the liquidator for distribution. Instead, the company’s financial position in the lead up to the liquidator’s appointment is likely to have triggered one or more events of default under the facilities agreement, entitling the lender(s) to accelerate. In such circumstances, the security trustee (acting on behalf of the syndicate of lenders) or, where there is no syndicate, the lender itself as chargee, will appoint a receiver to realise the secured assets. Also excluded from the pool of assets available to the liquidator for distribution are monies that must be set-off, provided that there is mutuality of debits and credits as between the company and the relevant creditor.

Regarding the priority of other creditors, the ranking on insolvency is as follows:

- costs, charges and expenses incurred in the winding-up of the company, including the liquidator’s remuneration;
- preferential creditors (including the Irish Revenue for certain taxes, local authorities for certain rates, and employees of the company in respect of certain amounts owing to them);

- holders of floating charges;
- unsecured creditors; and
- members and contributories of the company.

The Irish Revenue has an effective priority under section 571 of the Taxes Consolidation Act 1997 in respect of certain capital gains tax (CGT) or corporation tax that may arise on the disposal of an asset by a chargee/security trustee on enforcement, or by a liquidator or a receiver on behalf of that chargee/security trustee.

**5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

Public or private companies incorporated in Ireland are generally not excluded from bankruptcy proceedings.

**5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?**

A security document will generally give the chargee or security agent the right, following a default, to appoint a receiver over the secured assets. The receiver will take control of those assets and deal with them under powers deriving from the security document and/or the intercreditor agreement or security trustee deed which will also generally set out the order in which the proceeds of realising the secured assets are to be applied.

A chargee or security agent may also exercise its right (subject to that right being properly formulated in the security document) to take possession of the secured assets rather than appointing a receiver; this will result in the chargee having a liability to strictly account to the chargor for amounts received while the chargee is in possession. As such, it is more common for a receiver to be appointed.

Where the chargee or security agent is a bank and has a charge over a deposit account held with it, it may (instead of appointing a receiver) simply opt to exercise a right of bilateral set-off, subject to this being properly provided for in the underlying contractual documentation.

On the occurrence of an enforcement event relating to security over financial instruments, a collateral taker has a right to realise its financial collateral by sale or appropriation and by setting off the instrument’s value against, or applying that value in discharge of, the relevant financial obligations. However, the definition of financial collateral does not include shares in a company whose exclusive purpose is (a) to own means of production that are essential for the collateral provider’s business, or (b) to own real property, meaning that this is not likely to assist in enforcing over the shares of a project company.

In common with market practice in other jurisdictions, project financing transactions in Ireland will generally include contractual controls on key assets (for example, by way of payment cascades and account bank agreements in respect of the bank accounts established for the construction and operation of the project) and direct agreements which allow the creditors (or their representative(s)) to “step-in” to key project agreements in place of the relevant obligor(s) in circumstances where the project counterparties would otherwise be entitled to terminate such agreements by reason of the obligor’s non-performance or insolvency.



**5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?**

### Examinership

Ireland has an examinership regime, which is a court moratorium/protection procedure introduced in 1990 with the aim of enabling a company in serious financial difficulties, but with a reasonable prospect of survival, to agree a solution with its creditors, shareholders and employees which will enable it to return to a financially sound footing.

Examinership tends to be availed of by active trading companies. A petition to place a company in examinership can be presented to the Irish High Court by the company, by its directors, by a creditor or by shareholders holding at least 10% of the paid-up voting share capital of the company.

The company then enters a court-protection period of 70 days (which can be extended by 30 days), and an examiner is appointed to formulate proposals for a compromise or scheme of arrangement in relation to the company. A scheme of arrangement often involves the writing down of creditors' claims and the introduction of new funds. Meetings must be held by the examiner with the company's members and creditors, and a majority must approve the proposals before the scheme is referred back to the High Court for approval.

Rights of secured creditors are, for the most part, suspended during the protection period, and enforcement action cannot be taken without the examiner's consent. Payments in respect of pre-existing liabilities are also put on hold. The examiner may dispose of assets, and borrow monies. Those monies will rank ahead of any floating charge, but will rank behind any fixed charge. The examiner may also take steps that the company would otherwise, under a negative pledge, have been prevented from taking. The examiner is entitled to dispose of secured property – the holder of a floating charge from the company will have the same rights in respect of the proceeds as it had in respect of the charged asset. Where the sold property was subject to a fixed charge, the proceeds of sale must be applied towards the debt owing to the holder of the fixed charge.

### Schemes of arrangement

Part 9 of the Companies Act 2014 provides a procedure for a company to implement a compromise or other arrangement with one or more classes of its creditors, which will be binding on all creditors in the relevant class(es), subject to being approved by a majority in the number of creditors holding 75% of the value of the relevant class of creditors which are present and voting at a properly convened scheme meeting. A scheme of arrangement may be used to effect a debt restructuring or cramdown of dissenting creditors but must be proposed by the relevant company and the relevant classes of creditors must be properly constituted and sanctioned by the Irish High Court. The Irish High Court may stay proceedings and restrain further proceedings against a company in respect of which one (or more) scheme meeting has been convened or has been ordered by the court.

**5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.**

In Ireland, a company is deemed insolvent where it is unable to pay its debts. The Companies Act 2014 prescribes that a company will be deemed insolvent where: (a) it has failed to discharge a statutory 21-day demand letter delivered by a

creditor within the requisite period; or (b) where it is unable to pay its debts as they fall due, taking into account contingent and prospective liabilities.

Where directors of a company are aware (or ought to be aware) that there is no reasonable prospect of the company avoiding an insolvent liquidation, they have a duty to take every step available to them to minimise loss to creditors. Depending on the circumstances, the directors may decide to cease trading or recommend to the members of the company that the company be wound up by way of creditors' voluntary liquidation. Alternatively, if the company has a reasonable prospect of survival, the directors may decide to petition for the appointment of an examiner.

## 6 Foreign Investment and Ownership Restrictions

**6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?**

There are no restrictions on foreign ownership of project companies in Ireland (subject to restrictions relating to compliance with sanctions and anti-money laundering legislation).

**6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?**

No, Ireland is not party to any bilateral investment treaties. As an EU Member State, trade agreements entered into by the EU with certain countries apply to Ireland.

**6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?**

The right to own, transfer and inherit property are embodied in the Irish Constitution, which also acknowledges that these rights ought to be regulated by the principles of social justice. The State may pass laws limiting citizens' rights to private property in the interests of common good, but if it does so, it will likely be required to pay compensation for this restriction. Examples of restrictions or limitations on the right to own property include town and regional planning, compulsory acquisition of land and property taxes. Some statutory bodies can (subject to legal process) take land by means of a compulsory purchase order in connection with the development of public infrastructure. The proposed MetroLink project may require that a number of homes are acquired under compulsory purchase orders if the route proceeds as planned. Nationalisation of assets is generally rare in Ireland, but in 2009 the Irish government nationalised the Anglo Irish Bank to secure the bank's viability.

## 7 Government Approvals/Restrictions

**7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?**

The Department of Public Expenditure and Reform's Central Unit for PPP facilitates the process of implementing PPP transactions in Ireland, although financial responsibility for individual PPP projects remains with the relevant government department



or agency. The National Development Finance Agency (which is itself part of the National Treasury Management Agency) (NDFA) acts as the statutory financial advisor to the Irish government in respect of PPPs. The NDFA acts as procuring agent on behalf of government departments for accommodation PPP projects. Other significant procuring authorities include Transport Infrastructure Ireland which is responsible for the national roads network and for the operation of light rail systems. The National Transport Authority has overall responsibility for developing public transport policy in Ireland particularly in light rail and bus sectors.

Various ministries have responsibility for policy areas which are relevant to projects: for example, the Department of Communications, Climate Action and Environment is the main government ministry which is responsible for telecoms, energy policy and the related regulatory framework.

The Commission for Regulation of Utilities is the independent energy and water regulator in Ireland with responsibility, in conjunction with the Utility Regulator in Northern Ireland, for (amongst other things) the regulation of the all-island Integrated Single Electricity Market.

The Environmental Protection Agency is an independent public body established under the Environmental Protection Agency Act 1992 and has a wide range of functions to protect the environment, including environmental licensing, enforcement of environmental law, environmental planning, research development, waste management and regulating Ireland's greenhouse gas emissions.

*An Bord Pleanála* is the national planning appeals board and is also the competent authority for EU Projects of Common Interest relating to trans-European energy infrastructure and is responsible for planning cases relating to projects which are classified as strategic infrastructure development.

**7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?**

Stamp duty is generally payable on documents effecting transfers of interests in real property. Otherwise registration and/or filing of financings or project documents is not generally required, subject to compliance with the applicable security perfection and registration requirements referred to in section 2 above.

**7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?**

Various licences are required to own or operate certain land, natural resources or pipeline assets. There is no general prohibition on foreign entities owning such licences.

For example, in order to construct or reconstruct a generating station, a person must have an Authorisation to Construct or Reconstruct. Similarly, a person must have a Licence to Generate in order to generate electricity. It is the responsibility of the Commission for Regulation of Utilities to grant, monitor the performance of, modify, revoke and enforce these authorisations and licences.

By way of a further example, under Irish statute the only entity permitted to operate a transmission system in Ireland is Eirgrid (the Transmission System Operator) and the only entity permitted to operate a distribution system is ESB (the Distribution System Operator).

**7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?**

**CGT**

Gains on Irish specified assets will always be subject to Irish CGT regardless of the residence of the individual/company disposing of them. The specified assets include:

1. Land in the State: this includes not just actual land but any interest in land such as buildings or leases of land.
2. Minerals in the State or any rights, interests or other assets in relation to minerals or mining for minerals or searching for minerals. In addition to mineral rights in the State, exploration or exploitation rights in the Irish continental shelf are deemed to be assets situated in the State.
3. Assets which are situated in the State and which were used in or for the purposes of a trade carried on by the person in the State through a branch or agency.

**CGT Withholding Tax**

Where specified assets are disposed of for consideration of more than EUR500,000, a buyer must deduct capital gains withholding tax at a rate of 15% from the purchase price and pay it over to the Revenue Commissioners unless the seller provides a CGT clearance certificate.

**Corporation Tax Rate**

Operations involving dealing in or developing land (other than such part of the activity that consists of construction operations or dealing by a company in qualifying land), working minerals and petroleum activities are subject to a tax at a rate of 25% as opposed to the standard corporation tax rate of 12.5%.

**Relevant Contract Tax (RCT)**

RCT is a withholding tax that applies to certain payments by principal contractors to subcontractors mainly in the construction, forestry and meat-processing industries. The rates of tax are 0%, 20% and 35%. RCT can apply to activities involving the extraction of natural resources.

**Petroleum Production Tax (PPT)**

PPT applies to net income from oil and gas discoveries made under petroleum authorisations granted on or after 18 June 2014. The tax is payable in addition to the existing corporation tax rate of 25% applicable to excepted trades. PPT payments are allowed as a deduction in calculating the amount of corporation tax due.

**7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?**

There are no exchange controls or similar restrictions on foreign exchange transactions, except for any restrictions imposed as a result of sanctions legislation where applicable. Tax may be payable in respect of foreign exchange gains in certain circumstances.

**7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?**

There are no restrictions, controls or fees which are generally applicable to the remittance and repatriation of investment

returns or loan payments to parties in other jurisdictions. Withholding tax may apply to dividends and/or interest payments made by companies in Ireland to parties in other jurisdictions, subject to certain exemptions (see questions 7.8 and 17.1 below).

**7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?**

Yes, subject to compliance with applicable domestic and international legislation regarding money laundering and sanctions.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

There are no restrictions on the payment of dividends from a project company to its parent company, subject to compliance with corporate law requirements including the restriction in the Companies Act 2014 on companies making distributions except out of profits available for the purpose (being accumulated, realised profits not previously utilised, less accumulated, realised losses to the extent not previously written off in a reduction or reorganisation of capital duly made).

Financing documentation may impose contractual restrictions on the payment of dividends by a project company. Project documentation may impose contractual restrictions on project companies paying dividends to its parent company in certain circumstances (for example, in terms of a requirement to share any “refinancing gain” with the relevant contracting authority).

Dividends from Irish resident companies will be subject to dividend withholding tax, subject to applicable exemptions in respect of domestic and overseas shareholders (for example, in respect of shareholders resident in EU Member States other than Ireland or other countries with which Ireland has a double taxation agreement, subject to compliance with other applicable conditions).

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

Proposed developments must be assessed to determine what effects they may have on the environment. Before development consent is granted, projects likely to have significant effects on the environment by virtue of their nature, size or location must undergo an environmental impact assessment (EIA). The developer will be required to submit an EIA to the competent authority (i.e. the relevant local authority or the national planning authority, *An Bord Pleanála*) when applying for development consent.

In addition, where a proposed development is likely to have a significant effect on a designated European conservation site, an appropriate assessment (AA) must be carried out under the Habitats Directive and the relevant national legislation transposing that Directive. Failure to carry out an adequate EIA or AA may result in a proposed development being challenged in the courts by way of judicial review.

The Environmental Protection Agency is the regulator tasked with the administration of Ireland’s environmental licensing regime. Projects involving certain specified industrial activities may require an IE (Industrial Emissions) licence under the EU Industrial Emissions Directive and relevant national legislation transposing the Directive, or an IPC (Integrated Pollution Control) licence under the Environmental Protection Agency Act 1992.

The Safety, Health and Welfare at Work Act 2005 is the main piece of Irish legislation governing health and safety. It imposes an obligation on employers to provide and maintain a safe workplace for employees. The legislation is enforced by the Health and Safety Authority.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

Project companies are generally special purpose vehicles established on a commercial basis. For this reason they are generally not bound to observe public procurement law (which applies to public bodies and non-commercial entities) when making purchasing decisions.

In some circumstances in the utility sector project companies are performing regulated utility activities and where doing so are required, when procuring supplies, services or works, to observe public procurement law applicable to those activities (as set out in Directive 2014/25/EU and transposing Irish regulations).

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Where foreign insurance companies are carrying on insurance business into Ireland, they will generally require authorisation to do so from the Central Bank of Ireland (and will be required to comply with the appropriate Central Bank of Ireland regulations) unless they are appropriately authorised by the relevant regulatory authority in another European Economic Area (EEA) Member State and are able to “passport” such authorisation on a freedom of services basis.

Under the Insurance Act 1936 it is unlawful for any person to carry on an assurance business in Ireland without a licence (where “assurance business” is defined as including the “guarantee insurance business” which in turn includes the “business of issuing bonds or contracts of suretyship”). The Insurance (Amendment) Act 1978 (as amended by the Insurance Act 1989 and the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992) provides that credit institutions which are licensed in Ireland or another EEA Member State are not prohibited from issuing bonds, contracts of suretyship or guarantees in the course of their banking business. Other institutions may require to be licensed in order to issue guarantees or related products (potentially including letters of credit) in Ireland.

There is a levy of 3% on the gross amount received by insurers in respect of certain non-life insurance premiums, subject to exceptions in relation to (amongst others) reinsurance, marine insurance, aviation and transit insurance and export credit insurance.

## 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Foreign creditors may be co-insureds or named as loss payees under insurance policies in respect of project assets.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

EEA and Swiss nationals do not need an employment permit to work in Ireland. Following the UK's exit from the EU, UK nationals do not need an employment permit to work in Ireland, given the continuation of bilateral arrangements between the UK and Ireland.

There are various types of employment permits, including the general employment permit which requires the applicant to have a minimum annual remuneration of EUR32,000 (subject to restrictions on certain ineligible occupations), the critical skills employment permits which are available for most occupations where the applicant will have an annual remuneration in excess of EUR64,000 and contracts for services employment permits which are intended to allow non-EEA employees to work on an Irish contract in Ireland while remaining on an employment contract outside of Ireland (subject to meeting a labour market needs test).

Employees carrying out certain professional occupations in Ireland will need to be registered with the appropriate body in Ireland.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

The importation of project equipment or equipment used by construction contractors from another EU Member State is not subject to such controls or taxes. Equipment imported into Ireland from outside of the EU will be subject to compliance with the Irish Revenue's customs procedures. Customs duty may apply subject to any exemptions or reductions which may apply under applicable trade treaties between the EU and the relevant country of origin. Excise duty (in relation to oil products) and VAT may also apply in relation to equipment imported into Ireland from outside the EU.

### 10.2 If so, what import duties are payable and are exceptions available?

Please see question 10.1 above.

## 11 Force Majeure

### 11.1 Are force majeure exclusions available and enforceable?

*Force majeure* exclusions are often included in project documents and such provisions are generally enforceable under Irish law where the relevant contract defines what would constitute a *force majeure* event. On the basis of Irish case law as to the meaning

of the term "act of God", it is not advisable to define *force majeure* events by reference to this term.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Criminal Justice (Corruption Offences) Act 2018 (the 2018 Act) was commenced in July 2018 and repeals and replaces previous legislation on anti-corruption and bribery. Irish citizens, companies and other corporate bodies registered in Ireland who commit acts outside of Ireland which if committed in Ireland would be an offence under the 2018 Act may be prosecuted in Ireland. The offences covered by the 2018 Act include (in very high-level terms):

- corruptly offering, giving, requesting or obtaining a gift, consideration or advantage as an inducement to, or reward for, doing an act in relation to one's office, employment, position or business;
- corruptly offering, giving, requesting, accepting or obtaining a gift, consideration or advantage to induce another person to exert an improper influence over an Irish or foreign official;
- commission of an act, or use of confidential information, by an Irish official in relation to his/her office, employment, position or business to corruptly obtain a gift, consideration or advantage;
- giving a gift, consideration or advantage to a person knowing that it will be used to facilitate an offence under the 2018 Act;
- corruptly creating or using a document knowing or believing it to contain a false or misleading statement with the intention of inducing another person to do an act in relation to his/her office, employment, position or business to the prejudice of that other person; and
- threatening harm to a person with the intention of corruptly influencing that person or another person to do an act in relation to that person's office employment, position or business.

Under the 2018 Act, a company is liable for the actions of directors, officers, employees, agents or subsidiaries who commit a corruption offence with the intention of obtaining or retaining business or a business advantage for the company. If convicted, a company is liable to a fine of EUR5,000 on summary conviction or an unlimited fine on conviction on indictment. If convicted, individuals may be sentenced to up to 12 months in prison on summary conviction or up to 10 years (depending on the type of offence) on conviction on indictment.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements are generally governed by Irish law.

### 13.2 What law typically governs financing agreements?

Financing agreements for Irish projects are generally governed by Irish law, though certain types of financings (such as private placement notes subscribed for by US-based creditors) may be governed by New York law. English law may be used for widely



syndicated loan financings involving large numbers of international creditors, though there has been increased use of Irish law on such financings in recent years.

### 13.3 What matters are typically governed by domestic law?

Agreements relating to the acquisition or use of real estate, concession arrangements and governmental authorisations. Security documents relating to Irish situated assets are typically governed by Irish law.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Pursuant to Regulation (EU) No. 1215/2012 of the European Parliament and of the Council (the Recast Brussels Regulation), the submission to the jurisdiction of the courts of other EU Member States will be upheld in the courts of Ireland and provided that neither Article 45 nor Article 46 of the Recast Brussels Regulation applies, any judgment obtained in another EU Member State against an Irish company would be recognised and enforced in Ireland without retrial or examination of the merits of the case.

Subject to the provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 30 October 2007 (the Lugano Convention), the Irish courts will uphold the submission to the jurisdiction of the courts of Iceland, Norway and Switzerland unless an unconditional appearance has been entered in another jurisdiction.

Where neither the Recast Brussels Regulation nor the Lugano Convention apply, the Irish courts will enforce the submission by the parties to the jurisdiction of the courts of another jurisdiction, and such a judgment will be enforced by the Irish courts, if the following general requirements are met:

- the foreign judgment is for a definite sum;
- the foreign court had jurisdiction in relation to the particular defendant according to Irish conflict of law rules; and
- the foreign judgment is final and conclusive and the decree is final and unalterable in the court which pronounced it.

It was established by the Supreme Court in *Byrne v Ireland and the Attorney General* that the Irish State is a juristic person capable of being sued and is vicariously liable for the tortious acts of its servants and agents. However, legislation may exempt sovereign entities from liability either generally or in specific circumstances. A sovereign entity may waive immunity and accept jurisdiction by way of an express contractual provision to such effect. As in other jurisdictions, immunity will not attach to the extent the sovereign entity is engaged in commercial or trading activities, as opposed to "State" or "public" activities.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, the Irish courts will generally enforce arbitral awards, save where there is a reason to deny enforcement on the grounds set out in the UNCITRAL Model Law and the New York Convention.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Ireland has been a contracting state to the New York Convention since 1981. The Arbitration Act 2010 gives the force of law to the New York Convention and also to the UNCITRAL Model Law, the Geneva Protocol, the Geneva Convention and the Washington Convention.

### 15.3 Are any types of disputes not arbitrable under local law?

Enforcement or recognition of arbitral awards may be refused if the Irish High Court finds that the subject matter of the relevant dispute is not capable of settlement by arbitration under Irish law or if enforcement of the relevant arbitral award would be contrary to public policy. However, the Irish courts are generally strongly in favour of enforcing arbitral awards. The Arbitration Act 2010 does not apply to certain employment and industrial relations disputes, or to property valuation disputes.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No, generally arbitration is chosen as a means of dispute resolution as a result of a consensual agreement to do so between the parties to the arbitration.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

No, direct agreements with central government or political risk guarantees have not been requested in recent project finance transactions, though on PPP/PFI projects it would be common to enter into a direct agreement with the relevant contracting authority (but not central government itself). There is a limited precedent in offshore oil and gas fields for lenders to take the benefit of a limited form of direct agreement from government in which the government acknowledged the security interest of the lenders and gave lenders step-in and cure rights before certain licences could be terminated.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

In general, interest paid by a borrower incorporated in Ireland is subject to withholding tax at the standard rate of income tax (currently 20%). There are a number of withholding tax exemptions enshrined in Irish domestic law however, which can often remove the requirement to withhold. These include interest paid:

- to a bank carrying on a *bona fide* banking business in Ireland;
- on commercial paper and certain listed bonds; or

- by a company where the beneficial owner of the interest is a company that is resident for tax purposes in an EU Member State (other than Ireland), or in a country with which Ireland has entered into a double taxation agreement, where that country imposes a tax that generally applies to foreign source interest receivable in that country by companies. However, this exemption does not apply where the interest is paid to the recipient company in connection with a trade or business carried on in Ireland by it through a branch or agency.

Relief from withholding tax on Irish-source interest may also be available under the terms of a double taxation agreement entered into with Ireland and the jurisdiction in which the lender, as recipient of the interest, is resident for tax purposes.

The case law on the nature of guarantee payments is equivocal but in summary and on the basis that guarantee payments take their nature from the payment which they replace, a payment under a guarantee in respect of interest on an advance should be treated as being a payment of interest (and therefore subject to withholding tax (unless any applicable exemptions apply)). The exemption outlined above for EU/DTA residents should also apply.

However, payments under a guarantee may be treated as having their own nature, such that they would be subject to withholding tax only if such payments were annual payments with an Irish source.

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There are no tax or other incentives which are provided preferentially to foreign investors or creditors investing in project financing transactions in Ireland.

There are no stamp duty or registration taxes which are generally applicable to loans, mortgages or other security documents for the purpose of effectiveness or registration.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

On syndicated project financings, where an Irish borrower is a micro, small or medium-sized enterprise (within the meaning of Commission Recommendation 2003/361/EC), if a syndicate member that is an Irish regulated financial services provider, or a financial services provider authorised in another EEA Member State to provide credit in Ireland, transfers all or part of its commitment to an unregulated entity, that unregulated transferee entity may in certain circumstances require authorisation from the Central Bank of Ireland as a credit servicing firm and, if any activities that fall within the definition of “credit servicing” set out in the Central Bank Act 1997 are carried on by the facility agent of any other finance party, that party may also require authorisation unless it is already regulated. The Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 also apply to certain types of lending by regulated financial services providers to borrowers which are micro, small or medium-sized enterprises, but not to multi-lender credit.

The Irish tax code provides for the tax treatment of certain credit sale, deposit and investment transactions (referred to in the legislation as “specified financial transactions”) with the aim of treating the return arising on a specified financial transaction as interest for tax purposes and apply all relevant tax legislation pertaining to interest to that return.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

A private company limited by shares cannot offer debt securities to the public (see below). Such a company is also prohibited from applying to have, and from having, securities admitted to trading or listed on any market (regulated or otherwise).

A designated activity company is subject to restrictions on offering debt securities to the public (see below). However, it can apply to have the following securities admitted to trading or listed on any market, regulated or otherwise:

- An offer addressed to qualified investors only.
- An offer addressed to fewer than 150 persons (other than qualified investors).
- An offer addressed to investors who acquire securities for a total consideration of at least EUR100,000 per investor, for each separate offer.
- An offer whose denomination per unit is at least EUR100,000.
- An offer with a total consideration in the EU of less than EUR100,000, calculated over a 12-month period.

A public limited company can offer debt securities to the public, and can apply to have those debt securities admitted to trading and listed, whether on a regulated market or otherwise.

Under the Companies Act 2014, private companies (most commonly, private companies limited by shares and designated activity companies) cannot offer securities to the public. However, there are some exceptions under section 68(3) of the Companies Act 2014, under which the offer of certain types of securities by a private company will not constitute an offer to the public. Retail transactions must be issued using a public limited company, but institutional offers are commonly carried out using a designated activity company.

The Companies Act 2014, the *Euronext Rule Book I: Harmonised Rules* and *Euronext Dublin Rule Book II: Listing Rules* (Regulated Market Rule Books) and the *Global Exchange Market Listing Rules and Admission to Trading Rules*, as appropriate, of the Irish Stock Exchange trading as Euronext Dublin are generally applicable.

For the prospectus regime, the following legislation and regulation is applicable:

- Regulation (EU) 1129/2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (Prospectus Regulation) and repealing Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive) (which is directly effective in Ireland).
- European Union (Prospectus) Regulations 2019 (SI No. 380 of 2019) (Irish Prospectus Regulations).
- Central Bank (Investment Market Conduct) Rules 2019 (Investment Market Conduct Rules).
- Central Bank Guidance on the Prospectus Regulatory Framework.
- Central Bank Prospectus Regulatory Framework Q&A.

For the transparency regime, the following are applicable:

- Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market and amending Directive 2001/34/EC (transposed into Irish law by the Irish Transparency Regulations (SI No. 277/2007)).
  - Investment Market Conduct Rules.
  - Central Bank Guidance on the Transparency Regulatory Framework.
  - Central Bank Transparency Regulatory Framework Q&A.
- For the market abuse regime, the following are applicable:
- Regulation (EU) 596/2014 on market abuse (which is directly effective in Ireland) and Directive 2014/57/EU on market abuse (transposed into Irish law by the Irish Market Abuse Regulations (SI No. 349/2016)).
  - Investment Market Conduct Rules.
  - Central Bank Guidance on Market Abuse Regulatory Framework.
  - Central Bank Market Abuse Regulatory Framework Q&A.

Issuers and debt securities listed on the Euronext Dublin Regulated Market are subject to the prospectus regime, the transparency regime and the market abuse regime.

Issuers and debt securities listed on the Global Exchange Market are subject to the market abuse regime only.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

Although various *Sukuk* bonds have been listed in Ireland, we are not aware of *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments having been used in the structuring of Islamic project financings in Ireland. It would be feasible to structure an Islamic project financing in Ireland, for example, by way of using an *Istina'a* instrument to finance the procurement or construction of assets required in connection with a project and an *Ijarah* instrument to lease operational assets from financiers, though there is no established legislative framework for the use of Islamic finance instruments in Ireland (save as noted below in respect to tax legislation).

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Irish law does not recognise *Shari'ah* law as a system of law which can be used as the governing law of a contract. There have been

no recent notable cases on the applicability of *Shari'ah* law or the conflict of *Shari'ah* and local law which are relevant to the finance sector of which we are aware.

Part 8A of the Taxes Consolidation Act 1997 provides for the tax treatment of certain credit sale, deposit and investment transactions (referred to in the legislation as “specified financial transactions”) which achieve the same economic result in substance as comparable conventional financing products.

Although the Irish Revenue has confirmed that the legislation is designed to cover certain *Shari'ah*-compliant structures, the legislation applies to any financing arrangement falling within the meaning of the term “specified financial transaction”, with the aim of treating the return arising on a specified financial transaction as interest for tax purposes and applying all relevant tax legislation pertaining to interest to that return.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

No, subject to ensuring that any default interest provisions in a loan agreement do not conflict with case law restrictions regarding unenforceable penalty clauses. In particular, lenders should ensure that default interest clauses are agreed as part of commercial negotiations and included in the relevant loan agreement (as would generally be the case where the loan agreement is substantially based on the Loan Market Association’s recommended forms) rather than cross-referring to the default interest provisions included in any lender’s standard terms of business.

The Irish Court of Appeal handed down judgments in the *Sheehan v Breccia & others* and *Flynn & others v Breccia* cases in 2018 which found that a 4% *per annum* surcharge interest rate included in a lender’s standard terms and conditions was an unenforceable penalty on the basis that it was not a genuine pre-estimate of the loss or damage that the lender would have suffered on a non-payment by the borrower.

In the cases of *Banco Santander v Demba and another* and *Cortes v Banco de Sabadell*, the European Court of Justice ruled in 2018 that national case law, whereby a non-negotiated contract term in a consumer loan agreement is regarded as automatically unfair where the default interest rate exceeds the standard interest rate by more than 200 basis points, is consistent with the Unfair Contract Terms Directive.





**Matt Dunn** specialises in project and infrastructure finance in the energy, utilities and infrastructure sectors, including PFI and PPP. He also has experience advising across a range of loan and bond financing transactions, including some of the largest cross-border acquisition financings in Europe in recent years.

Matt's experience includes financing multiple windfarms and road and social infrastructure PPP projects in Ireland, financings of powerships deployed to provide emergency electricity supplies in Ghana and Indonesia, and financings for the acquisition of TDC A/S (Danish telecommunications network operator) and E.ON's Spanish electricity distribution and generation assets. Matt was previously a partner at Clifford Chance LLP in London where he advised on acquisition financings, infrastructure and project financings, margin loans and restructuring work, as well as advising the Loan Market Association on its suite of leveraged finance documentation.

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Investor-State Arbitration  
Lending & Secured Finance  
Litigation & Dispute Resolution  
Merger Control

Mergers & Acquisitions  
Mining Law  
Oil & Gas Regulation  
Outsourcing  
Patents  
Pharmaceutical Advertising  
Private Client  
Private Equity  
Product Liability  
Public Investment Funds  
Public Procurement  
Real Estate  
Sanctions  
Securitisation  
Shipping Law  
Telecoms, Media & Internet  
Trade Marks  
Vertical Agreements and Dominant Firms  
Workplace Pensions