

Lending and Taking Security in the Isle of Man: Overview

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A Q&A guide to lending and taking security in Isle of Man.

This Q&A provides a high-level overview of forms of security over assets, release of security over assets, special purpose vehicles in secured lending, quasi-security, guarantees, risk areas for lenders, structuring the priority of debts, debt trading and transfer mechanisms, agent and trust concepts, enforcement of security interests, borrower insolvency, and cross-border issues on loans.

Forms of Security over Assets

Real Estate

1. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

Real Estate

Real estate is:

- Land.
- The buildings affixed to it.
- The rights that go with that land.

It can be held in one of two ways:

- Freehold, which means:
 - absolute title in the case of land registered at the [Isle of Man Land Registry](#); and
 - fee simple in possession in the case of unregistered land recorded at the [Isle of Man Deeds Registry](#).
- Leasehold, which provides rights of possession for a period of time at a rent.

Since 1 December 2009, it has been compulsory for land to be registered at the Isle of Man Land Registry when a property is:

- Sold.
- Leased for over 21 years or an assignment is made of the unexpired term of an existing lease with more than 21 years left to run.

An application to register the title must be made within three months of the date of the transaction.

All other land has unregistered title (proved by title deeds) recorded at the Isle of Man Deeds Registry. A purchaser needs a good root of title that is at least 21 years old (and which can be over 100 years old) to prove the title is good (section 2, [Conveyancing Act 1985](#)).

Common Forms of Security

The most common forms of security over real estate are:

- A deed of conditional bond and security (CB&S) over unregistered title recorded at the Isle of Man Deeds Registry (sometimes referred to as a Manx Mortgage).
- A legal charge.
- A debenture over all land.
- An equitable mortgage.

CB&S. This is a form of security over land that is unique to the Isle of Man. Strictly speaking, it is now only appropriate in respect of unregistered land recorded at the Isle of Man Deeds Registry. The wording of a CB&S is considered to give rise to a mortgage that is only perfected on default. Therefore, a CB&S is released by filing a receipt to

cancel. There is no reassignment or reconveyance. Enforcement is achieved by suing on the bond or promise to pay and then putting the execution in the hands of the coroner (an officer of the court). The mortgagee never becomes a mortgagee in possession through this procedure and there is no equity of redemption since the power of sale is exercised by the coroner on behalf of the mortgagee as creditor. The appointment of a receiver is also possible, although this is entirely a contractual matter. Provisions permitting the appointment of a receiver can be built into a CB&S but are more commonly found in a legal charge.

Legal charge. Security can be created over registered title recorded at the Isle of Man Land Registry, by way of a legal charge under Schedule 7 of the [Land Registration Act 1982](#). Enforcement of a legal charge is largely the same as enforcement of a CB&S.

Debenture. Security over Manx land can also be created by way of a debenture over all land and assets. A debenture can be in the form of a fixed charge over identified land or a floating charge over unidentified land, whether registered title or unregistered title. A debenture must be registered at the Isle of Man Deeds Registry first, even where it concerns registered land (as registration in the Isle of Man Deed Registry is deemed notice to all), and against any specific registered titles currently in the ownership of the chargor.

Formalities

Creation and execution. CB&S, legal charges, and debentures are usually created in writing and executed as a deed. The company granting the charge cannot enter electronically into:

- A mortgage or charge of land.
- Mortgage or debenture or charge on the company's undertaking, property, or revenues.

(Section 4(1)(c) and (i), [Electronic Transactions \(General\) Regulations 2017](#).)

Registration. Any mortgage or charge granted by an Isle of Man incorporated company must be registered in accordance with the statute under which that company is registered. There are two legislative regimes under which a company can be incorporated and governed:

- The [Companies Act 1931](#) (1931 Act)
- The [Companies Act 2006](#) (2006 Act).

Any mortgage or charge over real estate must be registered at the Isle of Man Companies Registry

within a month of its creation. Under the 1931 Act a court order is required to register a charge after a month has expired and this can be a lengthy and costly process. Under the 2006 Act if a charge is not registered in time, an administrative application can be made to the registrar before the start of any winding up procedures. If the charge is registered late using either method, the rights of the chargee are without prejudice to the rights acquired by any party during the period between the date of creation of the charge and the date of its registration.

If the mortgage or charge is not registered in time and a court order or administrative late registration is not obtained for late filing, it is void against a liquidator or any creditor. Therefore, although the debt for which the charge was given will remain payable, it will be unsecured and rank behind all other secured creditors and *pari passu* with unsecured creditors.

Tangible Movable Property

2. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?

Tangible Movable Property

As in English and Welsh law, the alternative Isle of Man legal term for tangible movable property is chattels. Examples of chattels include:

- Personal property, for example, jewellery.
- Plant and machinery.
- Stock and inventory.
- Office equipment.
- Ships.
- Aircraft.

Common Forms of Security

The most common forms of security over tangible movable property are:

- Fixed charges.
- Floating charges.
- Aircraft mortgages.
- Ship mortgages.

Fixed charge. A fixed charge will usually charge a specific asset, or specific group of valuable assets.

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The chargee will exercise enough control over those assets to prevent the chargor from dealing with them in the ordinary course of business. This means it is rare to take fixed security over stock and other assets that a company needs to deal with freely.

Floating charge. A floating charge will not restrict the chargor's right to deal with the charged assets. A charge over the stock of a company is a practical example of when a floating charge is useful. The stock is usually a valuable asset of a company, so a lender will want to ensure it is secured, but the chargor will need to be able to trade without having to seek permission from the lender. A floating charge is the most practical solution. Usually, the right to deal with the charged asset terminates on an event of default when a floating charge crystallises into a fixed charge.

All-assets debenture. Fixed and floating charges can be taken over specifically identified chattels or, more commonly, are charged under an all-assets debenture, which a lender often seeks from a borrower. This sets out which assets, or class of assets, are subject to a fixed or floating charge, or both. This debenture can be governed by the laws of the Isle of Man or, provided there are no terms incompatible with Isle of Man law, the governing law where the lender is located.

Specific chattel mortgage. A specific chattel mortgage is another option for a lender, although in practice this is rare except in relation to significant assets, for example, ships and aircraft. The process of taking security over each is briefly outlined below, as they are active markets in the Isle of Man. There are no Bills of Sale Acts in the Isle of Man or prohibitions in respect of floating charges granted by individuals.

Aircraft mortgage. Launched in 2007, the [Isle of Man Aircraft Registry](#) (IOMAR) has grown substantially since that date. The IOMAR maintains a record of all aircraft mortgages registered in the Isle of Man. The UK Mortgaging of Aircraft Order 1972/1268 has been extended to the Isle of Man (subject to some slight modifications and adaptations) and therefore the law relating to the registration and priority of mortgages over aircraft registered in the Isle of Man closely follows the English and Welsh position. The mortgage of an aircraft registered in the Isle of Man can extend to any store of spare parts for that aircraft.

Ship mortgage. The [Isle of Man Ship Registry](#) was established as an international register in 1984 and Isle of Man registered ships, or any share in an Isle of Man registered ship, can be subject to a security interest.

Formalities

Security over chattels is usually created in writing and executed as a deed. If granted by an Isle of Man incorporated company, it must be registered at the Isle of Man Companies Registry within a month of its creation and is subject to the Electronic Transactions (General) Regulations 2017 (see *Question 1*, Formalities).

Aircraft mortgage. There is no prescribed statutory form of mortgage required to be used for an Isle of Man registered aircraft. A mortgagee of an aircraft registered in the Isle of Man can register its mortgage in the Isle of Man Register of Aircraft Mortgages. However, a floating charge over an aircraft is not capable of registration. The procedure for registration is straightforward and simply requires an application to be made to the IOMAR in the prescribed form. In the case of qualifying aircraft, with effect from 1 January 2018, an international interest can also be registered under the [Convention on International Interests in Mobile Equipment 2001](#) (Cape Town Convention) and its [Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment](#) and the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015/912.

Ship mortgage. The [Merchant Shipping Registration Act 1991](#) provides a prescribed statutory form of mortgage that must be used and generally follows established English and Welsh law principles. A mortgage of a registered ship or vessel, or a share in a registered ship or vessel (as the term is defined in the Merchant Shipping Registration Act 1991) cannot be entered into electronically by the company granting the charge (section 4(1)(g), Electronic Transactions (General) Regulations 2017).

Financial Instruments

3. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?

Financial Instruments

Debt securities and shares are the most common types of financial instruments over which a lender will seek to take security in a transaction.

Common Forms of Security

Although it is possible to take a legal mortgage, the practical realities of transferring legal title mean the most common form of security over financial instruments is a fixed charge.

While English and Welsh law governed floating charges and assignments subject to foreign law are recognised as security in the Isle of Man, it is recommended that a charge over financial instruments created under Isle of Man law, (particularly shares) be subject to Isle of Man law, for ease of construction, certainty, and available remedies.

The main advantage of an Isle of Man law governed charge over shares relates to enforcement. The courts in the Isle of Man have jurisdiction to order and implement the transfer of shares in a company and order rectification of the register of members (whether under section 101 of the 1931 Act or section 64 of the 2006 Act). This is not the case if the charge is governed by a law other than the Isle of Man and proceedings are not commenced in the Isle of Man.

Formalities

In practice, charges over certificated shares and debt securities are created in writing and executed as deeds. The security holder will take possession of:

- The share certificates and a signed, but undated, stock transfer form executed by the security provider with the transferee details left blank.
- Signed but undated letters of resignation from the directors.
- Letters of undertaking from the directors.
- An irrevocable proxy and power of attorney.

Any mortgage or charge over financial instruments must be registered at the Isle of Man Companies Registry within a month of its creation (see *Question 1, Formalities*).

Claims and Receivables

4. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?

Claims and Receivables

The most common types of claims and receivables over which security is granted are rights under contracts, debts, and claims under insurance policies.

Common Forms of Security

Typically, the preferred methods of security are:

- An assignment by way of security.
- A fixed or floating charge or both (see *Question 2, Common Forms of Security*).

Formalities

Security over claims and receivables is usually created in writing and executed as a deed. To perfect the security assignment or charge, it is advisable (whenever possible) to notify the debtor or other obligor. This is because priority between assignments of the same right will (in general) be determined by the order in which the debtor or other obligor receives notice of each assignment. Most security documents will contain a schedule with a template form of notice and acknowledgment that is sent to the relevant parties at completion.

A security assignment or charge granted by an Isle of Man incorporated company must be registered at the Isle of Man Companies Registry within a month of its creation (see *Question 1, Formalities*).

Cash Deposits

5. What are the most common forms of security over cash deposits? How are they created and perfected?

Common Forms of Security

It is common to grant security over cash deposits by charging or assigning the deposit in favour of the lender. The terms of the account will determine the type of security taken by a lender. It is not practical to take a fixed charge over an asset that a company requires daily access to, for example, a general account (see *Question 2, Common Forms of Security*). However, it is possible to take a fixed charge over a rent account on a real estate development transaction.

A security holder wishing to take fixed security over a cash deposit must take active steps to control it, for example blocking access to the funds in the

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account. If the security provider is entitled to access any part of the deposit (directly or indirectly), there is a risk the security will be recharacterised as a floating charge, regardless of how it is expressed in the security document (Re Spectrum Plus Ltd (In Liquidation) [2005] UKHL 41).

Where a lender takes a charge over a deposit held with it, the [Law Reform \(Miscellaneous Provisions\) Act 1996](#) removes any doubt about conceptual impossibility by providing that an account bank can take a charge over an account held by it. Express set-off clauses and flawed asset provisions are still commonly included. In the case of third-party account banks, assignments with or without a charge are also effective.

Formalities

Whether the security is a security assignment or charge, it must be:

- In writing.
- Signed by or on behalf of the assignor or chargor.
- Usually executed as a deed in wet ink (see [Question 1, Formalities](#)).

Intellectual Property

6. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?

Intellectual Property

The principal forms of intellectual property rights are:

- Copyright.
- Trade marks (registered and unregistered).
- Design rights (registered and unregistered).
- Database rights.
- Confidential information or trade secrets.
- Patents.

The Isle of Man is a popular jurisdiction for financial services, gaming, and technology companies and therefore the most common intellectual property rights tend to be copyright and trade marks. A lender will carry out due diligence to establish where the valuable intellectual property is located

and take security in that jurisdiction (which is often not the Isle of Man). That said, generally lenders will attempt to take security over all available intellectual property rights.

Common Forms of Security

As with chattels, it is common for security to be taken over intellectual property in an all-assets debenture. But security can also be taken by way of specific fixed and floating charges over certain intellectual property rights. While it is possible to take a mortgage, it is not particularly common to do so, because a licence is then required by the chargor to use the intellectual property in its business.

Formalities

Security over intellectual property is usually created in writing and executed as a deed in wet ink.

Security over intellectual property granted by an Isle of Man incorporated company must be registered at the Isle of Man Companies Registry within a month of its creation (see [Question 1, Formalities](#)). Licences, mortgages, or charges over patents, registered trade marks, and registered designs must also be registered as soon as possible after the transaction on the appropriate register at the UK [Intellectual Property Office](#) (IPO), if the relevant right has been granted by (or applied for through) the IPO. Similar registration may be required at other intellectual property offices for registered rights that have been granted or applied for in other jurisdictions.

The Isle of Man does not have its own patents legislation, but the UK Patents Act 1977 extends to the Isle of Man, subject to modifications as set out in the Patents (Isle of Man) Order 2013/2602. The Isle of Man does not have its own registry for trade marks or patents. The registration of trade marks is effected through the IPO. UK legislation in this area, namely the Trade Marks Act 1994, applies to the Isle of Man, subject to modifications made by the Trade Marks (Isle of Man) Order 2013/2601.

Problem Assets

7. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?

In terms of Manx situs assets, there are no types of property over which security cannot be taken.

The type of property will dictate what security can be taken and what security is practical for a lender to take.

Future Assets

Since the chargor cannot show any proof of ownership, it is not possible to take a legal mortgage over future assets. Fixed charges can be granted over future acquired assets when a mortgage is not appropriate.

Fungible Assets

A lender can take a floating charge over fungible assets, which will give the chargor the right to deal with the charged assets, up until the point of an event of default. For more information on the nature of floating charges see *Question 2, Common Forms of Security: Floating charge*.

Other Assets

Those seeking to take assignment of rights under a contract must be wary of any contractual right to prohibit any assignment. Any relevant prohibitions or restrictions must be reviewed before taking this particular type of security.

Release of Security over Assets

8. How are common forms of security released? Are any formalities required?

If security has been taken by way of a CB&S over unregistered land, to release the security the lender can execute a receipt to cancel and a Land Registry Form (Form 15) when the first registration has been triggered.

Where security has been taken by way of a legal charge over registered land, to release the security the lender can execute a Land Registry Form (Form 15) to discharge the registered charge.

If security has been granted by way of debenture (or by any other form of security document), a deed of release will be required to release the charge.

When any security granted by an Isle of Man incorporated company is released, the company will typically record it at the Isle of Man Companies Registry together with a deed of release (or other proof of discharge). However, failure to do so does not affect the validity of the release.

When an asset subject to a floating charge is sold, a release of the charge is not usually necessary. However, the buyer can request a letter of non-crystallisation from the charge holder to ensure the buyer takes the asset free from any encumbrance.

Special Purpose Vehicles (SPVs) in Secured Lending

9. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?

It is not common for security to be taken only over the shares of an SPV. Rather, security is often taken both over the assets directly and the shares of an SPV as an alternative or additional security option.

Lenders favour taking security over the shares of an SPV (in addition to direct security over the SPV's assets) for two main reasons:

- Subject to the nature of the underlying business (that is, whether that business is regulated or not) the enforcement process in relation to Isle of Man shares is fairly straight forward and quick.
- There is often value to a potential buyer in maintaining the corporate holding structure of the relevant assets. Having security over the SPV shares allows the lender to transfer the shares in the SPV, avoiding the need to remove the assets from the structure (which can lead to tax charges and other registry fees), and this means that security has a higher value when sold.

Quasi-Security

10. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

The types of quasi-security structures available are similar to those available in England and Wales.

Sale and Leaseback

Most commonly, the owner of equipment sells it to a financier who leases the equipment back to the seller. It is rare for transactions to be governed by Isle of Man law even when the assets are situated

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in the country, since the Isle of Man law of property follows English and Welsh law which is considered an acceptable choice of law. Variations on this structure are:

- An initial sale to a dealer, who on-sells to a financier, who leases back to the original seller.
- A financier leases the equipment back to another company in the seller's group, rather than to the original seller.

Under these arrangements when a purchaser of goods leases them back to their seller, the purchaser faces the two key risks:

- The seller can give good title to the goods to a third party under section 24 of the [Sale of Goods Act 1983](#).
- If the leaseback requires the seller to repurchase the goods, or gives it an option to do so, the arrangement may be recharacterised as a loan secured on the goods, resulting in a void security as against a liquidator or creditor in the liquidation of the company if perfection procedures are not followed (see *Question 1, Formalities*). Where the goods are Manx situs assets, this recharacterisation risk is a question of Isle of Man law.

A person who sells but retains possession of goods (or documents of title to those goods) after the sale, can give title to those goods to anyone who receives them in good faith and without notice of the previous sale (section 24, Sale of Goods Act 1983). Section 24 does not apply if the seller does not continuously possess the goods from the time it sells them to the financier until it sells them to a third party.

Where the seller has an obligation or option to regain title to the goods it sold, by paying an option price or a final rental under a lease back, there is a risk a court will recharacterise this arrangement as a secured loan. However, the Isle of Man court (following the English and Welsh courts' treatment) is unlikely to recharacterise these transactions as secured loans without evidence that the parties did not intend the sale and leaseback documents to record their true intentions.

Factoring

In factoring, the financier buys its customer's receivables from time to time. The customer's debtors can be notified of the purchases by way of perfection of assignment, although often they are not. The financier can collect payment from the customer's debtors direct. Often, the customer will collect for the financier. The financier may require recourse to its customer if the debtors do not pay the receivables.

The main risks for the financier derive from:

- Not notifying the debtor.
- Defective performance by the customer so that the receivables do not become due or due in full from the debtors.
- Allowing the customer to collect the receivables.
- The receivables purchase being recharacterised as a secured loan where the receivables are governed by Isle of Man law, with that security being void for lack of registration at the Isle of Man Companies Registry (see *Question 1, Formalities*).

If the purchases are not notified:

- The financier can lose priority to other purchasers who notify the debtor of receivables purchases they have made without notice of the financier's purchases.
- The customer's debtors will get a good discharge if they pay the customer rather than the financier.
- The customer and its debtors are free between themselves to amend or terminate their contract so that the assigned receivables do not fall due.
- The financier can be bound by certain rights of set-off the debtor has against the customer that would have been terminated if the factor's receivables purchases had been notified to the debtor.

If defective performance by the customer under, or in close connection with, the contract generating the receivable gives the debtor a set-off against the customer in relation to a sold receivable, notice will not prevent the debtor from asserting this set-off against the financier. However, the financier can avail itself as assignee of any enforceable prohibition of set-off in the contract generating the receivable against the debtor in order to collect free of set-off.

If the customer collects the receivables on behalf of the financier, the customer can dispose of the proceeds free of the financier's ownership. For this reason, the factor can require payments to be made into a charged or trust account.

In Isle of Man law, following English and Welsh law, a bona fide transaction using a standard structure is unlikely to be recharacterised as a secured loan.

Hire Purchase

Under a hire purchase agreement (HPA), the owner of goods leases them to a lessee and grants the lessee an option to purchase the goods at the end

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of the lease. A conditional sale agreement (CSA) means an agreement for the sale of goods under which:

- The purchase price or part of it is payable by instalments.
- The property in the goods is to remain with the seller (although the buyer will be in possession of the goods) until the conditions on the payment of instalments or otherwise as are specified in the agreement are fulfilled.

The [Hire Purchase Acts 1939](#) and [1973](#) only apply to HPAs, CSAs, and credit sale agreements for GBP2,000 or less, and for the purposes of this overview the Acts can be ignored. Credit sales do not represent quasi-security since title passes to the buyer immediately. HPAs and CSAs are together sometimes known as finance leases in the case of high value equipment.

The common law governs HPAs and CSAs exceeding GBP2,000. Under a CSA, the lessee must take title to the leased equipment by making the final payment under the CSA. HPAs and CSAs are not, of themselves, liable to recharacterisation as secured loans (see above, [Sale and Leaseback](#)).

A lessor or seller of equipment under an HPA or CSA faces the risk that its lessee or buyer may (in some circumstances) sell the equipment before the lessee or buyer has itself acquired title from the lessor or seller but is still able to give good title to the equipment to an innocent purchaser.

In the case of Manx ships and aircraft, the lessor or seller can register their ownership on the relevant asset registers to safeguard their rights as against a subsequent purchaser from the lessee or buyer. In the case of qualifying aircraft, an international interest can now also be registered under the Cape Town Convention on International Interests in Mobile Equipment 2001, its Protocol on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, and the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015.

A buyer of goods under a CSA can, in some circumstances, give good title to those goods to an innocent purchaser despite the buyer not having acquired title to them from its seller (section 8, [Mercantile Agents Act 1983](#) and section 25, [Sale of Goods Act 1983](#)). These sections do not apply to HPAs since the lessee is not a buyer until the option to purchase is exercised. Nonetheless, these transactions are also vulnerable.

Among other things, lessors or sellers under both HPAs and CSAs face the following two risks that are inherent in equipment HPAs and CSAs:

- The courts have a discretion in equity (known as relief from forfeiture) to prevent the lessor or seller from repossessing the equipment following a lessee or buyer default if (broadly) the lessee or buyer can show it is ready, willing, and able to cure its breach of the HPA or CSA. Following English and Welsh case law, which is generally persuasive in the Isle of Man, this risk is very low in the case of a lease that is an operating lease and not a finance lease.
- Depending on the drafting of the HPA or CSA, the lessor or seller may not be able to recover all amounts expressed to be due from the lessee or buyer on a default termination of the HPA or CSA if those amounts are penal. Those amounts are likely to be penal if they are found to be extravagant, exorbitant, or unconscionable, or impose a detriment on the lessee or buyer out of all proportion to the lessor or seller's legitimate interests in the performance of the breached obligation. This follows current case law in England and Wales which is persuasive in the Isle of Man. Broadly, the risk of a termination sum being regarded as penal is lower under a CSA than under an HPA.

Retention of Title

Under a simple title retention arrangement, the seller retains title to goods it sells until it receives the purchase price. The Isle of Man courts will enforce this arrangement and not treat it as a registrable secured transaction (see [Question 1](#), [Formalities](#)).

Other Structures

Broadly, contractual set-off arrangements are enforceable unless inconsistent with the [Bankruptcy Code 1892](#) (Bankruptcy Code). The Bankruptcy Code imposes a mandatory insolvency set-off regime when a company goes into insolvent liquidation. Under that regime, the claims and cross-claims to be set-off must be mutual. This requires the insolvent company and its counterparty to each:

- Beneficially own their claims against each other.
- Own their claims against each in the same capacity as they are subject to cross-claims from each other (section 22, Bankruptcy Code).

Close-out netting of a type contemplated by, for example, derivatives transactions under an ISDA Master Agreement is generally considered

enforceable in Isle of Man law. If the contractual arrangements were to fail due to inconsistency with the insolvency set-off regime, section 22 will produce a similar result (but not necessarily identical net figures) to that contemplated by the ISDA close-out netting arrangements.

Structured set-off is also available where economic as opposed to legal security is required.

Finance leases are not, of themselves, liable to recharacterisation as secured loans (see above, Sale and Leaseback). See above, Hire Purchase for a summary of relief from forfeiture and of the possibility of a termination sum being irrecoverable as penal.

Guarantees

11. Are guarantees commonly used in your jurisdiction? How are they created?

Guarantees are common in many lending transactions. Subject to a company's memorandum and articles of association (articles), there are no capacity restrictions on companies providing guarantees. A guarantee must be in writing, signed by the guarantor, and, unless the guarantee is executed as a deed, the beneficiary of the guarantee must also provide consideration for the guarantor's promise.

Risk Areas for Lenders

12. Do any laws affect the validity of a loan, security, or guarantee (or the terms on which they are made or agreed)?

Financial Assistance

A public company and its subsidiaries (public or private) cannot provide financial assistance (directly or indirectly) in relation to the acquisition of that public company's shares (Companies Act 1992). There is no prohibition against private companies providing financial assistance, directly or indirectly, to acquire their own shares or those of their private company subsidiaries. However, care must be taken to ensure that, where a company is incorporated under the 1931 Act, the financial assistance does not breach capital maintenance rules. Where a company is incorporated under the 2006 Act, the transaction

must pass the solvency test if the assistance could be characterised as a distribution.

There are no specific laws that target the validity of a loan, security document, or guarantee, other than for a guarantee, that it must be in writing (section 1, [Law Reform \(Enforcement of Contracts\) Act 1956](#)). However, the general laws and principles of contract apply to loan agreements and other finance documents. These can affect specific terms, for example, a high default payment (whether expressed by way of penalty, additional or default interest, liquidated damages, or otherwise) may be unenforceable if it can be established that the additional payment constitutes a penalty rather than a compensatory amount.

This Q&A only covers situations that involve loans made to and security taken from Isle of Man incorporated companies. The situation is different when lending to individuals when the [Moneylenders Act 1991](#) applies.

Corporate Benefit

Directors have a duty at common law to act in the best interests of the company. The risk of this duty being breached is minimised by explaining the benefit to the company or group in a well drafted set of board minutes, usually accompanied by a shareholders' resolution approving the actions of the board. This minimises the risk of a transaction being set aside on the basis that the directors lacked agency authority. However, these approvals will not prevent a transaction which prejudices a company's creditors from being vulnerable to challenge.

Loans to Directors

There is no prohibition on loans to directors or statutory procedures regulating them. Conflicts are dealt with by the relevant company statute and the company's articles, which may be more or less permissive.

Usury

There are no usury laws.

13. Can a lender be liable under environmental laws for the actions of a borrower, security provider, or guarantor?

There are no environmental laws expressly imposing environmental liability on the holders of a security interest. Liability only becomes an issue if a

secured lender, rather than a receiver, enforces and possesses security over an asset that is subject to environmental laws.

Structuring the Priority of Debts

14. What methods of subordination are there?

Contractual Subordination

The position on contractual subordination in the Isle of Man is very similar to that in England and Wales.

The courts generally recognise contractual subordination which is commonly seen in deeds of priority and intercreditor agreements. It is common to subordinate junior debt by agreement between the senior and junior creditor. The borrower is usually a party to the agreement.

These agreements can be used to subordinate junior debt both before and during the borrower's insolvency. For pre-insolvency subordination, the borrower will simply agree not to make, and the junior creditor will agree not to claim or accept, junior debt payments other than any permitted payments the parties may have agreed.

Different techniques can be used to ensure the subordination remains effective if the borrower enters an insolvency procedure. The simplest is for the junior creditor to agree not to prove in the insolvency until the senior creditor has been paid in full. A better and more commonly used alternative is turnover subordination. The junior creditor agrees to turn over to the senior creditor any recoveries it makes from its claim until the senior creditor has been paid in full. The senior creditor takes a credit risk on the junior creditor for this obligation.

To address this, the senior creditor can also require the junior creditor to hold any turnover amounts on trust for the senior creditor until the junior creditor makes the turnover payment. There is some doubt as to whether a turnover trust creates a security interest in favour of the senior creditor. However, Isle of Man law follows English and Welsh law in this regard and it is not conventional to register this type of arrangement as a charge.

Structural Subordination

It is also common for debts to be structurally subordinated. Structural subordination can be standalone or in addition to contractual subordination. It is achieved by the junior lender lending to a holding company of the senior lender's borrower (the

subsidiary), rather than by an agreement between the lenders. This structure subordinates the junior debt because on a subsidiary's insolvency, all the subsidiary's creditors must be paid in full before any distribution is made to the holding company in respect of its shares as a contributory.

A senior lender wishing to rely on structural subordination must take note of how the proceeds of the holding company's loan will be used. The holding company by definition (and therefore its creditors) will rank equally as creditors of the subsidiary with the senior lender (assuming neither has security over the assets of the subsidiary) where either:

- The holding company on-lends the proceeds from the junior lender to the subsidiary company.
- The holding company is already (or later becomes) a creditor of the subsidiary.

If the holding company will be on-lending to the subsidiary, the loan must be subordinated.

Intercreditor Arrangements

Intercreditor arrangements are often entered into in the course of transactions where there are several creditors involved, to determine the ranking of claims and the order in which proceeds will be distributed.

An intercreditor agreement will generally include provisions relating to:

- Ranking and subordination.
- Restrictions on payments to junior creditors.
- Restrictions on junior creditors taking enforcement action.
- Control over security enforcement.
- Usually, each creditor, any agent, or security trustee and the borrower will be party to the intercreditor agreement.

These are not commonly governed by the laws of the Isle of Man; however, the Isle of Man follows the position in England and Wales in this regard.

Debt Trading and Transfer Mechanisms

15. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

Although it is not common, debt can be traded in the Isle of Man and the position is very similar to that in England and Wales.

- **Novation.** This is a full legal transfer of rights and the assumption of obligations by terminating the old contract and creating a new contract. It is the conventional way of transferring syndicated loan commitments. In almost all secured syndicated loans, the security is held on trust by a security trustee for the benefit of the lenders from time to time. If that is the case, the buyer will automatically benefit from the security following the transfer.
- **Assignment.** Assignments transfer rights only, not obligations, so they are commonly used to transfer fully drawn loans where the assignor has no continuing obligations to the borrower. Recently, it has become more common to see English and Welsh law syndicated loan agreements that expressly provide for transfers by assignment agreement, and by novation. Despite their name, these assignment agreements include:
 - a release of the seller's obligations;
 - the buyer's assumption of equivalent obligations; and
 - an assignment of the seller's rights.

However, where an Isle of Man law analysis applies, it may be that the distinction turns on whether an assignment agreement is intended to create a new agreement between the parties or not. In Isle of Man law, which follows English and Welsh law in this regard, a novation is a new agreement, the old agreement having been terminated. In most syndicated loan agreements it is often technically possible to make an effective transfer by way of novation or assignment agreement without the borrower's consent at the time, if that is what the parties have agreed in advance.

- **Sub-participations.** A sub-participation transfers some or all of the economic interest in a loan without changing the legal relationship between the seller (who remains the lender of record) and the borrower. It therefore does not affect any security granted, which will remain held by, or for the benefit of, the seller. The seller does not usually need to obtain the consent of the borrower, or even notify it. Sub-participations can be funded or unfunded. On a funded sub-participation, the buyer (participant) pays to the seller (grantor) an amount equal to the loan funded by the seller or the agreed percentage of it. The seller agrees to pass on to the buyer any interest and principal payments it receives from the borrower for that amount. In an unfunded (or risk) participation, the buyer agrees to make whole the seller if the borrower makes a payment default on the loan

(or relevant part of it), much like a guarantee. In return, the seller agrees to pass on to the buyer any "profit" it receives on the loan (or relevant part of it). The main disadvantage of sub-participation is increased credit risk. In a funded participation, the buyer takes credit risk on the seller and the borrower. In an unfunded participation, the seller (who is attempting to sell the economic risks and rewards) retains a credit risk on the buyer.

Agent and Trust Concepts

16. Is the trust or agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

Agent Concept

The concept of facility agent or security trustee under a syndicated loan is conventional and recognised, allowing the agent or trustee to enforce security and apply the proceeds to the claims of all the lenders. The law of agency is part of Isle of Man law.

Trust Concept

The concept of the trust has been part of Isle of Man law since medieval times and is overlaid by particular statutes replicating in large part, statutes of England and Wales, which clarify the law. Principles of equity and equitable interests form part of Isle of Man law.

Enforcement of Security Interests

17. What are the circumstances in which a lender can enforce its loan, guarantee, or security interest? How are the main types of security interest usually enforced? What requirements must the lender comply with?

Enforcement

Rights of enforcement are entirely governed by the instrument constituting the relevant loan, guarantee, or security. A lender can include any events of default in the relevant loan, guarantee, or security as it considers appropriate. There are no common law or statutory principles that must be followed prior to enforcement though English and Welsh common law is persuasive in default of any local authority to the contrary. As a matter of general law, a lender has a duty to act reasonably.

Methods of Enforcement

If a lender has a mortgage or charge over a particular asset or group of assets (for example, a company's real estate or its shares), it will often enforce its security by appointing a receiver over the asset. Provided the security document has been properly drafted and executed:

- The appointment under the instrument can be made without court involvement.
- Following the appointment, if expressly provided for in the mortgage or charge, the receiver has power to collect in any income from the asset and to sell it.

There are no statutory powers of sale available to lenders under Isle of Man law, but foreign law security is generally recognised that may incorporate statutory powers in accordance with the governing law. A receiver or a lender making a sale must get the best price reasonably obtainable. However, it is not necessary to delay a sale to obtain a higher price. No public auction is required. Sales are usually by private agreement without court involvement. One advantage of appointing a receiver is that a lender is not usually responsible for the receiver's conduct. In this context, English and Welsh law principles are followed in the Isle of Man.

There are no moratoria available in Isle of Man insolvency law which would affect a secured creditor and a lender's untrammelled exercise of its enforcement rights, in accordance with the mortgage or charge, is permitted.

If the mortgage or charge does not permit the appointment of a receiver, or if the lender chooses not to exercise this power, the lender can sue for the covenanted debt and a coroner is authorised by the court to sell the charged assets at public auction without reserve in accordance with statutory procedure (Schedule 2, [Administration of Justice Act 1981](#)).

Borrower Insolvency

Rescue, Reorganisation, and Insolvency

18. Are company rescue or reorganisation procedures (other than insolvency proceedings) available in your jurisdiction? How do they affect a lender's rights to enforce its loan, guarantee, or security?

In contrast to the position in England and Wales, there are no rescue or reorganisation procedures, for example, administration or company voluntary arrangements. The only comparable proceeding is the ability of a creditor, member, or liquidator to apply for a compromise or arrangement under section 152 of the 1931 Act or section 157 of the 2006 Act as relevant.

In recent years Isle of Man courts have been prepared to extend the scope of Manx common law to assist overseas insolvency officers or administrators in the absence of statutory power within the jurisdiction to provide this assistance (see *Capita Asset Services (London) Ltd v Gulldale Ltd (CHP) 2014 MLR N-2*). The jurisdiction of Isle of Man courts in this regard has not yet been challenged.

In practice, if an Isle of Man incorporated company held assets in the UK, a lender could make an application to the Isle of Man High Court for a letter of request to be issued to the High Court of England and Wales seeking an order (in relation to UK insolvency law) over the Isle of Man company. This may achieve the desired outcome in respect of that company's business situated in the UK. This remedy will only be available in certain circumstances on a case-by-case basis.

19. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee, or security?

The onset of insolvency procedures does not affect the rights of a secured creditor to enforce its security in accordance with its terms. However, there is a stay on starting or continuing legal proceedings against a company in liquidation without the leave of the court.

20. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor, or security provider becomes insolvent?

Where a company enters insolvency proceedings, a security interest can become vulnerable to challenge on one or more of the following statutory grounds:

- **Fraudulent preference.** Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property done by or against a company that would (if made or

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done by or against an individual) be deemed in a bankruptcy to be a fraudulent preference, will be deemed in a winding up to be a fraudulent preference and be invalid. Certain transactions are void as fraudulent preferences if entered into within four months before the start of a company liquidation. A payment will be a fraudulent preference if it is made with the dominant intention of giving the creditor a preference over other creditors and if it is a voluntary act. Any conveyance or assignment by a company of all of its property to trustees for the benefit of its creditors is also void.

- **Floating charge.** Where a company is being wound up, a floating charge on the undertaking or property of the company created within six months of the start of the winding up will be invalid, unless it is proved that the company was solvent immediately after the creation of the charge (except for any cash paid to the company at the time of or after the creation of (and in consideration for) the charge, together with interest).
- **Fraudulent assignments.** All fraudulent assignments or transfers of a debtor's goods or effects are void and of no effect against its creditors. Only creditors known at the time the transfer was made are taken into account. If a company transfers any of its assets or enters into any agreement, it must ensure that it receives good consideration for it, otherwise that transaction will be liable to be set aside in a liquidation.

21. In what order are creditors paid on the borrower's insolvency?

The order in which creditors are paid on a distribution depends on whether they have security over their claim and, if so, what type of security it is and whether there has been any contractual subordination.

Provided that each security document is correctly executed and registered and there is no contractual subordination to the contrary, creditors will be paid in the following order (subject to any fees and expenses):

- Secured creditors with a fixed charge.
- The costs and expenses incurred in relation to a winding-up including liquidator's remuneration costs and other charges and expenses reasonably incurred in the winding-up proceedings.

- Preferential creditors in the order contained in the [Preferential Payments Act 1908](#) (which includes debts due to the Crown, rates, and employees).
- Secured creditors with a floating charge. There is no concept of prescribed part in the Isle of Man.
- Unsecured creditors (who rank equally, assets being distributed on a *pari passu* basis).
- Shareholders.

Typically, secured creditors who hold security over the same asset enter into a ranking agreement or intercreditor agreement when the later security is taken, to determine priority.

For the consequences of security not having been registered see *Question 1, Formalities*.

Cross-Border Issues on Loans

22. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders, or taking guarantees from foreign subsidiaries of the borrower?

Provided that there are no terms in any of the documents that are illegal or contrary to Isle of Man law or public policy, there are no restrictions on foreign lenders (who do not have a place of business in the Isle of Man) making loans to Isle of Man registered companies. There are also no restrictions on granting security or guarantees to foreign lenders.

This Q&A only covers situations that involve loans made to (and security or guarantees taken from) Isle of Man incorporated companies that are not regulated entities (for example, banks or insurance companies). The situation is also different when lending to individuals, which is covered by the Moneylenders Act 1991.

23. What regulatory requirements does a UK lender have to comply with to purchase a loan made to a borrower in your jurisdiction?

There are no regulatory requirements with which a UK lender must comply to make a loan to, or purchase a loan made to, a borrower in the Isle of Man.

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