

# MHC TIMES

Merger

Business Compliance:  
How to save your business money  
during the downturn

Construction, Energy and Projects

Full Implications of Bank Guarantee  
Scheme Unknown



Mason Hayes + Curran  
Incorporating Arthur O'Hagan



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## Editor's Welcome



Ailbhe Gilvarry

Welcome to issue 24 of MHC TIMES. The big news for the firm since the last edition is the merger last month with Arthur O'Hagan. We are all delighted to welcome our new colleagues and you will be reading about them in this and future editions of MHC TIMES.

As part of Dublin Culture Night 2008, MH+C put its extensive art collection on show to the public. The cover image was designed by Brian Byrne as the invitation to the event and includes details from some of the paintings in the MH+C collection, namely 'Viridirium' by Margaret Morrison, 'Dublin Port' by Mike Fitzharris and a number of images 'After Vermeer' by Chris Banahan. The event was very successful and is reported on page 14.

The focus in this edition falls on Construction, Energy and Projects which is multi-disciplinary team with a diverse and innovative practice area. Fionan Breathnach reviews the Bank Guarantee Scheme controversially introduced last month. Finally, thanks to all those who sent me suggestions for the Closing Argument. Many were thought too risqué for print purposes but the assessment process gave us a great laugh!

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# MHC TIMES

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## Managing Partner's Diary

### Merger

The excellent news for our firm and our clients is that, in late August, we announced a merger with Arthur O'Hagan ("AOH"), a long established medium sized law firm in Dublin. AOH specialises in and has an unparalleled reputation in healthcare, education and charities sectors.

Our merged firm, which will continue to operate under the existing brand and name of Mason Hayes+ Curran, provides AOH clients access to a broader range of services. The arrival of AOH personnel introduces new practice areas of education and charities to the merged firm and enhances our established medical law practice. In the following pages you will read more about AOH and the qualities and expertise its personnel brings to MH+C. Our new colleagues moved into South Bank House with us in early October. I am delighted to welcome them and pleased to report that the substantial benefits to clients from the merger are already apparent.

### Ireland Inc

Perhaps because of the stellar growth in our economy over the last decade, its positive impact on the wealth of Irish people, and its ability to showcase Irish industry on the global stage, Ireland Inc has been slow to admit that the economy has slipped into recession. At the time of going to print, recession has become a fact of life for the Euro zone. The stock market remains on a constant downward trend with the radar firmly fixed on the financial shares. The recently announced Government Guarantee Scheme to certain credit institutions has not stemmed the flow and availability of finance is becoming an issue for all industry sectors. Lack of funding for business enterprise leads to lack of growth and this, combined with significant increases in employment statistics translates into a country in recession.

Many commentators had predicted a soft landing. Unfortunately, this prediction was overly optimistic and the speed of change and severe impact that had been felt by so many industry sectors has resulted in the firm refining our legal services to adapt to our clients adjusting needs. MH+C prides itself on being aligned with our clients needs and providing them with the legal services they require, in good times and in bad. We will continue to adhere to these core values and provide all possible support to our clients during these uncertain times.


### Managing a practice during the hard times

The economic downturn also presents opportunities and as a firm, we are committed to being progressive. This is a characteristic that has served us well in the good times and we expect that the same attitude will allow us to prosper in these changed times. The merger with AOH is an example of one opportunity that has resulted in MH+C being able to offer an enhanced and broader legal service to our clients.

Currently, MH+C is advising a large variety of business leaders and assisting them in navigating their businesses through these challenging times. Sound legal advice is essential. Understanding our clients' business and their particular challenges, being supportive and available to them on a 24/7 basis, is where we excel.

MH+C is quite diverse in terms of practice areas and through careful planning, recruitment and expansion in key areas we have always ensured that we are not over reliant on any one area. I am pleased to say that fee income in all departments remains strong. In tougher economic times, there is usually more demand for litigation and dispute resolution services and this trend is very evident. The Employment Law and Benefits Unit has seen an increase in contentious matters, the Corporate Department is advising clients on restructuring and MH+C is a market leader in the area of energy and projects. In this edition, you will see a focus on this area which introduces you to the key people and gives an overview of the work type.

In conclusion, these are indeed challenging times. However, I believe that we will rise to the challenge and by staying true to our core values, MH+C will emerge a stronger firm.



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Emer Gilvarry

## Merger



On the 1st October 2008 Mason Hayes+Curran and Arthur O'Hagan merged to form a 121 strong lawyer firm based at MH+C headquarters. Just under forty staff moved in to South Bank House. While the move required a significant effort to transfer files, good planning and an energetic 'moving team' ensured that it was business as usual within one working day. One month into the move the feeling is good, and the general perspective is that the merger has delivered earlier than expected on its promise for clients.

For Mason Hayes+Curran the merger offers a great opportunity to develop further services in key sectors namely healthcare, education and not for profit. For Arthur O'Hagan the need to provide a full service legal service to clients has been met. Arthur O'Hagan was very attuned to the changing needs of its clients and merging with a full service firm that has the expertise to deliver fully on client expectations has fulfilled these needs.

Marrying two firms is not easy. It is a challenge. What makes the union possible is a shared set of values that places client service at the centre of every decision and a mission and focus to provide superior legal services. We believe that the strength of our client relationships is the product of a highly experienced, skilled and dedicated personal service.

Mason Hayes+Curran is a very friendly and approachable firm. Lawyers are easy to do business with and are keen to build mutually respectful relationships. They have the highest standards of integrity and expect the same from those with whom they come in contact. The firm is also very progressive, and takes initiative to be just ahead of the market. Being progressive means taking unusual, but strategic steps to achieve your goals.

Ian O'Herlihy, Partner and former Partner at Arthur O'Hagan has found the merger very beneficial, "One of the challenges we were aware of in Arthur O'Hagan was the wide ranging needs of our clients... since working with my new colleagues at MH+C I have the opportunity to get that second opinion or talk to an expert while sitting in my own office. The depth and breadth of expertise in MH+C really helps my work in the education sector, I knew it would be helpful, but I didn't think I would be able to tap into all the additional resources so quickly".

The existing Healthcare division at MH+C is now strengthened and joined by additional experts in the field. MH+C Healthcare is now a very strong force and key advisor to the Irish healthcare market. Ann O'Driscoll who set up MH+C Healthcare is delighted with the additional team members at MH+C Healthcare. "Having the ability to tap into the resources that John Gleeson and his team bring is wonderful. The opportunities for MH+C Healthcare are endless and we look forward to working together as a larger and more diverse team to provide a full service medico legal service to the Irish healthcare market."



Edward Gleeson, Partner at MHC and former partner at AOH adds "I have been delighted already by the capacity of the firm to assist our clients in looking around corners and by its willingness to invest in planning for the provision of their needs. A core objective of ours in entering this merger was to preserve what has engendered such loyalty from our clients whilst assuring them of enhanced expertise and strength in depth. I feel secure that this objective is already well on the way to being delivered. Our clients have been delighted also on hearing familiar voices greeting them on the phone albeit with a different name and by the friendliness of all whom they encounter".

Commenting on the merger at the announcement, Emer Gilvary, Managing Partner of Mason Hayes+Curran, said; "The merger will deliver significant benefits to clients of both Mason Hayes+Curran and Arthur O'Hagan and will broaden the legal expertise and services available to the clients of both firms. Arthur O'Hagan has an excellent reputation and market leading expertise across a number of practice areas which we look forward to bringing to our client base. Mason Hayes+Curran has followed a very focused growth strategy in recent years which has been based on expanding our range of services and legal expertise, aligning with growth areas of the economy and developing our international credentials to be in a position to advise international businesses establishing a presence in Ireland. The merger with Arthur O'Hagan supports our growth strategy and our ambition to be the most progressive Irish law firm through taking initiatives that benefit our clients and keep us ahead of the market". The message remains.

The integration of the two firms is not a start stop process and will receive attention within the firm for a significant period. Significant contact will be made with the clients of Arthur O'Hagan to ensure that they are fully aware of the move and that they can easily find their lawyer! Former clients of Arthur O'Hagan will continue to be served by their existing advisors under the firm name, Mason Hayes+Curran. While the merger has been a fairly seamless process, it would be unfair to dismiss any nostalgia or loss associated with the change, especially the change of name. Arthur O'Hagan served its clients very well for over 150 years and while the name is no more, the spirit lives on.

Pictured above left (left to right): Emer Gilvary, Managing Partner, Mason Hayes+Curran and John Gleeson, Partner and former Managing Partner at Arthur O'Hagan. Pictured above: Arthur O'Hagan Team.

# Business Compliance:

## How to save your business money during the downturn



Una Burke

### Background

These are challenging economic times and flaws in a business are now being exposed, with potentially devastating consequences. You can take control by using the opportunity to review your business and identify its strengths and weaknesses. Take steps to remedy weaknesses before your bank, suppliers or customers even notice them and so preserve those crucial relationships which bring value to your business.

### Basic obligations

A company director should ensure that his company continues to comply with its basic legal obligations. Such basic obligations include those provided under company law, health and safety, employment law or consumer protection law.

### Directors

Directors are responsible for managing the company. In the tougher economic climate, increased involvement and awareness by directors with more regular board meetings and more frequent financial reports on the company is advisable. Matters discussed and decisions made at board meetings should be carefully documented. Directors can retain control during difficult times by understanding exactly how the business is doing day to day and making informed decisions. Directors should take advice from professional advisors where necessary. Making decisions without sufficient information or the right information can be costly.

### Filing Accounts

Companies of a certain size are required to prepare and file annual audited accounts. For small and medium sized companies, exemptions are available from these filing requirements. Avail of these exemptions to save your company the cost of an annual audit. For large companies or companies that cannot avail of the exemptions, failure to file accounts on time can lead to strike off from the company register. Save your company the expense of late filing penalties and the cost of an application to restore your company to the register by ensuring that your accounts are ready and filed on time.

### Health and Safety

Do not be tempted to cut back on your health and safety budget because you view it as "non-essential" to your core business. If a serious accident occurs and you are at fault, it could cost you more in compensation that you save in cutting corners. You may also face prosecution by the Health and Safety Authority. Keep up with the obligations imposed by your insurers and with insurance premiums. It could be a disaster for your business if your insurance is invalidated.

### Employment Law

Staff headcount, performance and remuneration are often scrutinised in an economic downturn. Redundancies may even have to be made. If this is the case, ensure you have good legal advice before you start into this process. A review of staff performance and remuneration or implementation of a redundancy programme can prove to be very expensive if not done in accordance with employment law.

Continue to fulfil pension obligations whether it is facilitating access to a PRSA or making employer contributions to an existing scheme. Failure could result in prosecution by the Pensions Board.

### Consumer Protection

Do not be tempted to put a "crunch" on your customers by imposing onerous terms and conditions that will not be upheld by the courts, such as severe penalties for late payments. Deal within the terms and conditions which you have agreed with customers. Do not damage the valuable reputation of your business.

### Insolvency Issues

Directors need to understand the trading position of the company to appreciate its solvency. Directors should seek and receive financial and trading information frequently. Directors facing insolvency should take steps early in this process to deal with the issues. A director can be made personally liable for the debts of the company if he or she trades recklessly or fraudulently and can face criminal sanction. A director can also be made subject to a restriction order or disqualification order, which may negatively impact on the ability of that director to gain future employment or run another business.

### Conclusion

Talk to your trusted professional advisors - legal, financial and tax - early on, if you feel you are heading into difficulty. Remember, prevention is better than cure!

Una Burke,  
Partner, Corporate Department

Una is a member of the MH+C Business Compliance Unit. The Unit is made up of a team of experienced lawyers from a range of specialist areas who can give you advice on assessing risk and improving the systems and procedures in your business. For more information contact Una at uburke@mhc.ie or Liam Brazil at lbrazil@mhc.ie



Mason Hayes+Curran  
Incorporating Arthur O'Hagan

# Construction, Energy and Projects

## Introduction

We are delighted to introduce you to our multi-disciplinary Energy and Projects team. The practice group comprises of lawyers specialising in construction, finance, real estate, regulated utilities, energy and corporate law. We have been going from strength-to-strength over the last number of years and were one of the first law firms to advise on renewable energy project finance in Ireland. Last year we were ranked by Infrastructure Journal as one of the top 10 firms in Europe in renewables. We advise leading banks, developers, state agencies and investors. Our regulatory team played a lead

role in drafting the trading and settlement code for Ireland's All Island electricity market.

In addition to a number of 50MW + wind farms we are currently advising on refinancing a portfolio of developed projects and acting for a state agency in procuring a district heating scheme as well as an ocean energy pilot project. Our transaction lawyers have been busy this year on a number of the key disposals in the Irish market place. Should you wish to have a word on any related issue, don't hesitate to get in touch with Kevin Hoy, Rory Kirrane or John Kettle.



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## Recent Events

### Renewable Energy Seminar

The fourth annual MH+C Renewable Energy Seminar took place on 24 September 2008 and was very well attended with representatives from all of the leading banks and corporate finance houses. We were delighted to have David Taylor, former CEO of Sustainable Energy Ireland in attendance as the chair for the event. A number of presentations were given on various topical matters currently affecting the renewables market.

Peter Corcoran of OpenHydro Group Limited gave a most interesting presentation on tidal energy taking us through the workings of an open-centre turbine and describing the experiences of OpenHydro in completing the sub sea deployment of their first turbine which is located up in Orkney in Scotland.

Andrew Ennis of NCB spoke about NCBs involvement in raising finance for a number of large high profile energy projects in recent times and spoke about the economics of the sector, focusing on the Irish market in particular.

Stephen Woodhouse of Pöry Energy Consultants which has offices throughout Europe gave an invaluable presentation on the situation and history of the England and Wales pool

making comparisons with how things are being done in Ireland and setting out lessons which can be learned by Ireland from the England and Wales experience.

Kevin Hoy who is the head of MH+C's financial services department spoke about practical recent issues affecting the Irish market focusing in particular on the duration of planning permissions and made a number of proposals on how the law might be changed to facilitate wind farm development in the future.



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### IWEA's Autumn Conference

MH+C were delighted to be one of the sponsors at the IWEA autumn conference which was held on 3 October 2008 in the Europa Hotel in Belfast. The topic of the conference was "Actions for the Economic Prosperity in a New Energy Era". The conference was a very productive workshop particularly in the context of the current credit environment. MH+C had a strong representation from its Construction, Projects and Energy unit with Rory Kirrane (head of Construction), Will Carmody (partner in Financial Services), Liz Roche (partner in Real Estate) and Eoin Cassidy (solicitor in Construction) all in attendance.



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## The Construction, Energy and Projects Team



# Role of PSDP in Construction of a Wind Farm: Can it be Divided



Susan Bryson

In November 2006 new Irish Health & Safety Legislation was enacted requiring a client at the commencement of a project to appoint a Project Supervisor for the Design Process (PSDP) and at the commencement of construction works to appoint a Project Supervisor for the Construction Stage (PSCS). The requirement applies in the case of all projects other than routine maintenance, cleaning, decoration and repair or where the project is being carried out at the clients own domestic residence.

The role of the PSDP has been expanded significantly from that of the previous requirement for a PSDS under the old legislation. The new legislation effectively requires that one designer takes overall responsibility for the health & safety issues on a project throughout the entire lifetime of the project. The PSDP is responsible for identifying all potential health and safety risks and co-ordinating co-operation between designers of the various stages of construction in order to protect the safety health and welfare of those involved in the construction of the project. Whilst the PSDP does not assume responsibility for the work of other designers the idea is that the PSDP would have overall responsibility for identifying gaps in the risk assessments undertaken by each of the designers and ensuring co-operation between each of the designers to ensure those gaps are plugged.

The responsibility placed on the PSDP is extremely onerous and in practical terms means that the individual or firm appointed as PSDP is expected to identify risks and make decisions in relation to aspects of construction/ design in which they do not and cannot be expected to have expertise. Whilst this causes a difficulty in construction projects in general, it is causing major issues for both clients and professionals involved in the construction of wind farms, the number of which being built in Ireland has increased significantly over the last number of years.

The difficulty in the case of wind farms arises from the complex nature of construction and the various discreet elements involved in the construction of a wind farm. The structure of the project depends largely on the size of the project and the method of procurement but in simple terms can be identified in a number of stages;

1. The procurement of the wind turbines;
2. The civil works including the roads, hard standings and foundations;
3. The electrical works required in order to connect to the grid via the sub-station; and
4. Construction of the grid connection assuming that the client is responsible for the contestable works.

Each of these stages involves very specialised and specific designs and processes and it is difficult to see how one particular professional or firm of professionals can have the expertise necessary to properly carry out the role of PSDP as envisaged in the legislation. Recent attempts to find a solution to this problem have included splitting the project into two separate and distinct projects and appointing a different PSDP for each project. The separation has been done according to whether the works are inside or outside the substation palisade fencing so that one project is the construction of the transmission line (including the sub-station) and the second project is the construction of the wind farm works including the turbines and interconnecting electrical cabling.

The entire ethos of the 2006 legislation was to provide for a situation where one designer would take overall design responsibility throughout the entire construction process in all matters both on and off site so that there would be one single point of responsibility for health and safety matters. It is difficult in those circumstances to see how the HSA could accept a situation where a client presents a project as two separate and distinct projects for the purposes of the appointment of the PSDP. Whilst there maybe an argument to be made where a project consists of many different phases of construction with significant and substantial periods of time between phases it is impossible to see how the construction of a wind farm, the works for which are generally carried out on the same site and simultaneously, could be defined as two or more distinct projects. The issue remains academic at present with different professionals having different views and the reality is that we will have no real guidance on the issue until an accident happens on site at which point the HSA and/ or the courts will have to make a determination.

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## Enforceability of Liquidated Damages

Liquidated damages provisions are an ever-present part of construction contracts, allowing parties to agree the amount of compensation to be paid in the event of a particular obligation not being performed. Thus, they avoid the necessity, and cost, of proving loss and proximity in legal proceedings.

Courts in common law jurisdictions usually enforce contracting parties' rights to agree and identify compensation in the event of a breach of contract where the compensation is a genuine pre-estimate of loss. In the case of *Philips Hong Kong Limited v The Attorney General of Hong Kong* it was acknowledged that it was to both parties' advantage in building and engineering contracts to have a reasonable degree of certainty as to the contractor's liability and to the level of protection for employer in the event of a contractor default.

However the courts have indicated that liquidated damages provisions may be unenforceable, and deemed an unlawful penalty provision where:

1. the pre-determined sum is extravagant and unconscionable when compared to the greatest loss that could be proven to have resulted from the breach;
2. the sum is a single lump sum payable on the occurrence of one or more or all of several events, the events occasioning varying degrees of loss;
3. where the breach consists of the failure to pay money and the damages due are greater than this sum (allowing for limited interest); and

4. where a precise pre-estimate of loss is possible and the damages due pursuant to the liquidated damages clause is greater than this amount.

Recently in Scotland, *Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited* examined the enforceability of a liquidated damages provision in an amended FIDIC "Silver Book" contract for the construction of balance of plant works at a wind farm development. In upholding the Arbitrator's decision that the provision was unenforceable, the court noted that the clause could impose liquidated damages liability on the contractor in respect of delays to individual wind turbines caused by the wind turbine contractor. The difficulty with the provision was that although wind turbine contractor delays did entitle the contractor to an extension of time there was no provision in the contract for sectional completion thus no completion took place until all turbines were fully connected and taken over. Where overall critical delay was caused by the contractor but individual wind turbines were delayed by the turbine contractor there was no provision to alleviate the imposition of liquidated damages on the contractor. This was deemed a penalty and therefore unenforceable.

Care should be taken in drafting liquidated damages provisions to ensure that the liquidated damages are a genuine pre-estimate of loss. There ought to be allowances within the clause, or other contractual provisions, to allow for extensions of time or alleviated damages in circumstances where delay to the works has not been caused by the contractor.



Eoin Cassidy

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## Trading Arrangements in the SEM

The Single Electricity Market or "SEM" is a single market for wholesale trading in electricity on the island of Ireland. Trading commenced on an all-island basis in the SEM on 1 November 2007. The market is a "gross mandatory pool" which means that all generators above a de minimis threshold (currently 10MW) are required to trade their electricity through a "pool" mechanism to all retail suppliers who then supply to end users.

The terms of trading in the SEM are governed by the Trading and Settlement Code ("Code") which was drafted jointly by the Irish Commission for Energy Regulation and the Northern Ireland Authority for Utility Regulation. MH+C were principal advisors to the Regulatory Authorities in drafting the Code. Under the Code, all generators are deemed to be selling collectively to all suppliers who take electricity from the grid in the relevant trading periods. Generators will receive the system marginal price for every unit of electricity sold through the pool in any given half hour.

As a rule, generators above 10MW cannot enter into bilateral power purchase agreements for the physical sale of power outside of the pool, although they may hedge the pool price by entering into contracts for differences or "CfD"s. The ideology behind this gross pool structure is that it facilitates market power mitigation, so that a small number of large energy producers cannot monopolise the market by buying up power from all generators and selling on to suppliers.

There is, however, an exception which is generally suitable for renewable generation schemes such as the Renewable Energy Feed in Tariff or "REFIT", whereby the generator can enter into a power purchase agreement (PPA) with a third party, who then sells the electricity into the pool assuming the role of the generator for the purposes of the Code. This saves the renewable generator the administrative burden of registering in the SEM and arguably provides for a more secure price. In the case of REFIT for example, the purchase price under the PPA is State subsidised.



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# Financing Energy Projects



Micheál Grace

## Introduction

Financing a specific undertaking or venture and using the revenues from that particular undertaking as security for a loan is not a new concept. The ‘wildcat’ oil exploring pioneers in Texas and Oklahoma used ‘production payment’ loans to finance oil exploration in the 1930’s. In fact, this type of finance has been around for centuries. The first recorded example of project finance dates back to 1299 where a Florentine bank was mandated to finance the development and exploitation of silver mines in Devon, England.

## Project Finance

Project finance involves the creation by a sponsor of a legally independent project company or special purpose vehicle (“SPV”) partially financed with a non-recourse or limited recourse financing structure in which debt, equity and credit enhancement are combined for the construction and operation of or the re-financing of a particular single purpose industrial asset in a capital intensive industry.

The project finance model requires lenders to base credit appraisals on the projected revenues, rather than the general assets or creditworthiness of the sponsor. The lender must rely on any revenue producing contracts and other cash-flow generated by the facility as collateral for the debt. Of course, the SPV will be the party to such contracts, rather than the sponsor.

It is usual that certain recourse will be available to the sponsor, but the level is usually determined by the unique risks presented in a project and on the appetite of the credit markets. In the current climate, for example, parent company/sponsor guarantees for unbudgeted costs are more likely to be requested. Also, as risks may vary during different phases of the project, sponsors may face increased recourse at certain phases such as during construction.

## Security

As security for providing finance to the SPV, the lender will take a mortgage, charge and assignment over all of the SPV’s assets. Usually those assets will consist of land, facility equipment (wind or wave turbines, electrical equipment and ancillary items) and the power purchasing contract.

The lender will also enter into direct agreements with third parties (those supplying various operational assistance and services to the facility, equipment suppliers, power purchasers and landowners) which will allow the lender to ‘step into the shoes’ of the SPV and operate (or more probably appoint a nominee to operate) the facility themselves in a situation where the debt service obligations of the SPV have not been met.

## Due Diligence

In advance of providing project finance, the lender will engage various professionals to ensure that the complicated contract matrix which the sponsor and the SPV have put in place is suitable to ensure successful completion of the facility and ongoing revenue stream.

Lawyers, technical advisors and financial specialists will ensure that risk can be apportioned appropriately. Work will include ensuring that relevant site surveys are carried out in advance of construction, insurance is in place for business interruptions caused by such events and that liability (and resultant losses) is left with those responsible.

## Energy Pricing Fluctuations and Project Finance

The recent rapid fluctuations in the price of oil and gas resulted in the “pool price” in the Single Electricity Market (“SEM”) increasing. This has resulted in generating facilities (the SPV’s producing the power) seeking opportunities to operate as merchant plants, supplying directly into the SEM pool and obtaining the upside of this price increase. The only source of revenue up to that point was supplier payments to the SPV under the power purchase contract. Removing this predictable revenue path creates significant difficulties for prospective lenders relying on this revenue stream as the principal security for their loan.

One established wind farm has already cancelled its power purchase contract and refinanced its project finance entirely with private equity. It is unknown whether the lender had any desire to remain involved or was given the opportunity to remain in light of the revised revenue structure. High loan to value ratios combined with the tightening of credit and bank caution about the volatility of fossil fuel prices mean that it is unlikely that a wind farm in the course of construction or in the early stages of production would be able to follow this example. However, there may be developments with private equity providing mezzanine funding.

## Conclusion

Project finance has allowed for the exploitation of natural resources, both renewable and non-renewable for centuries. In the current climate, with global credit being more difficult to obtain, renewable energy projects will still succeed in obtaining attractive finance packages due to continued state support and guaranteed revenue streams. However, extensive and in depth due diligence combined with intelligent and responsible risk management are essential in ensuring not only a successful project finance, but also a successful project.

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# Full Implications of Bank Guarantee Scheme Unknown

On 30 September 2008 the Irish Government announced a guarantee (the "Guarantee") of certain credit institutions operating in Ireland (the "Covered Institutions").

Emergency legislation (Credit Institutions (Financial Support) Act 2008) was enacted on 2 October 2008 to provide an enabling framework for the Guarantee. The details of the Guarantee were then introduced by way of a scheme (the "Scheme"), which received the blessing of the European Commission as being compatible with EU state aid rules. However, the full implications for the Covered Institutions are unknown, due to the wide discretions reserved by the Minister for Finance (the "Minister") under the Scheme and his power to amend its terms at any time.

## The Scheme

The primary purpose of the Scheme is stated to be the maintenance, in the public interest, of the stability of the financial system in Ireland. The Scheme provides that the Minister will stand as guarantor of all retail and corporate deposits (to the extent not covered by existing deposit protection schemes in Ireland or any other jurisdiction), interbank deposits, senior unsecured debt, asset covered securities and dated subordinated debt (Lower Tier 2) (the "Covered Liabilities") of the Covered Institutions. The Scheme will expire after a period of two years on 29 September 2010.

## Principal Terms and Conditions

The Covered Institutions are subject to stringent terms and conditions, including an unlimited indemnity to the Minister in respect of any financial support provided and all associated costs. Other principal terms include the following:

### Cost

- a quarterly non-refundable charge for the financial support, reflecting the risk profile of the Covered Institution;
- payments made by the Minister will be recouped in full from the Covered Institution in a manner consistent with its long term viability.

### Commercial Conduct and Subsidiaries

- regulation of commercial conduct (e.g. capital ratios, market share, balance sheet growth) with restrictions on growth of overall activity;
- compliance with targets on assets and liabilities to be set by the Regulatory Authority;
- the Minister's consent for any acquisition or merger with another institution not benefiting from the Scheme;
- rules to be made by the Minister governing the payment of dividends (no new dividends are permitted before these rules are made).
- where subsidiaries are regulated in Ireland, but the parent is not, then only the liabilities of the Irish subsidiary which relate to its business are covered by the guarantee;

- the Minister has the right to impose further restrictions to 'appropriately ringfence' the activities of the Irish subsidiary so that its financial exposure to its parent is minimized;

There will also be increased compliance obligations on Covered Institutions including reports to evidence compliance with the Scheme, possible mandatory restructuring and the preparation of a code of practice for effective risk management.

### Board Representation and Executive Remuneration

- the appointment of one or two public interest directors to the board;
- an 'appropriate balance' on the board between executive and non-executive directors;
- the right of the Minister to appoint persons to observe all meetings of the remuneration, audit, credit and risk committees;
- oversight of remuneration packages of directors and executives by an independent committee to be established by the Minister;
- bonus payments to be measurably linked to reductions in guarantee charges, reductions in excessive risk taking and the encouragement of long-term sustainability of the Covered Institution.

### Unknown Implications

The landscape of banking has certainly shifted for the foreseeable future. The impact on the Covered Institutions is multifaceted. Apart from the unlimited nature of the indemnity provided to the Minister and the actual charge the Covered Institutions must pay for the Guarantee, the unknown nature of the other obligations cannot be ignored. The Minister has reserved wide and varied powers under the Scheme which may be exercised at his sole discretion. He may vary the existing terms of the Scheme and Covered Institutions undertake to comply with any such amended terms and with any future directions issued by the Minister. Accordingly, the Covered Institutions cannot fully evaluate the nature, scope and extent of the implications of the Scheme.

The Minister also has wide discretionary powers to regulate how Covered Institutions conduct their business. The Scheme specifically states that Covered Institutions shall conduct their affairs at all times with a view to furthering the purposes of the Scheme and in a manner that progressively reduces the risk to the Exchequer under the Guarantee. Needless to say, this represents a significant change in the business objectives for the Covered Institutions, the full implications of which will only become apparent over the lifetime of the Scheme.

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Fionán Breathnach

## Mason Hayes+Curran News and Events



### Four New Partners

MH+C is delighted to announce the recent promotions of three new partners - Gavin O'Flaherty, (Corporate), Paul Convery (Litigation) and Elizabeth Roche (Real Estate). These promotions bolster the firm's expansion, which has seen staff numbers grow to over 270. We also welcome Susan Bryson as a new partner in the Construction and Engineering division at MH+C. Prior to joining Susan was a partner at Ivor Fitzpatrick where her practice focused on construction related disputes and commercial litigation.

Pictured above, from left: (back row) Gavin O'Flaherty (Partner), Paul Convery (Partner), (front row) Elizabeth Roche, (Partner), Emer Gilvarry, (Managing Partner) and Susan Bryson, (Partner).

### Three New Senior Associates

The firm is also pleased to announce the recent promotions of Rachel Carney (Real Estate) and Claire Lord (Corporate) to senior associates. In addition we welcome Jane Pilkington who joined us as a new senior associate in the Commercial Litigation division at MH+C. Prior to joining the firm, Jane was a senior associate at Eugene F. Collins Solicitors where she specialised in the areas of commercial litigation and business immigration.

Pictured below, from left: Rachel Carney (Senior Associate), Jane Pilkington, (Senior Associate), Emer Gilvarry, (Managing Partner) and Claire Lord (Senior Associate).





### MBA Association

Mason Hayes+Curran were delighted to play host to a topical discussion on the 2009 Budget in association with the MBA Association of Ireland. The event was held on Thursday, 16 October, Marc Coleman a leading Economist spoke on the topic of “Budget 2009 – what does it mean for you!” and the various changes to be implemented and the affects it will have on our everyday lives. The event was attended by over 60 MBA graduates in Ireland and was hosted by our Partner Martin Kelleher, who is a committee member of the Eastern Chapter of the MBAAI.

Pictured above, from left: Andrew Harbourne-Thomas, Chairman, MBA Association of Ireland, Greg Devlin, President, MBA Association of Ireland, Marc Coleman, Economics Editor of News talk 106 to 108 and weekly Economics columnist with the Sunday Independent, Godfrey Fletcher, Deputy Chairman, MBA Association of Ireland and Martin Kelleher, Partner, Mason Hayes+Curran.



### Mock EAT

Mason Hayes+Curran and Sanders & Sidney/O’Shea held a Mock Employment Appeals Tribunal to address selection for redundancy on Wednesday 22nd October. Due to the recent economic boom, many organisations are facing uncharted waters when it comes to redundancy as many Human Resource Directors, Managers and Senior Executives may not have been through the process previously or in recent times. The event presented a real learning opportunity to Managers and Senior Executives involved in decisions to reduce their workforce.

Pictured above, from left: Richard Woulfe, Head of Employment and Benefits at MH+C and Ger Ryan, Managing Partner, SSOS.



### Chairman speaks at leading Public Sector conference

Declan Moylan, Chairman of MH+C was a speaker at a well attended conference aimed at senior public sector executives whose subject was “Efficiency and effectiveness in the Public Sector”. Declan spoke on the theme of Corporate Governance in a public sector context and the impact of legislative and judicial intervention on public administration.

Pictured above, from left: Declan Moylan, Chairman, Mason Hayes+Curran, Dr Sean barrett, Tony O’Brien, Director, Grant Thornton and Don Bergin, Conference Chairman and Director, Public Affairs Ireland.



### St Patrick’s CY Soccer Club

When the Treasurer and Manager of our local soccer club approached us to support their club we invited them to our offices to meet with us. After learning more about the good work the volunteer coaches are doing, we agreed to sponsor two teams - the Under 13 and Under 15. We are pleased to inform our readers that the Under 15 team remain unbeaten this year in Division A1 of the Dublin District School Boys League (DDSL). Well done St Pats.

Pictured from left: (back row) David Kemple, St Pat’s, Kevin Hoy, Partner, MH+C, Daniel McGuinness, St Pat’s, Eithne Harley, MH+C, Pictured from left: (front row) St Pat’s players.

## Mason Hayes+Curran News and Events



### Irish Society of Insolvency Practitioners

Mason Hayes+Curran were delighted to host a topical evening seminar on Thursday, 30th October. This seminar was run by the Educational & Technical Committee for The Irish Society of Insolvency Practitioners Members. The seminar was on the Implications for Insolvency Practitioners of the "Companies Consolidation and Reform Bill". The speaker was Declan Murphy – Barrister and Kings Inn Lecturer in Company law. The informative session was followed by a thorough questions and answers session.

Pictured above, from left: Jim Hamilton, Secretary, The Irish Society of Insolvency Practitioners, Declan Murphy, Guest Speaker and Barrister, Declan Black, Partner.

### MHC support Drug Project for Youths

The Irish Drug Treatment Centre Board has undertaken a novel approach to enhance outcomes in addiction treatment using charity sponsorship as an incentive for clients. Mason Hayes+Curran were delighted to support the project by agreeing to sponsor the clients during this pilot.

The Pilot initiative was undertaken in the Young Person's Program (YPP) at the Drug Treatment Centre Board over a twelve week period during the summer 2008. The YPP provides a treatment service for teenagers with very serious addictions, generally heroin dependence. Nine young people participated.

Between them, the young people earned a total of €3115 for a range of charities chosen by the youths. They earned money for the charity through attendance at counselling sessions, demonstration of abstinence (confirmed by urinalysis) and the attainment of goals specific to their individualised care plan. The rationale of this novel treatment approach draws on the principles of contingency management, this being an evidence based approach used in addiction treatment internationally where clients receive rewards for making progress in their treatment.

According to the YPP "Clients obtained a deep satisfaction from the knowledge that their efforts in addressing their own addiction were going to have benefits for others through the charity sponsorship. It challenges the unfair stereotype that drug users are self centred or don't care about others"



### MH+C sponsor Chartered Surveyors Annual Conference

The theme of this year's conference was 'Ireland's Future in the Global Economy'. The Conference considered the threats and opportunities that the international context presents to the Irish economy and its component parts, particularly, the property investment and construction sectors and was attended by 250 delegates.

Pictured above, from left: Sean McCormack, President SCS and John Minihane, Partner, Mason Hayes+Curran.



### Culture Night

On Friday September 19th as part of Dublin's Culture Night, Business to Arts, the organisation that promotes creative partnership between business and the arts, joined forces with MH+C, to facilitate the viewing of the firm's collection of art, and present a talk on collecting and commissioning to demystify the process for the public. This was a wonderful opportunity for the firm to open its doors to those interested in art and was very well received. Over 140 guests enjoyed an evening of art and heard short talks about the firm's collection and tips on collecting art. MH+C were delighted to host the evening and greatly value our relationship with Business to Arts. Business to Arts' Chief Executive, Stuart McLaughlin, is developing strong relationships in New York with a view to building support for touring Irish arts and cultural activities in the city and beyond, an essential element in building the 'Ireland Inc' brand overseas.

Pictured from left: Stuart McLaughlin, CEO, Business to Arts, Eithne Harley, MH+C and Declan Moylan, Chairman of MH+C.

## Closing argument...

Two blondes walk into a building... you'd think at least one of them would have seen it.

Phone answering machine message - '...If you want to buy marijuana, press the hash key...'

"Doc I can't stop singing 'The Green, Green Grass of Home' 'That's like Tom Jones syndrome. 'Is it common?' 'It's not unusual.'

A man takes his Rottweiler to the vet. 'My dog's cross-eyed, is there anything you can do for him?' 'Well,' says the vet, 'let's have a look at him' So he picks the dog up and examines his eyes, then checks his teeth. Finally, he says, 'I'm going to have to put him down.' 'What? Because he's cross-eyed?' 'No, because he's really heavy'

What do you call a fish with no eyes? A fsh.

Police arrested two kids yesterday, one was drinking battery acid, and the other was eating fireworks. They charged one and let the other one off.

'You know, somebody actually complimented me on my driving today. They left a little note on the windscreen. It said, 'Parking Fine.' So that was nice.

A man walked into the doctors, he said, 'I've hurt my arm in several places' The doctor said, 'Well don't go there anymore'

Borrow money from pessimists -- they don't expect it back.

Half the people you know are below average.

82.7% of all statistics are made up on the spot.

A clear conscience is usually the sign of a bad memory.

All those who believe in psychokinesis, raise my hand.

I almost had a psychic girlfriend, but she left me before we met.

OK, so what's the speed of dark?

Hard work pays off in the future; laziness pays off now.

If Barbie is so popular, why do you have to buy her friends?

Why do psychics have to ask you for your name?

The hardness of the butter is proportional to the softness of the bread.

If your car could travel at the speed of light, would your headlights work?

## And more Footballers....

'I'm a firm believer that if the other side scores first you have to score twice to win.

"We didn't underestimate the opposition they just turned out to be better than we expected

'If we can play like that every week we'll get some level of consistency.'

"And Lineker scored the equaliser thirteen minutes before the end - Talk about a last-minute goal!"

"He dribbles a lot and the opposition don't like it - you can see it on their faces."

"I never comment on referees and I'm not going to break the habit of a lifetime for that prat."

"If history repeats itself, I should think we can expect the same thing again."

"They're the second best team in the world, and there's no higher praise than that."

"A game is not won until it is lost."

"I definitely want my son to be christened, but I don't know into what religion yet."

"The minute's silence was immaculate, I have never heard a minute's silence like that."

"Germany are a very difficult team to play.. they had 11 internationals out there today."

"You've got to believe that you're going to win, and I believe we'll win the World Cup until the final whistle blows and we're knocked out."

"The first ninety minutes of a football match are the most important."

"My parents have been there for me, ever since I was about 7."

"I can see the carrot at the end of the tunnel."

"I always used to put my right boot on first, and then obviously my right sock."

"We haven't been scoring goals, but football's not just about scoring goals. It's about winning."

"We must have had 99 per cent of the match. It was the other three per cent that cost us."



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