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# Project Finance 2018

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## General Chapters:



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Chapter 1

# Why the World Needs Multi-Sourced Project Financings (and Project Finance Lawyers…)


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## Introduction

Project financing has evolved significantly since it was first used to finance maritime operations and infrastructure developments in ancient Greece and Rome. Its modern incarnation in the 1980s was as a tool, used principally by commercial banks, to finance the construction of large-scale infrastructure projects in North America and Europe. The project financing techniques developed in the 1980s in North America and Europe were subsequently honed in the 1990s in the emerging markets of the Middle East, Latin America and Asia; however, despite this geographical shift, project finance lenders and sponsors (the term used to describe the ultimate owner(s) of a project company) remained primarily based in (or near) Tokyo, London or New York. In recent years, the concentration of project finance lenders and sponsors has been notably diluted as a far wider range of lenders and sponsors located all over the world have now become active participants in the market. In recent years, increased pressure on commercial banks (the traditional source of project finance debt), resulting from the on-going financial crisis and the application of regulatory capital adequacy requirements such as the Basel III standards, has made it harder for sponsors to raise finance for their large-scale projects without including a broad range of lending institutions from all over the world in their financing plans.

Notwithstanding the constraint on the availability of credit from commercial banks, the market continues to see significant levels of activity on projects of ever-increasing size and complexity. That this level of activity can occur is possible, thankfully, due to a number of factors:

- the increasingly central role taken by export credit agencies ("ECAs") and development finance institutions ("DFIs") in financing projects;
- the emergence of creative solutions by sponsors to fill the funding gap left by the absence of liquidity in the commercial bank market (such as mini-perm structures);
- where possible, the increasing use of Islamic finance;
- the possibility of incorporating project bonds into the capital structure, either from the outset or as a pre-agreed refinancing option; and
- the intrinsic value of the firm foundations that the discipline of project financing imposes on the stakeholders (such as extensive due diligence, strong collateral packages, transparent financial structures and bankable risk allocation),

which have meant that the project finance market has remained a viable option for the financing of large infrastructure projects around the world.

## The Importance of Multi-Sourced Financing Solutions

A sponsor's ability to procure financing on acceptable economic terms will have a significant impact on the profitability (and in some cases viability) of a project. The primary goal of a sponsor will always be to identify the cheapest source of financing available and from the outset of a project, a sponsor will focus substantial effort on assessing the financial markets in order to identify the optimal sources of financing for its project. The availability and cost to a sponsor of its financing will be dependent on a number of factors, such as:

- the project's location (for example, how liquid are the local commercial banks in that country and are there DFIs with a particular focus on that region?);
- the project's contractors (are the parties constructing the project able to benefit from the support of their country's ECA?);
- the industry sector for that project (is the project using tried and tested technology, in which case the perceived risk to the lenders will be lower?);
- the identity of the sponsor (does the sponsor have a track record of successfully developing projects on time and on budget?); and
- the procuring government authority (is there clear political support for this project?).

In today's project finance market, regardless of the identity of the sponsor or the robustness of a project's predicted future revenues, large-scale or complex projects will almost always require a sponsor to combine financing from a number of different sources in order to achieve a fully funded finance plan. As one might expect, the diversity of finance and financing structures has meant that the accompanying legal issues in multi-sourced project financings has become increasingly complex. Notwithstanding this complexity, these new structures have been welcomed and integrated into the project finance market and it is today seen as normal to have such diverse funding sources form part of the financing plan for a large-scale project financing. In this innovative and creative market, project finance lawyers have a unique and crucial role of being able to advise their clients, whether sponsors or lenders, as to how they can optimise the structuring of their projects so as to maximise their access to diverse pools of finance.

## Commercial Banks

Commercial bank debt has historically been the main source of finance for projects. However, since the onset of the financial crisis in 2007 commercial banks, with some notable exceptions, have, in recent years, found their ability to offer competitive pricing and long-term tenors severely constrained. That said, commercial bank liquidity levels in recent years have provided project sponsors with the opportunity to refinance their projects at lower pricing and on more favourable terms and conditions. Loans from commercial banks remain an attractive option for sponsors due to the commercial banks' project finance experience, their appetite for cross-border financings, the funding flexibility they have in managing construction drawdown schedules and multi-currency draws and their capacity to be a positive and responsive partner during the life of the project.

### Regulatory Restrictions

Even prior to the financial crisis, any commercial bank's decision to participate in a project financing would have been influenced by the treatment of its loans by the regulatory framework to which it is subject. One of the primary factors for recent credit constraints in the commercial bank market has been the U.S. and European regulatory response to the downturn in the global financial markets. U.S. and European commercial banks (who traditionally have been very active participants in project financings all around the world) have, in recent years, found it more challenging to participate in project financings due to an increased regulatory burden focusing on capital adequacy and minimum capital requirements.

### Commercial Bank Liquidity

The traditional project finance funding model developed in the 1980s saw projects being funded by international commercial banks which would often hold the loans they had originated until they were repaid. During the 1990s it became much less common for a commercial bank originating a loan to hold that exposure in the long term. Instead, it became the norm for originating lenders to quickly distribute their booked loans in order to create space on their balance sheet thereby enabling them to participate in further financings. Prior to the downturn in the banking market in 2007, commercial bank activity in the project finance market was high, in part, because there was a wealth of options for commercial banks to distribute their exposure, whether through syndication, secondary market sales or, to a lesser extent, securitisation.

A recent lack of options for commercial banks to distribute their booked loans and create space on their balance sheet, combined with high internal funding costs and increased regulatory constraints, has meant that, with the notable exception of Japanese commercial banks, international commercial banks had struggled to remain competitive in terms of pricing and tenor in the global project finance market. At the time of writing, this trend has been reversed as the liquidity levels of commercial banks appear to have returned to pre-financial crisis levels. In addition, we have seen the emergence of Chinese banks as key sources of finance in the large-scale project financings in the GCC region and Africa.

### Local Commercial Banks

In countries where there is a high level of commercial and political risk, local commercial banks are likely to figure prominently in a sponsor's financing plan as they can play an important role in providing comfort to their co-lenders through their knowledge of the local regulatory system and political environment. In addition, in jurisdictions where local commercial banks have significant liquidity, they are often key participants in project financings in that country. The downward pressure on global oil prices over the last two years reportedly had an effect on the liquidity levels of commercial banks in oil-rich jurisdictions (such as many of the GCC countries in the Middle East). Prior to that period, most large-scale project financings in the Middle East region had significant participations from local commercial banks who had lower funding costs than, and do not suffer from the same regulatory constraints as, their international counterparts and were consequently able to offer cheaper loans with longer tenors.

### Mini-Perm

In recent years, the inability of many international commercial banks, in particular the U.S. and European banks, to provide long-term debt has led to an increased focus on "mini-perm" structures. "Mini-perm" structures (which have long been common in North American project financings) enable commercial banks that are unable to offer long-term tenors to participate in financings through the provision of loans with much shorter tenors. Such "mini-perm" loans will cover the construction phase of a project and, typically, a four- or five-year period after project completion.

There are two types of "mini-perm": "hard" and "soft". A "hard mini-perm" requires sponsors to take 100% of the refinancing risk since if a refinancing does not occur by a certain date, this triggers an event of default under the loan documentation. A "soft mini-perm" differs in that the sponsors are incentivised to refinance because the project company becomes subject to increasingly onerous financing terms (such as an increase in the margins on the loans, cash-sweeps and/or prohibitions on dividends and other distributions to the sponsors).

Market sentiment is split on the long-term viability of the "mini-perm" as both commercial banks and sponsors remain wary of refinancing risk. Many commentators take the view that a "mini-perm" structure is unlikely to be successful unless there is clear evidence that the project will be able access the capital markets once it becomes operational (which, as we discuss below, will usually require the project to be able obtain at least a BBB+ credit rating). That said, if a commercial bank judges that a project may be able to access the capital markets at a future stage, it may be incentivised to participate in the initial financing so as to try to position itself to be in pole position to lead a debt capital market refinancing.

### Future Prospects

Notwithstanding that project finance lending from international commercial banks (as a percentage of the overall project debt) may be smaller than seen in previous years, there can be no question that international commercial banks, with their huge depth of global project finance experience and know-how, still have an important role to play in the project finance market. ECAs, now key players in any major project financing, will often prefer to finance a project alongside an international commercial bank (regardless of the size of that bank's participation) so as to obtain a degree of comfort that full due diligence on the project has also been undertaken by an international commercial bank with expertise in that industry sector or geographic region and that the project's risks are regarded by the private-sector debt market as "bankable". As a result, co-financings of projects by commercial banks, ECAs and DFIs have become a standard feature of the cross-border project finance market.

## Export Credit Agencies and Development Finance Institutions

With project finance as much in demand as ever, but the liquidity of commercial banks increasingly strained, the rise of the ECA and DFI has continued apace in recent years. For a number of years, and well before the current credit constraints in the commercial bank market occurred, ECAs and DFIs have played significant roles in financing projects in commercially or politically challenging jurisdictions where commercial banks would otherwise be unwilling or unable to lend without some element of political or country risk mitigation. As a result of the difficulties faced by the commercial bank market from 2007 onwards and the subsequent global financial crisis, the role of ECAs and DFIs in financing projects has dramatically increased as sponsors have sought to fill the funding gap left by credit-constrained commercial banks.

The rise in the importance of ECA funding has meant that sponsors will often spend time weighing up the advantages gained on a bid from a contractor where its host country's ECA is able to provide funding compared to a bid from a contractor that may be less expensive but which does not qualify for ECA funding. Likewise, sponsors will undertake a cost-benefit analysis of the additional expense of satisfying the host country for that project's development objectives so as to be able to access DFI funding.

### "Soft" Benefits of ECAs and DFIs

As well as their ability to offer or support loans with long tenors at reasonable pricing, having an ECA or a DFI participate in a project financing is attractive to sponsors as their involvement facilitates the participation of commercial banks. The reason for this is that:

- the participation of an ECA or a DFI is commonly perceived to increase the likelihood that the host government will be supportive of the project for fear of losing access to future financial support from ECAs and DFIs; and
- ECAs and DFIs are regarded as having access to diplomatic channels and therefore being able to act as a "soft" mitigant to any political risks (such as government expropriation or interference with the project) entailed in projects in less developed regions of the world.

### ECAs

Unlike commercial banks, ECAs are motivated by the aim of promoting the supply of goods and services from their country. ECAs are government departments, or financial institutions that benefit from government guarantees or direct funding, which provide financing as a means of supporting exports from their countries. Most ECAs follow the rules of the OECD consensus agreement (the "Arrangement") which governs the terms on which they provide finance for particular sectors and countries (the most notable exceptions being Russia and China). The Arrangement, which is not legally binding and is akin to a gentleman's agreement, permits ECAs to make or support loans of up to 85% of the export value of the relevant contract, plus up to 30% of the project's "local" costs.

There are different types of ECA:

- those that provide credit insurance and/or guarantees to other lenders like commercial banks (for example, *Banque Publique d'Investissement* ("Bpifrance") of France and *Euler Hermes Kreditversicherungs* ("Hermes") of Germany); and
- those that are also able to lend directly (for example, the Japan Bank for International Cooperation ("JBIC") and the Export-Import Bank of Korea ("Korea Eximbank")).

In addition, there are also ECAs that provide both insurance and/or guarantees and can also lend directly, such as UK Export Finance ("UKEF") of the United Kingdom.

An ECA's ability to make direct loans is a particular commercial advantage to its country's exporters as, following the financial crisis, regulatory changes have made ECA-backed loans less attractive to commercial banks which has had the effect of shortening the tenors and raising margins on the ECA-backed loans that commercial banks are able to provide. Unsurprisingly, a number of ECAs, including UKEF, that did not have the capability to provide direct loans at the time of the financial crisis, have subsequently established direct lending capabilities. Other financing vehicles, including those tied to fund investments, capital market issuances (including ECA-wrapped bonds) and direct equity investments, have also gained prominence in recent years within the ECA financing arsenals.

### DFIs

DFIs play a crucial role in providing credit and assistance to projects in developing countries where the political or credit risk is such that commercial banks are unable to lend to those projects or where export content is not sufficient for an ECA financing (for example, where a project entails a substantial civil works component). DFIs differ to ECAs in that rather than promoting the supply of goods and services from their country of origin, they are financial institutions whose purpose is to promote social and economic development. As a corollary, a DFI (as will an ECA) will seek to ensure that any project which it finances meets specific environmental and sustainability standards.

DFIs can be divided into two categories: bilateral development banks; and multilateral development banks. A bilateral development bank is created by the government of a single country and is solely funded by that government. European bilateral development banks such as the French development agency, *Promotion et Participation pour la Coopération Économique* ("Proparco"), the German development institution, *Deutsche Investitions und Entwicklungsgesellschaft mbH* ("DEG") and the Dutch development bank, *Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.* ("FMO") are regular participants in the project finance market.

By way of contrast, a multilateral development bank is a body or agency created by international agreement among multiple countries (each a "member country") and each member country will contribute to the funding of the multilateral development bank. Multilateral development banks are also sometimes referred to as international finance institutions ("IFIs"). The principal global multilateral, the World Bank, is comprised of two institutions: the International Bank for Reconstruction and Development ("IBRD"); and the International Development Association ("IDA"). Each of the IBRD and the IDA principally extend credit to sovereign borrowers (i.e. the government of a country). Where credit is not extended directly to a government, the World Bank will usually direct state support (i.e. a government guarantee) in respect of such credit.

The World Bank is part of the World Bank group. The Work Bank group is made up of the World Bank, the International Finance Corporation ("IFC") and the Multilateral Investment Guarantee Agency ("MIGA"). Unlike the IBRD and the IDA, the IFC and MIGA extend credit principally to non-sovereign borrowers. The IFC is a regular participant in the project finance market as it seeks to stimulate growth in the private sector of developing countries by encouraging domestic and foreign capital and making loans and equity investments to private sector participants that have projects in such countries. Unlike the World Bank, the IFC does not require direct state support. MIGA primarily provides both debt and equity guarantees against losses caused by non-commercial risks, including currency transfer restrictions, expropriation, war and civil disturbances and, in certain cases, breach of contract.

Multilateral development banks which are focused on specific regional development, such as the Inter-American Development Bank

("IADB"), the European Bank for Reconstruction and Development ("EBRD"), the African Development Bank ("AfDB") and the Asian Development Bank ("ADB"), have also been established and are now regular participants in the project finance market.

### "A/B Loan" Structures

DFIs have additionally historically facilitated commercial bank lending to projects by providing debt guarantees or fronting a loan through the use of "A/B loan" structures whereby the DFI acts as lender-of-record on the loan but sub-participates all or a portion of the loan exposure to commercial banks. "A/B Loan" structures have traditionally been popular with DFIs and commercial banks as the structure allows a DFI to leverage available liquidity from commercial banks whilst remaining the "lender-of-record" in the loan agreement. This allows DFIs to commit more funds to a project in order to achieve its development priorities and provides the participating commercial banks the ability to hold an economic interest in loans that, as they are being administered by the DFI, may enjoy a "preferred creditor status" in the event that the host country experiences a foreign exchange crisis.

Under the typical "A/B loan" structure, the DFI will enter into a single loan agreement (the "A Loan") with the project company for the entirety of the loan and enter into a form of participation agreement with the commercial banks to sell participations in the A loan (the "B Loan"). As far as the project company is concerned, the DFI is its sole contractual lender and as such, under the loan agreement, the DFI is solely responsible for administering the loan and collecting payments from the project company. Under the participation agreement, the DFI is responsible for distributing the payments it receives among itself and the commercial banks on a *pro rata* basis.

### Domestic Development Organisations

Many countries have established financial institutions that will have a specific focus or provide support to a particular group or sector. In the Kingdom of Saudi Arabia, for example, the Saudi Industrial Development Fund ("SIDF") and Public Investment Fund ("PIF") have active lending roles in the fulfilment of the country's programmes for industrialisation and the development of its economy.

## Capital Markets

While sponsors have accessed the capital markets to raise financing for projects since the 1980s, project bonds have typically been a less common source of finance than commercial bank, ECA or DFI debt. The attractiveness of the capital markets to sponsors unsurprisingly increases when, as in recent years, the comparative cost and availability of finance from commercial banks, ECAs or DFIs makes it challenging or more expensive to construct a financing plan based solely on those sources. At the time of writing, for well-structured and -sponsored projects the capital markets remain liquid and more than capable of providing long tenors and large amounts of debt. Accordingly, sponsors are increasingly looking to find ways of integrating project bonds alongside loans into their multi-sourced financing structures.

### Project Bonds

The U.S. has a long history of this practice (and indeed to date most project bonds have been issued to the U.S. market for predominantly U.S. projects). Although there is a perception amongst some sponsors that issuing project bonds can be a labour- and time-intensive process and dealing with a large pool of bondholders during the life of a project (rather than a group of lenders accustomed to the demands of a project financing) can be problematic, the pricing and tenors available in the capital markets have meant that this is a financing option that cannot be ignored by sponsors seeking to optimise their financing plans.

Whilst project bonds are certainly not uncommon in project financings, there are a number of characteristics of the capital markets which have meant that, where possible, sponsors have chosen to finance their projects using the loan markets. As such, notwithstanding the benefit of (currently) competitive debt costs and longer tenors available from the capital markets, a decision to issue project bonds is not one that is taken lightly by a sponsor.

### Regulatory and Rating Requirements

The securities laws to which a project bond will be subject, which do not apply to loans, inevitably make the process of issuing a project bond more laborious than entering into a loan due to the documentary and regulatory work entailed. Historically, the largest market for project bonds has been the U.S. market and therefore generally, issuers (both U.S. and foreign) will seek to structure their bond offering so that they can make offers and sales into the U.S. market to ensure access to sufficient investor demand and competitive funding terms for their bonds.

As with any jurisdiction, raising capital from the public markets in the U.S. is heavily regulated by both state and federal law. The body which regulates these matters in the U.S. is called the United States Securities and Exchange Commission ("SEC") and the principal legislation which applies to offerings in the U.S. is the Securities Act of 1933 and the Securities and Exchange Act of 1934. This legislation requires all offerings to be registered with the SEC and imposes extensive disclosure and reporting obligations on the issuer both prior to and after the offering. Project bonds issued to U.S. investors under Rule 144A require underwriters to obtain so-called "10b-5" disclosure opinions which will require both sponsors' and underwriters' counsel to carry out extensive due diligence in relation to the project.

An issuer of a project bond will usually be required to have the bonds obtain a credit rating of BBB+ or better. One of the primary reasons why project bonds have in the past held little appeal for sponsors as an alternative to loans is because many project companies located in emerging jurisdictions have lacked the ability to obtain a sufficiently robust credit rating.

### Consent Issues

One of the advantages of a project bond for sponsors is that bondholders will typically have less stringent documentation requirements which affords the project company greater flexibility as to how it constructs and operates the project (it should be noted that a sponsor will not benefit from this flexibility if the project bond forms part of a multi-sourced financing). Despite the extensive documentation governing the project participants' relationships, issues that had not been contemplated at the time of signing can (and often do) arise during the life of any financing and, when this happens, lender consent will usually be required for an amendment or waiver of the relevant terms of the finance documentation. In the context of project bonds, this process can be problematic for sponsors as it is generally more difficult to obtain the consent required to amend (or obtain waivers of) finance documentation from a large pool of bondholders than a group of lenders accustomed to the demands of a project financing.

### Construction Risk

Although it can be mitigated through completion support, one of the main obstacles to project bonds being more widely used in project finance has been the reluctance of bondholders to take construction risk on a project. This reluctance stems from the identities of the investor base for project bonds which typically comprises of insurance companies, bank treasuries, pension funds and asset managers looking for long-term assets with predictable revenue flows. One very popular option for sponsors is therefore to hardwire into the initial finance documentation the possibility of refinancing the initial loans with project bonds (as these will likely become available on more attractive terms once the project is fully operational since bondholders will no longer be taking a project's construction risk into consideration when pricing the debt). Sponsors are unlikely to seek to refinance commercial bank debt for projects financed between 2004 and 2008 as, in comparison with the current market, the debt pricing on these projects is likely to be relatively cheap. However, using project bonds to refinance bank debt incurred from 2008 onwards on projects that are now operational is a very attractive option for sponsors.

### Future Prospects

Commercial banks and their credit committees are reviewing project structures and credit risk with far greater scrutiny than they did before the financial crisis. This level of scrutiny has been exacerbated in many upstream oil and gas projects by the recent crash in commodity prices, which has made credit committees wary of taking the risk that the oil price will fall below the price at which the project is unable to repay its debt and service its interest. Such scrutiny, combined with the complexity of large-scale projects, means that project financings may take longer to execute than they did before the financial crisis. As lenders' documentation requirements and credit approval conditions have slowed down the timetable for the execution of transactions the competitive edge that the loan market once enjoyed over capital markets (because of its ability to execute transactions rapidly) has therefore lessened. As commercial banks' ability to provide long-term debt continues to be constrained more and more sponsors have shifted their attention to the project bond market and 2017 saw some huge project bond issuances in Latin America. In addition, sponsors, particularly in the European offshore wind market, sought to access the project bond market in order to diversify their debt funding sources across their portfolio of assets.

## Islamic Finance

The growth in the use of Islamic finance (i.e. finance which complies with the principles of Islamic law) has, in a large part, been stimulated by the increase in the economic prosperity of the Middle East and Asian regions. This prosperity has fuelled both the number of projects undertaken in these regions and the expansion of the Islamic finance sector, indeed, the boom seen in the Middle Eastern projects market fuelled the development of Islamic financing structures which could be incorporated into more traditional project financing templates in the region. As the Islamic finance market has developed, sponsors have increasingly considered Islamic finance as a key funding source and an Islamic finance tranche is now commonplace in any large-scale multi-sourced project financing in the Middle East.

Islamic finance is finance that is structured to be compliant with the principles of Islamic law (known as *Sharia'a* law in Arabic). The key principles of Islamic financing are that profit and loss are to be shared between the financier and the project company (as Islam perceives that the ideal relationship between contract parties should be that of equals where profit and losses are shared) and conventional interest is not permitted to be applied to any financing. These principles mean that Islamic facilities cannot be made using conventional practices and therefore various financing structures have been developed to create *Sharia'a*-compliant financing arrangements which operate in a similar manner to conventional financing structures and techniques. It should be noted that although Islamic banks must ensure that any proposed funding complies with *Sharia'a* principles, Islamic banks are commercial entities and so will have regard to many of the same considerations as a conventional commercial bank when evaluating whether to participate in the financing of a project.

A recent and exciting development has been the introduction of Islamic bonds (known as a "*sukuk*") into the Middle East project finance market. The first *sukuk* issuance was closed by SATORP (a refinery project sponsored by Saudi Aramco and Total). The $1 billion SATORP issuance was several times oversubscribed and was followed in 2013 by another larger *sukuk*, the unprecedented $2 billion issuance by the Sadara Petrochemical Project (sponsored by Saudi Aramco and Dow), which formed part of the overall $12.5 billion limited recourse finance package.

## Documentation

Where a project is being financed by multiple sources, harmonising the intercreditor relationship between each lending group (who will usually rank on a *pari passu* basis) is not always an easy task; however, provided that each lending group is prepared to engage in intercreditor discussions in a collaborative manner, it is rarely a significant obstacle to a successful financing.

Most multi-sourced financings will be structured around a common terms agreement which will contain the common conditions, representations, covenants and events of defaults that will apply to the project company. Each lending group will then provide financing under a separate loan agreement (or debt instrument) which may include terms and conditions specific to that lending group. Often one of the most complicated aspects of documenting multi-sourced loans is harmonising the different requirements of each lending group and ensuring that each lending group's requirements have been met in a manner that is satisfactory not only to the sponsors but also to each lending group.

## Conclusion

Although it is generally accepted that structuring a project financing that includes multiple funding sources can be complex, few of the issues presented are new and it is now commonplace for large-scale project financings to be financed by a number of different lending groups. The largest deal to close in 2016 was the $30 billion Barakah Nuclear Power Plant Project in the UAE, which was financed through a combination of export credit agency finance and debt provided by both international and local commercial banks. Project finance has repeatedly proved itself to be a resilient way to fund essential infrastructure and commodity projects and there is no reason to believe that this will cease to be the case, despite regulatory changes dampening the ability of commercial banks to provide long-term finance. A modern project finance lawyer is therefore required to have a degree of familiarity with a range of financial instruments, including commercial bank loans, conventional capital market instruments, domestic government-funded loans, ECA and DFI loans and guarantees and Islamic *Sharia'a*-compliant financing structures. The willingness of diverse lending groups to co-finance today's large-scale "mega-projects", coupled with the involvement of sponsors with proven track records, means that, notwithstanding today's challenging global economic forecast, it remains possible for sponsors to finance projects of ever-increasing size and complexity.

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# Poland's Progress to Create a Public-Private Partnership Project Pipeline


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Since joining the European Union (EU) in 2004, Poland has been a primary beneficiary of the transfer of EU funds. The result has been dramatic improvements in Poland's infrastructure and the general welfare of its residents. However, with the next EU multiannual financial framework starting in 2021, the EU will need to trim its budget, if only due to Brexit, if not for other reasons, and Poland is preparing for a decrease in the EU funding that it receives.

One of the main actions that the Polish government is taking in this respect is the implementation of its policy for the development of public-private partnerships (PPPs). Although Poland has had a law on PPPs since 2005, the acceptance of PPPs and the project pipeline remain disappointing. The new government policy, adopted in July 2017, *The Government Policy for the Development of PPPs (Poland)* (the Policy) seeks to remedy this.[1] In this chapter, we present the main elements of the existing law, how the law is to be amended to eliminate barriers in PPP implementation and the other main action items of the government's Policy.

## The Existing PPP Law

Poland commenced PPP projects in the 1990s, using the act on toll motorways to conclude agreements with three private partners for significant improvements to Poland's infrastructure through the construction and operation of parts of the A1, A2 and A4 toll motorways.[2] Seeking to build on this sectoral base, Poland enacted a PPP law in 2005 covering all sectors. This law was a failure, with no projects completed on its basis. A new PPP law (the PPP Law) was enacted in 2008[3] to remove the excessive restrictions of the prior law. This law has achieved a very limited success – PPP projects have been implemented on its basis, but the project pipeline continues to be unsatisfactory.[4] The PPP Law functions in coordination with the Concession Law, first enacted in 2009 and then re-enacted in 2016,[5] to implement the revised Concessions Directive.[6]

To date, almost all PPP projects have been initiated by local government authorities. The majority of PPP agreements are signed as concessions, because the local government authorities prefer to transfer the majority of risk to the private partner. However, most of these concessions are with small and medium-sized enterprises and their value is low, with the greatest number for sports and recreation facilities.[7]

The largest recent PPP agreements have been for the construction and operation of broadband networks and waste-to-energy plants. The sector that is currently seeing the greatest growth in the number of agreements is energy efficiency. Other sectors include sewage and water projects, public building projects, car parks, urban regeneration, transport and hospital equipment.

The PPP Law defines a PPP agreement as one where "the private partner commits to implement the project for remuneration and to cover in whole or in part the expenditure for project implementation or to have them covered by a third party, while the public entity commits to collaborate with the aim of achieving the project objective, in particular by making its own contribution".[8]

The PPP Law applies to projects (a) for the construction or refurbishment of a building or structure, provision of services, performance of a work, in particular equipping an asset with devices increasing its value and use, or other consideration, combined with (b) the maintenance or management of the asset that is used for implementation of the project or related to it.

## Selecting the Private Partner

The procedure for the selection of the private partner for a PPP project applies a three-step analysis. First, the Concession Law applies if the private partner (a) constructs works for which the private party receives only the right to exploit the constructed building, or such right along with payments, or (b) provides services and the management of such services for compensation, which is only the right to perform such services (to receive service user payments), or such right along with payments. If this condition is not met, the Public Procurement Law[9] applies to the selection of the private partner. However, if the Public Procurement Law cannot be applied for any reason, the PPP Law states that the selection shall be conducted in a manner that guarantees fair and free competition and observance of the principles of equal treatment, transparency and proportionality, with due consideration of the provisions of the PPP Law, and in case the public partner contributes real property, also the provisions of law relating to real estate management.

Tender notices are published in the Public Procurement Bulletin maintained by the Public Procurement Office or in the Official Journal of the European Union, as well as in the Public Information Bulletin maintained by the public entity.

The public entity shall select the most advantageous offer, which is the offer that presents the most advantageous balance of remuneration and other criteria applicable to the subject of the project. Evaluation criteria must include (a) the division of tasks and risks related to the project between the public entity and the private partner, and (b) the dates and amounts of projected payments or other consideration by the public entity, if such are planned. Evaluation criteria may include: (a) the division of proceeds from the project between the public entity and the private partner; (b) the ratio of public entity contribution to private partner contribution; (c) the effectiveness of project implementation, including the effectiveness of asset use;

and (d) criteria referring directly to the project subject, in particular its quality, functionality, technical parameters, level of technologies offered, operational costs and servicing.

## The PPP Agreement

Under the PPP Law, remuneration of the private partner shall depend either upon actual use of the project or its availability for use. Currently, the market prefers availability payment structures rather than demand structures for agreements governed by the PPP Law. For agreements governed by the Concession Law, the private partner must take demand risk. The PPP agreement shall include performance criteria or penalties related to the performance by the private partner, as well as provisions relating to the right of control and inspection of performance by the public entity.

The PPP Law contains specific provisions relating to the return of property contributed by the public entity in case of default by the private partner. As for property contributed by the private partner, upon termination, the private partner has the right to reimbursement of the value of such property as at the time of contribution. Subject to this right of the private party, at the end of the term, the project company shall transfer to the public entity the assets used in implementation of the project. If the project company intends to sell real property contributed to it, the private partner shall have a right of pre-emption.

The PPP agreement cannot differ from the terms stated in the tender announcement, unless the tender announcement specifically stated that such amendments would be permitted, along with the scope of such permitted amendments.

The public entity may be a shareholder in a project company established for the PPP project, or a limited partner in a limited partnership or a limited joint-stock partnership. In such case: (a) unanimous shareholder/partner approval is required to transfer or encumber real property or the enterprise of such company or partnership; and (b) the public entity has a pre-emptive right to acquire the shares of the private partner.

With respect to PPP agreements signed by government administration bodies, the annual budget act of the government shall specify the maximum amount of financial liabilities that may be contracted in that year. If financing for a project from the state budget would exceed PLN100 million (approximately €25 million), the Minister of Finance must approve the agreement.

With respect to the public debt, obligations under a PPP agreement are treated as off-balance sheet if the private partner bears most of the construction risk of building and most of the availability or demand risk, taking into account factors such as guarantees or financing by the public entity and allocation of assets when the agreement expires.

## Proposed Changes to the PPP Law

A key element of the Policy is to enact amendments to the PPP Law to increase its functionality and eliminate perceived barriers to implementing projects. Since mid-2016, the government has engaged in an extended consultation process with interested stakeholders. As of this writing, the draft amendments to the PPP Law[10] are awaiting final approval of the Council of Ministers, after which they will be sent to parliament, where their enactment is expected in 2018. We discuss the main changes that are expected to take effect; although, their enactment is not guaranteed.

Prior to tendering a project, the public entity will need to procure a project review comparing implementation of the project as a PPP against implementation solely utilising public funding. This review must take into account risk allocation, estimated lifecycle costs and the realisation timetable. Further, the public entity is encouraged to submit this review to the Minister of Development for so-called "certification"; that is, issuance of a positive opinion regarding the PPP project. This opinion will be confidential and non-binding, but it is expected that government bodies will be loath to tender a project without it. The intent is to reduce the number of tender announcements that do not reach a successful closing.

The selection procedure will change. The PPP Law requires at the outset that the public entity choose between a tender that is governed by the Concession Law or by the Public Procurement Law. This means that, in many cases, the benefits of a competitive dialogue cannot be realised, because realisation of such benefits would necessitate recommencing the tender. The amendment provides that all selection procedures will follow the Public Procurement Law, with the public entity having the right to decide what type of agreement will be signed.

The PPP Law requires that the PPP agreement be signed with the tendering party, without a right of substitution. As PPP projects are generally realised through special purpose project companies, this means that tenderers are required to establish SPVs for the purposes of each tender. The amendment provides that the public entity may grant a right of substitution, and thus, only the winning bidder or consortium will need to establish an SPV. However, the public entity will have recourse to the parent or consortium members to the extent that they have committed to provide resources to the project company.[11]

Public entities will no longer be permitted to be limited partners in partnerships; their participation will be limited to shareholding in limited liability companies or joint stock companies. Further, PPP projects may be executed by permitting private partners to become shareholders in existing companies providing public services, rather than requiring the creation of a new project company and in-kind transfers of assets to it. PPP companies with a public shareholder must be limited in time to the term of the PPP agreement along with a necessary liquidation period following such term.

Provisions of the Public Procurement Law[12] replace the restriction in the PPP Law regarding amendments to PPP agreements. The Public Procurement Law was recently amended to provide for comprehensive treatment of amendments to procured contracts.

The Public Procurement Law provisions requiring the private party to post security in the amount of 10% of the contract value will not apply to PPP agreements.

The provisions of the Civil Code granting subcontractors the right to claim unpaid contract amounts against the public entity in its capacity as the investor (the owner of the property) are excluded.

The public entity may sign direct agreements with third parties financing the project and grant them step-in rights in case of a risk of failure of the project.

The requirement to transfer assets at the end of the term of the PPP agreement is clarified.

Local self-governments of large cities are provided with additional authority to enact parking charges to provide greater flexibility for parking structure PPPs. Further, the real property tax will not apply to private parties that have signed PPP agreements for road maintenance.

Public entities may tender a project before authorisation for financing the obligations to be incurred by the public entity is obtained. This requirement for pre-authorisation is a significant cause of delays in announcing tenders, although this requirement does not exist where the public entity cost is to be financed from EU funds.

Restrictions regarding funding of student dormitories are lifted to enable the public entity to enter into such PPPs more easily. Public entities may make donations to non-profits for the purpose of realising PPPs with them. This need has been noticed particularly with respect to non-profit social care institutions that provide public services. Local public healthcare agencies are permitted to make in-kind contributions to PPPs.

Any government investment project with an estimated cost in excess of PLN300 million (approximately €75 million) will require, with certain exceptions, review by the Minister of Development to ascertain whether such project should be carried out as a PPP. This confidential opinion will be non-binding, but the goal is to raise the consciousness of PPPs, particularly as to central government projects, increase the number of large PPP projects and create a real pipeline that will generate investor interest.

## The Government's Action Plan for 2018–2019

The Policy identifies actions to be implemented within a period of not more than two years (except for long-term activities), in order to ensure the proper development and use of PPPs in Poland. In addition to the proposed amendments to the PPP Law discussed above, these actions are:

1. Developing and monitoring a PPP project pipeline (a database of investment plans). The market's need to know about future projects should be met through a public database of PPP project plans. This database will identify projects that are at the pre-contract stage (at least in the initial preparation stage but before contract signature) that have the potential to be developed as PPPs.
2. Keeping a database of signed PPP projects and monitoring their implementation and impact. This will help evaluate the long-term value of PPP projects.
3. Carrying out PPP educational activities. This includes training for all public entity participants in the PPP process, not limited to potential parties to PPP agreements but also including fiscal officials, prosecutors, auditors and anticorruption officials, and implementing a communication strategy to improve knowledge about the benefits of PPPs. One goal is to present PPPs as a reliable, transparent and alternative method of providing necessary infrastructure and public services, without leading to privatisation.
4. Developing guidelines, recommendations and good practices relating to the PPP process. This will include the preparation of standard contract clauses for various sectors that will be mandatory for projects receiving government advisory support.
5. Providing comprehensive advisory services to public bodies at the preparation and tendering stages, when obtaining financing and at contract signature and its execution. The Ministry of Development will provide financial support to such advisory services.
6. Quality assurance/assessment through a certification process. Such certification will focus mainly on assessing the accuracy and completeness of the pre-implementation analysis of the project, the legal and organisational model proposed, the mechanism for remunerating the private entity and the proposed distribution of risks in the PPP arrangement.
7. Developing and implementing a required opinion on the formula to be used to implement large projects (over PLN300 million/€75 million) of investment financed from the state budget, comparing traditional procurement and the use of PPP. This opinion will confirm that implementing the project in question using the traditional approach is valid only if doing so will bring greater benefits throughout the project lifecycle than the PPP formula. These opinions will not apply to projects co-financed from EU funds or non-repayable international financial instruments (e.g., the Connecting Europe Facility), projects in the defence sector, projects concerning supplies of sensitive equipment, sensitive services and construction works or projects that are already in preparation.
8. Establishing a system of guarantees for the public and private sectors, including creating a special fund for PPPs to allow for financing based on preferential terms and interest rates. However, such system must not distort competition and comply with state aid rules. It is expected that the Bank for National Economy and Polish Development Fund would play major roles.
9. Assessing opportunities to develop instruments to co-finance the public sector's costs of preparing and implementing investment projects (e.g., preferential loans for public entities). This assessment should take account of both the needs and capacity of the state budget and the benefits that may be brought about by the increased level of investment.
10. Developing and implementing sectoral/regional strategies for PPP development, and facilitate the organisation of investment priorities at the sectoral and local levels.

Finally, the government has already implemented one action item, which is the issuance in December 2017 of a general interpretation by the Ministry of Finance[13] of accounting for taxation of PPPs as it relates to the scope of a project that is subject to VAT and the moment the VAT obligation arises, as well as the income tax consequences of PPPs. In particular, this interpretation distinguishes services for design and engineering, operation services and financing services.

## Conclusion

The Policy and its action plan have been very positively received by the project finance and PPP community. The amendments to the law and action plan highlight the main barriers to implementing PPPs in Poland. In particular, the proposed requirement that each new large government investment project be vetted to determine whether it will be implemented as a traditional procurement or as a PPP should have a major impact on raising the importance of PPPs with government decision-makers in a wide variety of sectors. However, implementation of the Policy requires enactment of the proposed PPP Law amendments and, most importantly, a show of support by creation of a pipeline of new projects with the goal of achieving continual improvement in the provision of public services.

## Endnotes

1. Available at: https://www.ppp.gov.pl/English/News/Strony/Policy_for_PPP_in_Poland.aspx. The Policy is part of the *Responsible Development Strategy until 2020*, also known as the Morawiecki Plan (named after the current Polish Prime Minister), which is an official government development strategy plan adopted by the Polish government on 14 February 2017. This document, along with the Justification cited in endnote 10, is the source of much of the information on the state of the PPP market presented in this chapter.
2. The 270 km A2 toll motorway PPP project, completed in two phases, remains the largest PPP project in Central and Eastern Europe and one of the largest in Europe.
3. Act of 19 December 2008 on public-private partnership (unified text, Journal of Laws of 2017 no. 1834).
4. The government reports that 490 tenders for PPP contracts were announced between the end of 2009 and mid-2017, with only 26% of such tenders leading to signed agreements, most of which were for very small projects.
5. Act of 21 October 2016 on a concession agreement for construction works or services (Journal of Laws of 2016 no. 1920).

6. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (O.J. L. 94 of 28 March 2014).
7. The Policy states that 13 projects have a value over approximately €25 million.
8. Art. 7.1 of the PPP Law.
9. Act of 29 January 2004 on the Public Procurement Law (unified text, Journal of Laws of 2017 no. 1579).
10. Draft of Act amending the act on public-private partnership and certain other acts, along with the Justification to such draft Act, both dated December 2017 and available under reference number UD215 on the website of the Government Legislative Center at http://legislacja.rcl.gov.pl/.
11. Art. 22a of the Public Procurement Law.
12. Along with analogous provisions of the Concession Law.
13. Available at: http://www.finanse.mf.gov.pl/vat/objasnienia-podatkowe-i-broszury-informacyjne.

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# US Infrastructure Outlook 2018: The White House Proposal


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On 12 February 2018, the White House released its long-awaited "Legislative Outline for Rebuilding Infrastructure in America". Among other things, the plan aims to "stimulate at least $1.5 trillion in new investment over the next ten years".

The White House plan calls for a multi-pronged approach that envisions USD 200 billion in Federal funding with direct grants and improvements to existing financing programmes, infrastructure programmes and regulatory process improvements and the expansion of workforce development programmes. In this outline, the Trump administration has called for greater state and local funding and control over infrastructure and encouraged Congress to open the door to public-private partnerships (P3s) for US infrastructure projects, including transportation (e.g., airports, ports, highways, mass transit, rail), rural infrastructure (e.g., broadband, tribal, territorial infrastructure), water infrastructure and environmental projects.

Although low-cost programmatic and regulatory changes may be more attainable, the Trump administration will likely face difficult negotiations as it tries to remove statutory impediments to P3s or increase Federal spending beyond current Congressional budget agreements, which already exceed spending caps.

The proposal clearly contemplates a reduction in direct Federal funding of infrastructure, while setting overall infrastructure funding as a priority. The Trump administration sees private investment as partly filling the gap, while also requiring increased contributions from state and local governments. Investment opportunities may also be presented from plans to divest Federal government assets and privatise services, as well as from a liberalised policy involving tolling of highway assets. The plan may face hurdles insofar as it relies heavily on leveraging cash-strapped state and local treasuries, but holds promise in addressing critical US infrastructure needs.

## 1. Greater State, Local and Funding Involvement; the Incentives Programme

The plan envisages reducing the Federal role in infrastructure finance, declares that "States and localities are best equipped to understand the infrastructure investments needs of their communities", and proposes an incentives programme to encourage increased state, local and private investment in infrastructure.

The incentives programme would be funded with USD 100 billion in direct Federal funding, which amount would be divided among the United States Department of Transportation (DOT), United States Army Corps of Engineers (USACE) and Environmental Protection Agency (EPA). Other Federal agencies would be able to petition DOT, USACE or EPA to transfer incentives programme funds to incentivise eligible projects within their jurisdictional areas.

A wide range of eligible projects – including airports, passenger rail, flood control, waste and water facilities, and environmental sites – would be selected based upon the following weighted criteria: (i) the project's value (10%), (ii) evidence supporting how the applicant will secure and commit new, non-Federal revenue to create sustainable, long-term funding for infrastructure investments (50%); (iii) updates to procurement policies and project delivery approaches to improve efficiency in project delivery and operations (10%); (iv) use of new and evolving technology (5%); and (v) economic and social returns on investment (5%). The lead Federal agency would calculate each application score by multiplying the weighted score from the evaluation criteria by the percentage of non-Federal revenues (out of total revenues) that would be used to fund the project. A Federal incentive grant would be limited to 20% of new revenue for a project. The incentives programme would include a look-back period of three years to ensure that applicants could receive credit for actions taken prior to the programme taking effect.

## 2. Reforms of Existing Programmes

The White House has also asked Congress to add USD 14 billion to existing infrastructure financing programmes. Existing credit programmes – including the Transportation Infrastructure Finance and Innovation Act (TIFIA), Railroad Rehabilitation and Improvement Financing and Water Infrastructure Finance and Innovation Act (WIFIA) – would be expanded to cover additional infrastructure projects. For example, TIFIA would be expanded to include port and airport expansion projects.

TIFIA was intended to leverage Federal monetary investment and encourage states to shift some of their transportation infrastructure capital investment from a cash basis to a project-finance basis. In recent years, the demand for TIFIA financing has exceeded the amount of loans available.

Much of the TIFIA financing that has been provided in the highway sector has been for toll road projects. Many of these projects have been structured as P3s. For example, in such a P3 structure, TIFIA financing might limit the amount of conventional state and Federal highway funds (i.e., direct grants) required for the project to between 10% to 20% of the total project cost. The remainder of the cost could be funded by sponsor equity or senior debt (backed by toll revenue) and a TIFIA loan of between 25% to 33% of the project cost. Similarly, TIFIA financing could be used to reduce the amount of governmental grants required to fund transit projects, also using P3 structures.

Certain limitations to these programmes, such as the current USD 3.2 billion lending limit under WIFIA, would also be removed.

The EPA's WIFIA authorisation would be expanded to include non-Federal flood mitigation, navigation and water supply. WIFIA eligibility would also be expanded to include remediation of water quality contamination by non-liable parties at Brownfield and Superfund sites. The EPA would also be given authority to waive the WIFIA springing lien in circumstances similar to the TIFIA statute.

## 3. Rural Infrastructure Programme

The White House plan proposes that USD 50 billion be made available for the rural infrastructure programme, 80% of which would be provided by block grants to states under a distribution formula, for use in connection with infrastructure projects in rural areas with populations of less than 50,000. 20% of the funds under the programme would be reserved for rural performance grants within eligible asset classes. A portion of the funds would be set aside for tribal infrastructure and territorial infrastructure, with the remainder available for states.

Eligible asset classes under the rural infrastructure programme would include: (i) transportation: roads, bridges, public transit, rail, airports, and maritime and inland waterway ports; (ii) broadband; (iii) drinking water, wastewater, stormwater, land revitalisation and brownfields; (iv) governmental power and electric generation, transmission and distribution facilities; and (v) flood risk management, water supply and waterways.

State grants under this programme would be subject to evaluation criteria that aligned in part with the evaluation criteria under the infrastructure incentives programme. Among other things, this would require the states to demonstrate how they intended to leverage Federal funds with other fund sources.

## 4. Transformative Projects Programme

The White House plan proposes that USD 20 billion be made available for the transformative projects programme, which would intend to "provide Federal funding and technical assistance for bold, innovative, and transformative infrastructure projects that could dramatically improve infrastructure". The plan indicates that funding under the programme would be awarded "on a competitive basis to projects that are likely to be commercially viable, but that possess unique technical and risk characteristics that otherwise deter private sector investment. The Transformative Projects Program would support projects that, with Federal support, are capable of generating revenue, would provide net public benefits, and would have a significant positive impact on the Nation, a region, State, or metropolitan area".

The plan indicates that projects under this plan would include "ambitious, exploratory, and ground-breaking project ideas that have significantly more risk than standard infrastructure projects, but offer a much larger reward profile", and that "[i]nfrastructure sectors covered by this program could include, but would not be limited to, the transportation, clean water, drinking water, energy, commercial space, and broadband sectors".

The Department of Commerce would be the principal administrator of this programme. Recipients of financing under the programme would be required to share value with the Federal government and to publish performance information upon achieving project milestones and upon project completion.

## 5. Divestiture of Federal Assets

The Federal government would change its land and real property management to pay for the White House plan, including by divesting assets that would be more valuable to the public after sale, including Ronald Reagan and Dulles International Airports, Tennessee Valley Authority (TVA) transmission assets and the transmission assets of the Southwestern Power Administration, the Western Area Power Administration and the Bonneville Power Administration. The political support for any of these divestitures, however, is far from certain with early opposition. Congress must navigate around existing operating arrangements.

## 6. Toll Roads and Rest Areas

Current law imposes significant obstacles for states to toll existing interstate highways and to commercialise interstate rest areas. The White House proposes to grant additional flexibility to the states to engage in such activities. States would continue to be required to invest toll revenues and rest area privatisation revenues in infrastructure.

## 7. Airports

The plan provides clarity in two areas of the White House's infrastructure initiative affecting airports – (i) funding; and (ii) infrastructure improvements. First, the Federal government will incentivise state, local and private investment in airports through Federal grants up to 20% of a project's total cost.

The plan calls for considerable changes in the FAA's airport privatisation pilot programme (APPP). First, the plan would remove limitations on the number and size of airports that can participate in the APPP. Currently, only 10 airports are permitted to participate, with additional limitations on the number of airports that can participate by size (e.g., one large-hub airport). It also would decrease the percentage of airlines needed to approve privatisation from 65% to a majority, which will reduce barriers and provide more flexibility for carriers to approve privatisation. Airlines are likely to oppose this change. Currently, the programme has slots for the privatisation of 10 airports. Under this programme, the private operator of an air carrier airport may receive Airport Improvement Program (AIP) grants and collect passenger facility charges. In April 2017, the Trump administration announced that the FAA had accepted the City of St. Louis' preliminary application for St. Louis Lambert International Airport to participate in the APPP. Lambert is the fourth airport in the programme.

More generally, the White House proposal also calls for limiting FAA oversight of non-aviation development activities, permitting the use of AIP funds for incentive payments for accelerated project construction, and AIP oversight through post-expenditure audits *in lieu* of grant review and approval.

To improve existing financing programmes, the streamlined passenger facility charge (PFC) process would be extended from non-hub airports to small hub-sized airports, and the Trump administration would support the expansion of TIFIA programme eligibility for airport financing options. For airports, the White House would look to create more efficient FAA oversight of non-aviation development activities at airports, reduce barriers to alternative project delivery for airports, clarify authority for incentive payments under the AIP, and move oversight of AIP funds to post-expenditure audits. When combined with the financing principles above, these initiatives may further the profitability of airport projects through reduced costs and additional funding options.

## 8. Private Activity Bonds (PABs)

In the US, much infrastructure finance is accomplished by means of municipal bonds, which can benefit from a tax preference in that interest received is exempt from taxation. Private activity bonds (PABs) give similar tax benefits to investors in connection with public infrastructure in which private concerns are involved, subject to significant limitations designed to ensure that the public benefits from the infrastructure financed. These limitations often provide significant challenges to structuring transactions that hope to use PAB financing. The aggregate amount of PAB financing is also capped.

The White House plan indicates that an additional USD 6 billion of Federal funding over 10 years would be allocated to the expansion of PABs. The plan proposes to create flexibility and broaden eligibility to facilitate use of PABs to finance public-purpose infrastructure projects.

The plan would add three new categories of exempt-facility PABs: (i) flood-control and stormwater facilities; (ii) rural broadband service facilities; and (iii) environmental remediation costs on Brownfield and Superfund sites.

The plan would also broaden the following existing categories: (i) the docks and wharves category would be expanded to include maritime and inland waterway ports, and waterway infrastructure, including dredging and navigation improvements; (ii) qualified highway or surface freight transfer facilities would be expanded to include roads, bridges, tunnels, passenger railroads and other facilities that are eligible for Federal credit assistance under TIFIA; and (iii) hydroelectric power generating facilities would be expanded beyond environmental enhancements to include new constructions.

The plan also envisions that the PAB tax-exempt status would be preserved, and PABs would be expanded to certain privately owned projects and longer-term leases and concession arrangements for more types of public-purpose infrastructure. The alternative minimum tax (AMT) preference for PAB interest would be removed, as would the state population-based volume and transportation volume caps. The plan would also revise existing law to provide change-of-use curative provisions for private leasing.

## 9. Public Attributes; Private Ownership; and Expanded Flexibility for Private Leases

The plan stresses that tax benefits that went to private enterprises would be conditioned upon projects having public attributes. A project with private involvement would need to have either state or local governmental ownership or private ownership under arrangements in which rates charged for services or use of projects were subject to state or local governmental regulatory or contractual control or approval and provide for availability of projects for general public use or provision of services to the general public.

The plan proposes to create a new safe harbour that would treat a project as governmentally owned when a state or local governmental unit leases the project to a private business if: (i) the term of the private lease is no longer than 95% of the reasonably expected economic life of the project; (ii) the private lessee irrevocably agrees not to take depreciation or investment tax credit with respect to the project; and (iii) the private lessee has no option to purchase the project other than at fair market value.

## 10. Permitting Improvements

The White House has proposed regulatory and legislative changes that would reduce the administrative burdens associated with infrastructure development. These include improving efficiencies and decision-making at the Federal level for environmental reviews and permitting, expanding the delegation of authority to states in environmental reviews and right-of-way transactions, increasing pilot programmes that address environmental impacts, and reducing environmental review litigation.

On 15 August 2017, President Trump signed an executive order purporting to streamline the process for environmental review and permitting of infrastructure projects. Among other things, this executive order calls for "one federal decision", designating a lead agency for every major infrastructure project with the responsibility "for navigating the project through the federal environmental review and authorization process".

The August 15 Executive Order revoked President Obama's Executive Order 13690 dated 30 January 2015, which imposed a Federal flood management standard for federally funded projects.

The White House has proposed a structure which would require that each infrastructure project have a single designated lead Federal agency to oversee the environmental review of the project under the National Environmental Policy Act (NEPA), which process would result in the lead agency issuing one document concluding the NEPA process. This process has been dubbed "One Agency, One Decision". The White House has also proposed that the NEPA review process be limited to two years in total (21 months to conclude the NEPA review, and three months for permits to be issued).

## 11. Workforce Development

Educational and workforce development programmes would see improvements to the accessibility of technical and short-term education programmes, particularly for programmes for skilled trades and apprentice certifications. It would also require states to accept out-of-state licensed workers, if the state accepts Federal funds for projects.

## 12. The Role of P3s

The Trump administration clearly views P3s as playing a major role in achieving the administration's infrastructure goals. More specifically, the administration seeks to expand TIFIA, fund WIFIA, remove the cap on PABs, and involve the private sector in tolling opportunities, highway rest areas, divestiture opportunities with respect to power transmission assets and in connection with VA infrastructure. It may be that P3s could participate in USACE projects as well.

The administration's reduced amount of direct Federal investment in surface transportation projects clearly contemplates that private investment will play a role in filling the gap between such reduced amount and the overall amount of investment that the administration views as necessary to restore US infrastructure.

The plan proposes to amend 49 U.S.C. Chapter 53 to allow the greater use of P3s in transit capital projects and to codify the P3 pilot programme administered by the Federal Transit Administration (FTA) to formalise the procedures and expand the number of eligible P3 transactions. The plan also proposes to increase the Federal contribution share in the Capital Investment Grants Pilot Program to 50% from 25%.

The plan also proposes to amend the water infrastructure pilot programme under Section 5014 of the Water Resources Reform and Development Act of 2014 (WRRDA), to permit the Federal government and third-party service providers to impose and retain fees under WRRDA to use or defray costs associated with carrying out a project. The proposal would limit application to no more than 10 projects.

## 13. The White House Budget Proposal

On the same day that it released its infrastructure plan, the White House also released its budget proposal for the 2019 fiscal year. The budget proposes to eliminate funding for the TIGER discretionary grant programme, and to limit funding for the FTA's Capital Investment Grants programme to projects with existing full funding grant agreements only.

## 14. Impact of Tax Reform

Of course, the White House proposals cannot be evaluated in a vacuum, and must be considered in light of other developments in the US investment environment. Among these are elements of the recent US tax reform legislation, including provisions that limit the deductibility of interest on debt to 30% of adjusted taxable income. These changes may affect how P3s are structured.

## 15. What Lies Ahead

Many of these proposed changes will likely face significant hurdles in getting passed by Congress. The increased spending from direct grants and reduced revenues from financing incentives will likely be a difficult sell to Congress, which has already faced extreme difficulty in reaching a budget agreement, combined with an increasing deficit arising from the 2017 tax cuts. The expansion of PABs may be less controversial, but the sale of federally owned assets, including Dulles airport and the TVA, has historically been an unpopular proposal for both political parties. Bipartisan legislation has already been introduced by Senators Cornyn (R-Tex.) and Warner (D-Va.) to raise the caps on PABs.

Because Congressional reactions to the White House proposals have been largely partisan, the 2018 mid-term elections will very likely be key to implementation. Considering the bipartisan support and huge need for infrastructure improvements, we expect Congress to take up the White House proposals and try to pass the less controversial and cheaper reforms that have been requested, while focusing on the more difficult aspects during the next session, when the composition of Congress may be quite different.

Infrastructure investment in the US is urgently needed. The American Society of Civil Engineers (ASCE) has estimated that the infrastructure funding gap is close to USD 1.5 trillion, which ties to the aggregate amount of investment that the White House plan hopes to generate.

Notwithstanding that the White House proposal may not be the last word, and that it may take time for Congress and the White House to agree to a comprehensive infrastructure deal, it is clear that several major projects are proceeding in the US. Some of these projects are using P3 structures, and leveraging funds provided by existing Federal programmes, such as TIFIA, or using PABs. For example, a transaction was recently structured involving a P3, PABs, sponsor equity and bank debt to finance an automated people mover for Los Angeles World Airports. Many other significant infrastructure projects are also moving forward, including P3 projects at the Denver airport and at New York's LaGuardia airport.

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Baker McKenzie is one of the world's most active project finance law firms. We advise sponsors, developers, financial institutions, investment funds, governments and governmental agencies on project development and financing across a wide range of industry sectors, including oil and gas, power, renewable energy, transport, water and social infrastructure on a full array of development and financing structures, including limited recourse financing, capital market issues, Islamic finance and project bonds.

# Andorra

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## 1 Overview

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

In the coming years, we anticipate a potential increase in the Andorran project finance market, in both the public and private sectors, and also under public and private schemes of collaboration; in particular, in respect of unique projects related to infrastructure for the tourism industry.

In the public sector, the main focus would be in infrastructure and energy projects; in particular, through the development of road infrastructure, a heliport and gas cogeneration and solar power plants.

In the private sector, the major trends relate to direct and indirect acquisitions of projects already under operation, in terms of both the financing of such acquisitions and the refinancing of the existing project debt. The enactment of Act 17/2017 of 23 November on the Andorran Tax Regime in Business Restructuring Operations (*Llei 17/2017 de 23 de novembre de règim fiscal de les operacions de reorganització empresarial*) is also expected to increase the number of intra-group M&A deals, since certain corporate restructuring transactions would benefit from a neutral tax regime.

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

In the last decade, the Andorran Government has opened the Andorran economy to foreign investors and has also updated the principal regulations of the old-fashioned Andorran legal framework. This situation has helped to build up some infrastructure projects, such as the €159m *tunnel dels Dos Valires* and the €42m *tunnel de la Tapia*, both in operation since 2012.

In 2015, Fomento de Construcciones y Contratas, S.A. (FCC) and Bankia, S.A. sold their 50% of the share capital in the Spanish concessionaire company Globalvía Infraestructuras, S.A. at €420m to the Universities Superannuation Scheme (USS), OPTrust and PGGM funds. The deal included the stake of Globalvía in the Andorran company Túnel d'Envalira, S.A., which holds the concession of the Andorran *tunnel d'Envalira* which connects Andorra with France.

Most recently, in February 2017, the Andorran electricity company, FEDA, built the first gas cogeneration plant in Andorra, which is currently in operation, and it is projected to build another plant during this year (2018).

## 2 Security

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

In general, each security must be granted by means of its relevant agreement related to each type of asset.

The most common structure of guarantees in a project finance transaction in Andorra is the pledge over the shares of the project company (normally a Special Purpose Vehicle (SPV)), one or several pledges over the bank accounts of the project company, and receivables deriving from the project (e.g. operation and maintenance (O&M) agreements or insurance policies), normally with cash-sweep clauses.

Moreover, security over the essential project assets, especially over assets which are essential to the project (e.g. certain types of specific machinery), is eventually used, normally by means of a pledge or mortgage, depending on the characteristics of the specific type of asset.

Under Andorran law, the creation of security interest does not require notarisation or any formal requirement, except in the case of real estate mortgages, where it is mandatory to constitute these before an Andorran Public Notary. However, we recommend, as a matter of best practice, the granting of the security by means of a public deed, in order to increase the effectiveness of its enforceability against third parties.

However, it has to be noted that under Andorran law, security does not provide equal rights to other common jurisdictions. Security in Andorra only grants the creditor a preferential position to receive his credit from a specific debtor's asset, in respect of other ordinary creditors, in case of insolvency of the debtor.

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

Security over real property may be taken through a real estate mortgage (*hipoteca immobiliària*), and security over plants, machinery and equipment may be granted by means of a chattel mortgage (*hipoteca mobiliària*) or non-possessory pledge (*penyora sense desplaçament*).

The election of the type of guarantee will depend on the characteristics of the specific asset, as well as the legal requirements to be fulfilled.

In general terms, under Andorran law, real estate mortgages cover: (i) the plot of land and construction on it; (ii) natural accretions; (iii) improvement works carried out on the property; and (iv) the amount of any compensation related to the asset owed to the owner of the asset.

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

Yes; under Andorran law, it is possible for security to be taken over receivables by means of a non-possessory pledge (*penyora sense desplaçament*), as long as the receivables cannot be possessed. However, notification would prevent set-off risks.

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

Yes, security can be taken over cash deposited in bank accounts. Such security will normally be taken over non-possessory pledge of receivables (*penyora sense desplaçament*), the possessory displacement being performed by means of notification to the bank in case of enforcement of the pledge. Usually, in addition to the granting of security over cash deposited in bank accounts, cash sweeps are established.

When security is taken over financial instruments, the use of a financial collateral arrangement is recommended, since this type of guarantee is expressly regulated in Act 8/2013 of 9 May 2013 on the organisational requirements and operating conditions of entities operating in the Andorran financial system, investor protection, market abuse and financial securities agreements (*Llei 8/2013, del 9 de maig sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercat i els acords de garantia financera*), which is aligned with Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

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

Yes, it is possible to take security over the shares of a company incorporated in Andorra. In fact, it is a customary measure of guarantee in project finance transactions performed in Andorra. However, the restriction set out in question 4.2 below should be taken into account.

The procedure to create security over shares requires two consecutives steps: (i) the granting of a deed of pledge before a Public Notary; and (ii) the registration of the pledge in the Registry Book of Shareholders (*Llibre Registre de Socis*) of the company.

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

There is no registration or stamp duty in Andorra related to security. Only notarisation fees apply. Those fees are published by means of the Decree of 3 May 2000 and vary in accordance with the nature and economic interest of the transaction.

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

The notification or consent required in relation to security may take a significant amount of time, although the granting of such consent may vary depending on the recipient.

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

Generally, Andorran law does not foresee a specific requirement for the granting of security over real property, plant, machinery and equipment. However, special consents may be mandatory in very specific cases, depending on certain criteria (e.g. the location of the asset, its legal nature or connection to the performance of a public activity).

However, please note that it could be necessary to obtain foreign investment authorisation in order to acquire the secured assets after an enforcement proceeding, as detailed in question 4.2 below.

## 3 Security Trustee

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

Under Andorran law, there is no recognition of the concept of "trust". Lenders usually appoint an agent for the Andorran security, which holds the security in its own name and acts on behalf of the rest of the lenders.

Frequently, the agent is granted with powers of attorney in order to enforce claims and issue enforcement proceedings on behalf of the lenders and the rest of the secured intervening parties.

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

The structures of joint and several creditor status, "parallel debt" between lenders and a special purpose vehicle (SPV) or a security agent are not known under Andorran law and there are no judicial precedents.

## 4 Enforcement of Security

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

Yes. The characteristics of the enforcement may vary significantly, depending on the nature of the enforced security and the enforcement proceedings carried out at the discretion of the lenders.

In essence, there are two main procedures to enforce securities in the context of project finance: (i) judicial; or (ii) notarial proceedings. Overall, the former is carried out by a declaratory civil proceeding in order to reach a judgment, and afterwards such judgment has to be enforced, the latter being less costly and time-consuming, although both parties have to agree to carry out the notarial enforcement proceeding.

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

In the event of foreclosure, the Foreign Investment Act 10/2012 (*Llei 10/2012 d'inversió estrangera al Principat d'Andorra*) establishes a restriction, as foreign investors or creditors would need to obtain a prior foreign investment authorisation granted by the Andorran Government in order to acquire the ownership of real estate in Andorra or more than a 10% stake in the relevant Andorran company.

However, please note that the Foreign Investment Act specifically prohibits foreign legal persons from investing in real estate properties in Andorra with the sole purpose of commercialising them.

## 5 Bankruptcy and Restructuring Proceedings

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

In general, bankruptcy proceedings in respect of the project company do not affect the ability of a project lender to enforce its rights as a secured party over the security, as long as the security is sufficient to cover the project loan.

In respect of preferential treatment of creditors, the claims of secured creditors will be considered "privileged claims" inasmuch as they are guaranteed by means of a security, up to the value of such guarantee or security. Any amount exceeding the value of the guarantee or security in this way will be considered an "ordinary claim".

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

There are no other preferential creditors' rights with respect to the security that could affect the secured lender rights, as such preferential creditors will only have preference over the rest of the ordinary claims on the insolvency estate but not in respect of the secured assets.

The clawback regime under the Insolvency Decree of 4 October 1969 determines that the insolvency judge will be able to declare the following acts unenforceable against the insolvent estate: (i) all acts of disposal made on a gratuitous basis and all agreements on which the debtor's obligations (project finance company) are notably superior to the obligations of the other party; (ii) all payments due for reason of outstanding debts on the cessation-of-payments day; and (iii) any mortgage of pledge granted after the cessation-of-payments day, over the debtor assets, for reason of outstanding debts prior to the cessation of payments.

In addition to these, the insolvency judge is entitled to declare as unenforceable against the insolvent estate, the gratuitous acts stated above which occurred during the six months prior to the date of cessation of payments.

Furthermore, the judge can set the cessation-of-payments date up to 18 months preceding this declaration.

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

Banking entities are subject to special administrative measures which apply before the opening of an ordinary bankruptcy proceeding, established by Act 8/2015 on Urgent Measures to Implement Banking Restructuring and Resolution Mechanisms (*Llei 8/2015 de mesures urgents per implantar mecanismes de reestructuració i resolució d'entitats bancàries*), which sets a similar regime to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

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

Yes, it is possible to carry out-of-court foreclosure proceedings before a Public Notary if such enforcement proceeding and its terms and conditions have previously been agreed between the parties.

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

The Insolvency Decree establishes a judicial proceeding (*Arranjament*) prior to the declaration of bankruptcy, allowing the project company to negotiate with its creditors in order to achieve a restructuring of its debts or cramdown of dissenting creditors that permits it to comply again with its payment obligations.

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

Under the Insolvency Decree, directors may incur personal liability if they continue to trade whilst the company is facing financial difficulties. The bankruptcy effects will be extended to the directors of the entity in consideration of the continuation of a financially deficient activity such as an act of bad faith, inexcusable negligence or serious breach of commercial uses and practices.

## 6 Foreign Investment and Ownership Restrictions

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

The Andorran Foreign Investment Act sets out the restrictions, controls and limits related to the foreign ownership of a project company. Thus, prior to investing in a real estate asset or in a stake higher than 10% in a share capital or voting right of a company located in Andorra, foreign investors have to obtain the relevant foreign investment authorisation before the Andorran Government. The amount, destination and sort of investment (e.g. investment in real estate assets) must be notified as a mandatory requirement to obtain the authorisation.

Nevertheless, the obligation to obtain the foreign investment authorisation does not impose any restriction on the remittance of income coming from an investment outside Andorra. In addition, exchange control rules are widely liberalised and thus, there are no restrictions on the transferral of currencies from a registered bank account located in Andorra to any country, and *vice versa*.

Under the anti-money laundering regulation, an Andorran or foreign entity which formalises a transaction before a Public Notary by granting a public deed shall identify its ultimate beneficial owner, which is any individual (either a natural or legal person) owning 25% or more of the social capital of the entity.

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

There are no bilateral investment treaties entered into by Andorra that would provide protection from the Andorran foreign investment restrictions. However, by means of a most-favoured-nation clause Andorra has access to the treaties entered into by its neighbouring countries.

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

The regime governing the nationalisation or expropriation of project finance companies and/or assets is set by the Act of Expropriation, dated 3 September 1993, making no distinction between Andorran and foreign companies or assets, as long as the expropriation of private property responds to the satisfaction of a public utility or social interest.

The requirements, procedure and guarantees to the expropriated entity are thoroughly and strictly regulated, due to the fact that the expropriation procedure is deemed an aggression against private property, which is only justified on the basis of serving the general and public interest.

## 7 Government Approvals/Restrictions

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

Overall, the public administration/agencies with authority over projects are determined by the specific sort of project. The main authorities involved are the different town halls (*Comuns*) of the administrative units ("Parishes" – *Parròquies*) into which Andorra is divided. According to the Andorran Constitution and the Qualified Act On Demarcation of Competences of the *Comuns*, dated 4 November 1993, these entities have competence over the management and governance, in general terms, of goods in both the public and private domains, as well as patrimonial goods that may have been acquired. In addition, this competence is projected over the use and exploitation of natural resources.

This general formula includes energy projects, inasmuch as they use natural resources which are located or generated in the territory under the jurisdiction of a specific *Comú*.

Additionally, the Andorran Government may play a significant role depending on the location and size of the project, especially if the project determines a financing need from the *Comuns*, as these entities are financed from the Central Government by means of Qualified Act 18/2017, of 20 October on Transfers to the *Comuns*.

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

Certain regulated sectors (e.g. telecommunications or energy) may be subject to the fulfilment of certain specialities and requirements imposed by the Andorran Government, the territorial entities (*Comuns*) or specific regulatory authorities.

The guarantees normally granted as a security package in an project finance operation (i.e. mortgages and pledges) are notarised. Please note that Andorra does not have a property register, such functions being equivalently performed by the Chamber of Notaries (*Cambra de Notaris*).

In addition, please bear in mind the requirements of foreign investment authorisation referred to in question 6.1 above.

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

Ownership of land or natural resources itself does not require a licence; however, performing a project or exploitation over such land or natural resources may require the prior obtainment of certain authorisations or licences granted by national or local public administrations, depending in particular on the size and relevance of the project.

The treatment between foreign and Andorran entities does not differ and, overall, foreign entities can hold licences and be granted authorisations on the same terms as Andorran entities.

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

There are certain taxes related to the processing of hydrocarbons (oil and natural gas) in order to use them as fuel, and the exploitation of electricity generation projects is subject to a burden tax. Thus, the obtainment, importation and refining of hydrocarbons and the production of electricity within Andorra are, respectively, subject to a special tax on hydrocarbons and the general indirect tax of 4.5%.

These special taxes would not be paid by the project company, as the payment would rely on the final consumer of the electricity or the hydrocarbon. Please note that importation of both electricity and certain types of hydrocarbons is exempt from taxation, due to the limited capacity of the Andorran public infrastructure to cover the energetic demand (electricity is imported from Spain and France).

The income obtained by a project company incorporated in and under the laws of Andorra from the sales of the extraction or exploitation are subject to company income tax at the rate of 10%.

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

There are no currency, exchange control or other regulatory restrictions that limit the availability or transfer of funds for the project company. Please refer to question 6.1 above.

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

There are no restrictions on the repatriation of investment returns.

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

Yes, they can.

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

According to the Andorran Corporate Act 20/2007, there are certain limitations on the payment of dividends to a parent company, as follows: (i) there is a requirement to offset losses from previous years in order to build up 10% of the profits to the statutory reserve until it reaches an amount equal or higher than 20% of the share capital; (ii) dividends may only be distributed if the mandatory reserves foreseen legally or in the by-laws are covered, as well as the research and development costs being covered; and (iii) a restricted reserve equivalent to goodwill must be funded, at least in the amount of 10% of the profits.

In terms of the contractual covenants normally imposed on the project company in project financing agreements, the distribution of dividends is normally restricted. Additionally, there are other typical financial and corporate restrictions imposed to the project company, such as: (i) the prohibition of performing structural modifications; (ii) the fulfilment of certain financial ratios (e.g. debt service coverage ratio); and (iii) the operation of the specific facility during a stipulated period of years.

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

Yes. There are material environmental, health and safety laws whose application and content will essentially depend on the location, nature and characteristics of the specific project. Moreover, the authorisations to initiate a project (especially in projects which are notable for their size and capacity of affecting the environment) will have to be granted by the relevant authority (normally, the specific *Comú*), taking into account the environmental impact on the territory.

In addition, before the execution of any private or public project that may impact the environment, an environmental impact assessment needs to be performed prior to the granting of the specific authorisation by the competent administration.

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

There is not a specific framework for procurement by project companies. However, in public projects, the administration could establish specific requirements.

## 8 Foreign Insurance

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

Insurance activity is a reserved activity. Thus, only licensed insurance companies in Andorra may provide insurance over project assets located in Andorra.

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

Yes, although a case-by-case analysis is highly recommended.

## 9 Foreign Employee Restrictions

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

Yes, there are restrictions on foreign workers being employed by a project company. In particular, prior to the hiring of such foreign workers, the project company has to confirm before the Andorran employment department that there are no qualified Andorran workers.

In order to validly work and reside in Andorra for a short period, foreign workers must obtain permission for stays of over 30 days in cases where they are working for a foreign company, during the time that the work for the foreign company in Andorra lasts and without limitation regarding the nationality or the professional level of the applicant (e.g. worker, technician, engineer or executive).

If foreign workers intend to stay for a longer period in Andorra, they will need to obtain a residence and working authorisation in advance, which is granted for one year by the Andorran Government. This type of permit is normally used for workers that come to Andorra to carry out professional activities in the country.

## 10 Equipment Import Restrictions

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

The Customs Agreement between the Principality of Andorra and the European Economic Community establishes a preferential regime for goods imported from or originating in the EU in comparison with third countries. Specifically, the objective scope of the Customs Agreement covers: (i) goods produced in the EU or in Andorra, including those obtained wholly or in part from products which come from third countries and which are in free circulation in the EU or Andorra; and (ii) goods which come from third countries and are in free circulation in the EU or in Andorra. Hence, customs duties will be applicable to imported project equipment coming from non-EU countries, in the terms established by EU agreements with these countries or applicable regulations that may be in place.

Please note that, currently, Andorra is an observer member of the World Trade Organization (WTO) and there are no regulations in place which confer on the Government any powers to impose anti-dumping measures in line with WTO principles.

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

The import duties depend on the characteristics of the goods, with exceptions available in each case; for example, for products coming from non-EU countries, such as imported equipment or machinery, depending on the nature and characteristics of the products. Thus, we recommend that a case-by-case analysis is performed.

## 11 *Force Majeure*

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

Under Andorran law, the verification of a *force majeure* situation exonerates any party from liability with respect to a legal relationship, although parties to a specific contract may, as in the vast majority of neighbouring jurisdictions, waive the application of this regime and accept liability arising from it.

The normal scenario is that most project financing agreements, and ancillary contracts to these (e.g. O&M contracts), establish the verification of *force majeure* as an event of default. In the case that a *force majeure* is discussed before a court, an Andorran judge will recognise its validity.

From the point of view of the lenders, a liability exclusion is normally established in project finance agreements if this affects their ability to provide the financing for the project facility under a *force majeure* scenario.

In the case of concession contracts with public authorities, and similarly to the situation in Spain, the verification of a *force majeure* normally entails compensation from the specific public administration to the concessionaire, which may take the form of an improvement of either the economic or temporal terms of the public concession.

In addition to the mechanics of a *force majeure* event (which will be regulated in the terms established by the project finance agreement – normally a turnkey contract), in the case that the project company suffers a prejudicial effect due to unforeseen circumstances, it would also be possible to invoke the *rebus sic stantibus* clause if foreseen in the relevant contract (lenders may also benefit from this clause).

## 12 Corrupt Practices

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

Qualified Act 9/2005 of 21 February of the Criminal Code (*Llei 9/2005 qualificada del codi penal*) punishes corruption and traffic-of-influence bribery performed by a public authority or by a private subject. Among the diverse ways in which this crime may be performed, bribery of a public authority determines the imposition of a qualified sanction.

In respect of the crime of corruption, this is defined by the Andorran Criminal Code as a demand by or an offer made to a public authority or civil servant, for its own benefit or for the benefit of a third person, for a handout or remuneration of any sort, in order to dictate or perform an act contrary to the duties and obligations inherent to its condition as a public official (active side), as well as the offering or demanding of the aforementioned remunerations to delay the performance of an act (passive side). The penalties imposed for the perpetration or omission of these conducts include: (i) a prison sentence (from one to four or two to five years, depending on the nature and gravity of the felony); (ii) criminal penalties (e.g. from two to five times the profit obtained); and (iii) ineligibility for public office for a period of between three and six years.

With regard to influence-peddling, the Andorran Criminal Code establishes that any person which, through his personal relationship, exerts influence over a public authority or civil servant with the aim of achieving a resolution dictated by the latter which benefits him or a third person either directly or indirectly, shall be punished with imprisonment and a fine of one to two times the benefit intended or obtained. Additionally, the public authority or civil servant may be punished with ineligibility for public office for three years and the person who influences this authority may be punished, at the court's initiative, with prohibition from contracting with a public authority for a three-year period.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Generally, project agreements are few and governed by Andorran law unless the relevant parties impose the application of a foreign law. According to Andorran law, the choice of foreign law is valid and legally binding. An Andorran court would apply such law provided that the contents of the relevant provisions of the chosen laws may be duly proved before the Andorran court without contravening the Andorran Constitution or the Andorran principles of public policy. However, please see question 18.1 below.

### 13.2 What law typically governs financing agreements?

Financing agreements are typically governed by Andorran law.

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

All security documents related to assets located in Andorra (i.e. mortgages or pledges) and personal guarantees granted by Andorran entities (e.g. bonds or first demand guarantees) are typically governed, and we would recommend that they be governed, by Andorran law.

As in most of the neighbouring jurisdictions, the contractual relationship between the public authorities and the concessionaire is mandatorily regulated by Andorran law.

## 14 Jurisdiction and Waiver of Immunity

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

Under Andorran case law and the applicable Andorran law (*dret comú*), submission to a foreign jurisdiction by the parties to a project finance agreement would be valid, binding and enforceable in Andorra. There are many judicial precedents that support this view. Moreover, in the case that a claim is presented before the Andorran courts, they should decline their competence in favour of the elected jurisdiction if an express submission clause had been agreed by the parties.

## 15 International Arbitration

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

Yes; the Andorran courts will recognise submission by the parties in a project finance agreement to international arbitration and arbitral awards, as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Arbitration Convention), which applies to the recognition and enforcement of foreign arbitral awards and the referral to arbitration by a court, has been in force in Andorra since September 2015.

Furthermore, Andorra currently has an arbitration regime for commercial disputes, and a local Arbitration Court should be operating in the next few years.

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

Yes. The New York Arbitration Convention entered into force in Andorra in September 2015.

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

The Andorran Arbitration Act 47/2014 (*Llei 47/2014 d'arbitratge del Principat d'Andorra*) excludes labour and consumer arbitration proceedings. Furthermore, the Arbitration Act states that all free disposal subjects can be arbitrable.

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

Taking into account that which is stated under the previous question, submission to arbitration as a conflict resolution process is only possible if the parties involved in a controversy expressly agree to it, either in the agreement or in a separate document. The submission of the parties to an arbitration proceeding must be made in writing and signed by them, in order to verify their unequivocal will to submit their controversy to arbitration.

## 16 Change of Law / Political Risk

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

To the best of our knowledge, political risk provisions are not common in Andorra, given the lower political risk of project finance, in line with the adjacent jurisdictions, as these are direct agreements with public administrations.

In the current climate of serious concern about the political situation (with potential future changes in the Government or in governmental policies which could substantially affect projected investment), the main options would be either to obtain a specific governmental resolution from the competent administration providing support to the project, or to wait for clarification of the political framework.

## 17 Tax

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

Under Andorran law, there is no deduction or withholding tax upon payment of interests on loans made to either domestic or foreign lenders.

On the other hand, under Andorran law, the proceeds of a claim under a guarantee and the proceeds of enforcing security are not subject to withholding tax if they are made to a domestic lender. However, they are subject to withholding tax at 10% if they are made to a foreign lender, unless a lower rate applies under a tax treaty (with treaty rates ranging between 5% and 10%).

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

The main incentive for foreign investors or creditors are the lower level of taxation and the possibility to benefit from certain tax exemptions (e.g. corporate tax at 10%), in addition to a solid legal framework. In particular, there are substantial advantages for those countries with which Andorra has signed a tax treaty (Spain, France, Luxembourg and Liechtenstein).

In essence, under Andorran law, there are no relevant additional taxes on foreign investments, other than those that would apply to an Andorran investor.

Although Andorra is not part of the EU, a customs agreement with the EU is currently in force, allowing the free transit of industrial products without customs duties being imposed.

## 18 Other Matters

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

Yes, since lending is a reserved activity that can only be performed by Andorran-licensed entities, as long as there is no passport to provide lending services on a cross-border basis into Andorra. Therefore, in practice, there is no secondary market for foreign financial entities to buy tickets for local project finance. However, international project finance transactions with an Andorran leg, where security has been granted but the disbursement of the loan had been made abroad, are common.

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

Please note that there is no regulation regarding the issuance of capital market instruments, but there is some limitation on their issuance. However, due to this lack of local regulation, it is necessary to use foreign vehicles as issuers in order to benefit from international standards in this matter.

## 19 Islamic Finance

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

The Islamic finance instruments *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* are not recognised under the laws of Andorra.

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

There is no case law in Andorra which has pronounced in regard to the application of *Shari'ah* law, nor in relation to the governing law of a contract or a dispute. In our view, it is not probable that Andorran courts will accept the application of *Shari'ah*, except where the law generally governing a contract is the law of a country whose legislation recognises and is based on *Shari'ah*.

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

Yes, there is a risk that the inclusion of interest payment obligations in a loan agreement construed in accordance with *Shari'ah* can be enforceable.

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CASES & LACAMBRA

Cases & Lacambra is a client-focused boutique law firm with a top-tier specialisation in banking, finance and tax law. We offer bespoke advice and solutions to our clients, which rank among the most highly reputed national and international financial institutions, family offices, investment firms, group companies and high-net-worth individuals.

The Firm and the Banking and Finance department lawyers are qualified in Andorra but also in other EU jurisdictions, and so are well-prepared to advise their clients in EU legislation that is progressively being adopted in the jurisdiction.

The Firm has broad experience in acquisition finance, project finance and refinancing in Andorra.

The Banking and Finance department has a broad range of clients, including local and foreign banks, the Andorran Government and the Andorran authorities, and regularly advises institutions on their inbound financial transactions towards that jurisdiction.

# Angola

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## 1 Overview

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

Like other countries with a hydrocarbon-based economy, the Angolan economy depends largely on the offshore petroleum industry for 50% of its Gross Domestic Product and 70% of the country's revenue, and has faced a severe economic setback attributed largely to the significant drop in oil prices in the international markets.

The state budget cuts, currency devaluation and high inflation levels have slowed import levels and hindered economic growth in the past years. According to the World Bank, in 2016/2017, the Angolan Gross Domestic Product stagnated at 0.9%/3.5% growth, respectively, while real growth declined by 6.6%. The most significant business challenge in Angola since then has been the lack of foreign exchange due to the steep decline in petroleum revenues and the resulting drop in international reserves entering the Angolan economy.

Over the last three years, as the government budget has been cutting public expenditure, project financing for government projects increasingly depends on external sources such as international commercial or export credit agencies that typically require a sovereign government guarantee. Domestic credit for private sector projects is extremely limited, and Angolan commercial banks are generally not willing to provide guarantees for foreign currency loans due to the foreign exchange risk. Several government-supported local currency credit lines managed through commercial banks for priority sectors exist, though Angolan companies complain of long review processes and difficulty securing such financing.

Angolan government sovereign guarantees that were available in 2016 for a number of high-profile projects are becoming scarcer since 2017, a trend that seems to correlate with the Angolan government's increased debt load.

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

Over the past years, investments in Angola were made to expand, equip and modernise the country's infrastructure, such as railways, roads and ports.

It was recently announced that the Angola Sovereign Fund invested $180 million in building the first deep-water port in the country (works are under way), a project to be developed in Caio, Cabinda province. It is said that this new port will feature a modern shipyard, dry dock, an industrial zone and a duty-free zone, and that it will be in function by the first quarter of 2019.

Under development with the Angolan government is a major World Bank commercial agriculture development project estimated at $230 million and anticipated to be completed in 2018. The proposed project development objective is to promote commercial agriculture development, increasing production and employment within selected value chains in targeted areas in Angola. Moreover, there are rumours that the government plans to construct and equip land and river terminals at Soyo to support oil operations at the Kwanza basin, as well as other investments in infrastructure and logistics to boost economic growth. Fisheries and coastal shipping are also sectors to which the government is paying close attention, not only to support local supplies and reduce imports, but also to promote effective transportation of goods and people along the country's coastline.

## 2 Security

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

Under Angolan law, the terms and formalities for security creation vary depending on the type of the asset. The most frequently used *in rem* guarantees are mortgages and pledges.

Mortgages entitle the creditor to obtain repayment of credit through the sale of the mortgaged assets before and with preference over other creditors of the debtor, except for some privileged credits and other credits previously guaranteed by mortgages over the same assets. Specific authorisations may have to be obtained in order to mortgage rights (e.g. surface rights granted by Angolan authorities). A mortgage must be executed by means of a notary deed with a Notary Public and registered with the relevant Registry Office.

The pledge is generally created by means of a written agreement and delivery of the relevant asset to the creditor or to a third party. Pledges are not subject to special formalities (other than a written document) nor to any type of public registration, except in the case of pledges of certain types of securities. It should be added that specific requirements may apply to pledges depending on the type of asset being given as collateral. Certain specific economic sectors such as the financial, insurance, media, mining and petroleum sectors are subject to special restrictions or approval requirements, or both. Therefore, certain authorisations can be required from the government or other state entities, or both, in order to pledge assets or equity interests in those sectors.

Under Angolan law, a pledge or mortgage over future assets is not prohibited. Alternatively, security agreements may provide for a security of existing assets and a promise of security over future assets. In the latter case, a definitive pledge over the assets is subsequently executed and delivered as a supplement to the security agreement.

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

The most common form of security over real estate property is the mortgage. Due to the existing restrictions to foreign ownership of real estate property, foreign investors in Angola are granted surface rights over real estate.

Security over these rights can be created, but it requires the prior authorisation of the grantor. The creation of security over immovable assets, related rights or movable assets subject to registration is created through a mortgage. The mortgage must be executed by notarial deed and is subject to registration with the relevant Registry Office.

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

The most common form of security over receivables is a pledge of credits, which is created by a written agreement. The pledge of receivables is subject to the notification of the respective debtor. Thus, it is also possible for security to be granted over the rental income from a property. This usually takes the form of an assignment whereby the tenants are directed to pay the rental income to the lender so that the rental income does not pass through the hands of the borrower.

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

A pledge over cash deposited in bank accounts is deemed as a pledge of credits (see above).

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

The form of security over shares is a pledge over the company's share capital (shares or quotas). The pledge of share capital participations must observe specific requirements to be deemed valid and binding. The requirements vary depending on the type of project company. In the case of limited liability companies by quotas, the company must consent on the execution of the pledge, which must then be formalised by means of a notary deed entered before a Notary Public and registered with the Commercial Registry Office. As for limited liability companies by (nominative) shares, the pledge is deemed formalised by means of executing a written agreement, inscription of the pledge in the relevant share titles, and registration of the same in the company's share registration book.

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

The calculation of notarisation and registration fees are based on variable percentages, depending on the secured amount and the number of the pages of deed, if applicable.

All guarantees and securities, irrespective of their nature or form, are subject to Stamp Duty (plus notary and land registry fees) provided that the security is granted in Angolan territory or if the security is granted outside Angola but submitted therein for any legal purpose (e.g. enforcement). Further, securities granted by non-resident entities to Angolan-based entities, regardless of the place where the security is granted, are always subject to Stamp Duty and is due upon issuance of the security. Stamp Duty over securities is calculated over the amount secured and the rates may vary between 0.1% to 0.3%, depending on the term of the security.

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

Stamp Duty and the notary and registration costs are usually deemed extremely high. As regards the filling, notification or registration requirements, they are quite straightforward and no longer time-consuming.

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

Provided that the security interests are created over assets belonging to private entities, Angolan law does not require any governmental or other consents. Securities over public domain assets are prohibited or restricted. These restrictions include governmental consent and/or approval, imposed through sector-specific regulations, the relevant concession contracts or general public administrative laws.

## 3 Security Trustee

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

These concepts are not recognised by Angolan law.

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

See question 3.1 above.

## 4 Enforcement of Security

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

Pursuant to Angolan law, no form of security can be enforced outside of court.

The enforcement of mortgages consists of a sale of the relevant assets through court proceedings. The sale of pledges may be made through court or through out-of-court proceedings, if the parties have so agreed. Therefore, in Angola, the appropriation of the assets is not available to pledges and mortgages.

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

Pursuant to Angolan law, there are no restrictions in this regard (additionally, it must be noted that no different rules on enforcement of security interests in Angola apply for foreign creditors). However, loans, guarantees and other financial contracts, deposits and the acquisition and sale of shares, bonds and other securities, involving rights or obligations between residents and non-residents qualify as capital operations and are subject to foreign exchange requirements; notably, the Angolan Central Bank's ("BNA") prior approval (see section 6 below).

## 5 Bankruptcy and Restructuring Proceedings

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

Upon the declaration of bankruptcy, all security must be enforced within the bankruptcy proceedings.

If a company is declared bankrupt, assets and documents are, for instance, seized in order to protect the creditors' rights. A bankruptcy declaration by a court entails the immediate maturity of all the debts of the bankrupt company and there are certain acts which are legally deemed to be detrimental to the bankruptcy estate (insofar as these transactions cause a depletion of the debtors' assets). For instance, *in rem* guarantees granted after the underlying debt within the year that precedes the declaration of bankruptcy or granted simultaneously with the underlying debt within 90 days preceding the mentioned declaration shall always be assumed to be detrimental to the bankruptcy estate. Therefore, the creditors may challenge the relevant transactions and claw back on those transactions.

Payments to creditors can only be made after the sale of the debtor's assets. In the case that there are creditors benefiting from guarantees *in rem*, payment of such creditors will occur immediately after the sale of the secured asset. Common creditors shall be paid *pro rata* every time a value equivalent to 5% of the amount in debt to common creditors is deposited in the bank for the account of the relevant bankruptcy.

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

The secured creditor has priority over unsecured creditors at the time of the payment of debts.

Only special privileged rights are given priority in relation to credits secured by pledges or mortgages. Angolan law provides that senior security ("*Privilégios Creditórios*"), in favour of the government and/or local authorities (e.g. taxes and outstanding court fees), or in favour of other third parties (e.g. employees credits), rank ahead of guarantees *in rem*.

It must be noted that retention rights (under which certain creditors are entitled to retain certain assets in their possession until their credit is paid) over a real estate asset prevails over a mortgage, even if such mortgage has been previously registered.

In case of different securities granted over the same asset, the oldest (for registration purposes) security shall be paid first. In fact, pursuant to Angolan law, the time of registration of a security is relevant for assuring the priority of the creditor.

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

The state and some public entities (e.g. BNA) are excluded from bankruptcy proceedings.

As to the special bankruptcy proceedings, it must be noted that (i) the Financial Institutions Act foresees that the bankruptcy preventive measures applicable to financial institutions will be determined by the competent supervision authority, and (ii) the Public Business Sector Act sets out special procedures regarding the liquidation of public companies.

Additionally, pursuant to the Private Investment Law, the company's bankruptcy leads to the company's dissolution, the Angolan investment entities (currently, the Technical Unit for Private Investment ("UTIP"), the Angolan Investment and Promotion Agency ("APIEX") and Technical Support Units for Private Investment ("UTAIPs")) being the competent entities to file for the company's bankruptcy.

The Angolan Civil Procedural Code does not make distinctions between foreign or national creditors for bankruptcy purposes.

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

Please see question 5.2 above for the retention rights.

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

Pursuant to Angolan law, there are two types of preemptive insolvency procedures: the Composition; and the Creditors' Agreement.

The process known as Composition is an agreement achieved within the judicial process, to be homologated by the court. The company may file for bankruptcy before the company ceases all payments to creditors or in the 10 days following this event. If the filing is performed in a timely manner, the law establishes that the bankrupt company may propose an agreement to the creditors in order to achieve the restructuring of its debts and to avoid the declaration of bankruptcy. The agreement must be approved by creditors representing 75% of the credits. In case the Composition is not proposed or its terms are not approved, the creditors may incorporate a limited liability company to continue commercial activity, with the purpose of satisfying the existing credits – the Creditors' Agreement.

If there is no Composition or Creditors' Agreement, or if they are rejected by the court, the bankruptcy shall be, thereupon, declared.

Finally, it must be noted that the debtor who has been indicted or tried for fraudulent bankruptcy is prevented from proposing any of these rescue procedures.

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

Directors of companies facing financial difficulties may continue to trade, provided they act with a special duty of care and do not violate any legal duties and legal principles applicable to the management of companies. In the event directors have contributed to the company's bankruptcy, they are liable and subject to penalties. Directors may also be held criminally liable for fraudulent insolvency and negligent insolvency.

## 6 Foreign Investment and Ownership Restrictions

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

Depending on the activities that will be carried out by the Angolan company (notably, if said activities fall within the oil & gas sector, telecommunications, infrastructure and energy, tourism or public works) or by virtue of the requirements of a specific tender or project, the company may require to be held, to some extent, by Angolan partners.

Also, pursuant to the Private Investment Law currently in force, foreign investment projects, such as the incorporation of a local company or acquisition of shares in an existing Angolan company, are subject to the prior approval of the State Investment Units, currently the UTIP, the APIEX and UTAIPs.

It is worth noting that a new Private Investment Law and the organisational model for the carrying out of private investment operations is currently being considered by the Angolan government. The basis for this new model was recently published and some local ownership requirements will no longer be required under the new investment framework.

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

The Angolan State has signed bilateral investment treaties ("BITs") with several countries, such as Cape Verde, Cuba, Italy, Germany, Namibia, Portugal, Russia, Spain and South Africa. Angola is a member of the Multilateral Investment Guarantee Agency (the "MIGA") which provides dispute settlement assistance. Its past efforts to resolve foreign investment disputes have proven to be extremely successful and, as a result, expropriation of private investment assets is today guaranteed to be fair. Angola also entered into a Trade Investment Framework Agreement ("TIFA") with the United States in May 2009.

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

The rules on nationalisation and expropriation procedures in Angola are still regulated by the Nationalization Law (Law 3/76 of 3 March 1976) and the Expropriation Law (Law 2030 of 22 June 1948). These regulations were actively enforced in the post-colonial era and led to the nationalisation of companies and seizure of significant real estate assets in Angola during this period. Although still in force, this statute is clearly outdated and inconsistent with the Angolan economic environment, the present wording of the Constitution and with the protection that is granted to private (and foreign) investors under the Private Investment Law. Thus, under the Constitution, it is only possible to temporarily seize the said assets or carry out their expropriation for reasons of public interest, upon payment of fair and prompt compensation, which shall be a condition of effectiveness of the expropriation. In light of these Constitutional provisions, the validity of the old statutes on nationalisation and seizure of assets may even be challenged.

## 7 Government Approvals/Restrictions

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

Normally, the governmental investment entities (the UTIP, the APIEX and UTAIPs) are the relevant government agencies with authority and may vary depending on the nature of a specific project. A project may fall under the authority of a specific ministry, but in certain cases several ministries may have authority. This often occurs with large projects that need, for example, to obtain an environmental licence, in which case the intervention of the Ministry of Environment ("MINAMB") will always be required at a certain stage.

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

Private documents with acknowledgment of a payment of obligation shall only be directly enforceable before the courts if authenticated by a Notary Public or by any competent authority.

Except for certain pledge arrangements which need to be authenticated by a Notary Public or by any competent authority, project documents are valid and enforceable without any need for registration, authentication or filing with any governmental authority.

Financing agreements which involve non-residents entities are subject to BNA's prior approval.

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

Private ownership of land has been restricted in Angola and, presently, land in Angola is divided, in terms of ownership, into private land (whose property rights are held by private entities and individuals) and state land (whose property rights are held by the state of Angola). State land is further divided into state private domain land and state public domain land. Rights over state private domain land can be granted to private entities or individuals, while the use of state public domain land is limited and subject to special public law rules. Please see question 2.2 above for details regarding ownership of land granted to foreign entities.

All mineral and natural resources found in the country's subsoil belong to the state, being deemed part of the latter's "public domain". The respective prospecting, exploration, development and production are normally carried out through a concession. Concession rights should be exclusively granted to the national concessionaires (e.g. Sonangol and Endiama).

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

The export of natural resources is, typically, subject to specific customs regimes (e.g. subject to special authorisations, formalities and specific fees) that may vary with regards to the type of natural resource. By way of illustration, holders of mining rights are entitled to trade the product of the mine operations, in the terms set forth in both law and the relevant investment contract. The export of mineral resources duly extracted and processed is typically not subject to customs duties and charges, except for fees for services rendered by customs. In turn, the direct or indirect exportation of raw (not processed) mineral resources is subject to a 5% customs duty over the market value of the relevant mineral. The exportation of Angolan mineral resources that is not expressly allowed under the Mining Code is prohibited. The exportation of crude oil is also subject to a specific customs regime and specific procedures must be followed. The exportation of crude oil is subject to a statistical tax of 1/100 *ad valorem*.

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

BNA is the foreign exchange control authority, which has a key role in terms of any repatriation of funds outside Angola. Under Angolan law, any entity with a registered office in Angola and local branches qualify as resident for foreign exchange purposes (Foreign Exchange Residents). Any currency transfers between a Foreign Exchange Resident and a Non-Foreign Exchange Resident are subject to different requirements depending on the nature of the underlying transaction. The transfer of profits abroad qualify as invisible items of trade. As mentioned above, a precondition and sale of shares, bonds and other securities, involving rights or obligations between residents and non-residents qualify as capital operations. The following rules apply:

(i) capital operations are subject to BNA's prior approval. The only exception is for capital operations of a personal nature referring to donations from abroad, as well as inheritances and legacies made exclusively to individuals residing in Angola;

(ii) the transfer of currency requests for a capital operation must be made to the intermediary bank, which will then submit it to BNA; and

(iii) BNA's authorisation for the transfer is valid for a period of 180 days. The period can be extended one or more times in the case that the licence was not wholly or partially used.

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

Please see question 7.5 above.

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

An offshore bank account can only be opened by an Angolan project company in the rare situation where an authorisation from BNA has been obtained. Angolan project companies may freely open a foreign currency bank account in Angola, though the operation of the said account is subject to the following limitations.

Credit operations in a foreign currency account are limited to:

(i) a deposit of foreign currency arising from its activities; and

(ii) a deposit of interest accrued over funds in the relevant account.

Debit operations in a foreign currency account are limited to:

(i) withdrawal or sale of foreign currency; and

(ii) foreign exchange transactions in accordance with Angolan foreign exchange regulations.

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

As mentioned above (see question 7.5 above), transfers of profits and dividends abroad qualify as invisible items of trade. A precondition for the right to transfer profits is the relevant company having approved an investment project under the Private Investment Law. Other conditions related to timings and submission of documentation to BNA will also apply.

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

The general principle set forth in the Angolan Constitution is that all citizens have the right to live in a healthy and unpolluted environment and that the government must take the necessary measures to protect the environment. The Environmental Framework Law provides guiding principles for the prevention and control of pollution and standards to protect the environment. A series of other laws and decrees provide for relatively extensive regulation of environmental protection and industrial licensing. Environmental licensing is mandatory in the case of construction, installation, refurbishment, extension, modification, operation and decommissioning of activities that require an environmental impact assessment study (e.g. agricultural, forestry, industrial, commercial, residential, tourism or infrastructure projects, which, by virtue of their nature, size or location, may have implications for the environmental and social equilibrium and balance or those activities that have a potentially hazardous nature) or in the case of activities that are likely to have a considerable environmental and social impact. The MINAMB is responsible for implementing and supervising the protection of environmental regulations.

Crude oil exploration and production activities are subject to a specific regime on environmental protection for the petroleum industry. In addition to general obligations, oil companies should take the necessary precautions to protect the environment and limit to the greatest extent possible their impact; several environmental plans are required for operations. The Ministry of Petroleum supervises the oil industry in Angola and is responsible for implementing national policy and coordinating, supervising and controlling all petroleum-related activities.

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

The legal framework for public procurement in Angola applies to a wide range of public contracts, including: (i) public works; (ii) lease or purchase of movable assets; (iii) acquisition of services; (iv) other contracts to be entered into by public entities that are not subject to a special legal regime; (v) Public-Private Partnership contracts; and (vi) defence and security contracts. Several amendments have been implemented with regard to the specific awarding procedures, which are now: (i) a public tender (without a qualification phase); (ii) limited bidding by pre-qualification; (iii) a limited tender by invitation; and (iv) a simplified procurement. As a general rule, a public tender or a pre-qualification procedure is mandatory for contracts with an estimated value equal to or higher than Kz 182,000,000.00 (approx. $1,075,126.55). The Law introduced the framework agreements in order to allow public contracting entities to set the terms and conditions applicable to contracts that shall be entered with one or more contractors/suppliers for a given period of time.

## 8 Foreign Insurance

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

Under Angolan General Insurance Law and the Insurance Regulations, all insurance contracts with (i) Angolan authorities, (ii) activities carried out in Angola, or (iii) assets located in Angola have to be entered into by insurance companies duly authorised to carry out insurance activity in Angola.

However, the Ministry of Finance may authorise that insurance contracts to be entered into outside Angola with a foreign non-admitted insurer, subject to the favourable opinion of the Angolan Insurance Regulator ("ISS") whenever the specific insurance in question cannot be obtained from a local insurer. The consequence of taking insurance outside Angola without the Ministry of Finance's authorisation is that the obligations arising from such contracts, as well as foreign court or arbitration decisions regarding the said insurance contracts, will not be enforceable in Angola. The Law sets forth specifics regulations for co-insurance for the oil & gas, mining, aviation and agriculture sectors.

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

Yes, in case all the foreign exchange requirements are fulfilled.

## 9 Foreign Employee Restrictions

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

Pursuant to the Angolan labour requirements, foreign nationals may only be hired for professional, technical or scientific job positions provided no Angolan nationals are available for such job positions.

Companies operating in Angola are required to comply with a statutory ratio of a minimum of 70% Angolans and a maximum of 30% expatriates (the so-called "Angolanisation" policy). Failure to comply with this ratio, may result in a fine of between seven and 10 times the company's average monthly salary per each expatriate employee unlawfully employed.

In order to work lawfully in Angola, an expatriate employee must first obtain a work visa from the Angolan immigration authorities, which is, under Angolan law, the only visa that allows an individual to carry out paid work in the employment of a third party. Work visas depend on a local employment relationship between the relevant expatriate employee and an employer with some sort of legal representation in the country (such as a branch or local company).

The use of any other visa to perform work is illegal. In the event an employee works in Angolan territory without a work visa, the Angolan Visa Law stipulates fines applicable to the employee and to the employer (Kz 1,000, equivalent to $5,000). In addition to this, the employee will be expelled from the country and the employer will have to pay all related expenses.

## 10 Equipment Import Restrictions

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

Equipment entering Angolan territory that is to be used in the country must be declared to the customs authorities and subject to proper importation procedures. Only companies duly registered in Angola as importers are allowed to carry out import operations. As a rule, importations are subject to prior licensing procedures with the Ministry of Commerce and attract payment of customs duties and other customs duties (in aggregate up to a maximum of 83% of the customs value). In addition, depending on the nature of the equipment, some specific authorisations may be required (from the ministry supervising the use of the relevant equipment) and some additional procedures may apply.

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

Equipment to be used directly and exclusively in petroleum exploration and production operations or in mineral exploration, evaluation, mining and processing operations may benefit from customs benefits.

The importation of equipment under a private investment project approved by the UTIP/APIEX/UTAIPs may also benefit from customs exemptions.

## 11 *Force Majeure*

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

There is no legal definition for *force majeure*, but this concept is generally accepted and enforceable (by doctrine and the Angolan courts). It usually relates to events from which liability does not arise for those responsible for performing the obligation affected by *force majeure* because the relevant events are by nature unpredictable, inevitable and irresistible.

## 12 Corrupt Practices

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

Corruption in the private sector is not a crime in Angola. In Angola, this crime may take the form of fraud, abuse of trust, forgery and other related common crimes.

Corrupt business practices and bribery targeting the public sector and public officials within the scope of the projects sector may generally constitute a crime of corruption in Angola.

Corruption offences are addressed in the Law on the Criminalization of the Infractions Relating to Money Laundering (Law 3/14 of 10 February). Law 3/14 was enacted in the context of the fight against money laundering, international criminal organisations and the financing of terrorism in compliance with obligations undertaken by the Angolan State under international conventions. Law on Money Laundering and Financing of Terrorism (Law 34/11 of 12 December) sets forth the crimes of terrorism, money laundering, financing of terrorism and terrorist organisations.

Among other offences, Law 3/14 sets forth corruption-related criminal offences, including active and passive corruption (already provided for as criminal offences under the Criminal Code of 1886), and enacts the new criminal offences of trading in influence, receiving undue benefits and economic participation in business. Pursuant to Law 3/14, any person who makes a payment, gift, offer or promise to a public employee with the intent of exerting influence to obtain or retain business is criminally liable, and so is the public employee who has been bribed. Any person who gives or promises an undue pecuniary or non-pecuniary benefit to a public official carrying out the duties of his or her office, or because of those duties, commits a criminal offence of receiving undue benefits, and so does the public employee. Finally, provided that some conditions are met, public officials may be deemed criminally liable for the crime of economic business participation when obtaining unlawful advantages related to interests under their control or supervision as public officials. The chapter of Law 3/14 relating to corruption also includes the criminal offences of trading in influence and corruption in international business.

Corruption practices involving customs officials are governed by a separate regime set forth in the Customs Code, approved by Decree-Law 5/06 of 4 October. However, the Customs Code did not fundamentally change the definition of corruption practices previously contained in the Criminal Code and now in Law 3/14. The Angolan legislator accepted that customs officials are entitled to receive small gifts made for cultural or protocol reasons. The Customs Officials Career Statutes (approved by Presidential Decree 18/11 of 12 January) describes which gifts are permissible.

A Public Probity Law (Law 3/10 of 29 March) was enacted in 2010, the provisions of which have a major impact on the regulation of corruption in Angola. Among other objectives, this law aims to unify in one statute the different rules applicable to bribery in Angola, as well as to the actions of public officials. In brief, the mainstay of the Public Probity Law is the principle of administrative probity under which public officials must perform their duties in an honest manner, and shall not request or accept anything of value which may affect their independence or the good name of the public institution they represent. This means that, as a rule, public officials should not receive or benefit from offers, either directly or indirectly, from Angolan or foreign individuals or corporations for the performance of their duties.

At an international level, Angola ratified:

(a) the Protocol Against Corruption of the Southern African Development Community ("SADC"), as per Council of Ministers' Resolution 38/05 of 8 August 2005;

(b) the United Nations Convention Against Corruption, as per National Assembly Resolution 20/06 of 23 June 2006; and

(c) the African Union Convention on Preventing and Combating Corruption, as per National Assembly Resolution 27/06 of 14 August 2006.

The provisions of the SADC Protocol and the Conventions are not directly applicable in Angola but are directed at the Angolan legislative entities. These should subsequently develop legislation to implement the principles of the abovementioned Protocol and Conventions. Law 3/14 implements some of the principles adopted under those Conventions, significantly widening the scope of the crime of corruption (including conducts that qualify as trading in influence and the criminal offence of corruption in international business).

According to the information available, a new Criminal Code has been prepared and is expected to be enacted soon in Angola. Reportedly, the Criminal Code will be aligned with the principles contained in international conventions and does not differ much from the rules enacted by means of Law 3/14.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Pursuant to the Angolan Civil Code, the general principle is that the creation and enforcement of the contracts are governed by the law chosen by the parties. Concession contracts and other project agreements entered into with public entities are governed by Angolan law.

### 13.2 What law typically governs financing agreements?

Please see question 13.1 above. Frequently, financing contracts are governed by foreigners laws.

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

Angolan law shall apply whenever overriding mandatory provisions thereof are at stake (public order principles of the Angolan legal framework, such as clauses excluding or limiting liability in cases of wilful misconduct or gross negligence).

## 14 Jurisdiction and Waiver of Immunity

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

Submission to a foreign jurisdiction and a waiver of immunity are effective and enforceable contract provisions, to the extent permitted by Angolan law.

## 15 International Arbitration

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

Pursuant to the Angolan Voluntary Arbitration Law, the primary domestic source of law relating to arbitration, parties enjoy full autonomy to designate the rules governing their proceedings and in doing so may choose to include specific procedural rules or simply refer to institutional rules, including those of the International Chamber of Commerce ("ICC").

Hence, there should be no issues with the enforcement of an award based on the fact that it has been issued by the ICC. As to enforcement of arbitral awards *per se*, a domestic award is automatically enforceable in the country. However, awards rendered in international arbitration proceedings – determined as those where international trade interests are at stake, in particular where parties to the arbitration agreement have business domiciles in different countries at the time of the agreement's execution, or the place of performance of a substantial part of the obligations resulting from the legal relationship from which the dispute arises is situated outside the countries where companies have their business domiciles, or where the parties have expressly agreed that the scope of the arbitration agreement is connected with more than one state, are subject to prior recognition proceedings before Angolan judicial courts under the Civil Procedure Code.

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

Angola has been a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 12 August 2016, which is now fully applicable in national territory. However, in line with the reciprocity reservation made by Angola to the Convention's Article I (3), international arbitral awards are recognisable and enforceable, so long as granted in the territory of another Contracting State.

It is important to add that there is still a certain level of resistance from local courts and practitioners in respect of arbitration, although it is expected that the accession to the New York Convention and its implementation will encourage courts to adopt an arbitration-friendly approach.

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

Under Angolan law, parties are generally free to submit their disputes to arbitration, with an exception made to disputes that fall under the state courts' exclusive jurisdiction and disputes that relate to inalienable or non-negotiable rights.

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

This is the case, for instance, with disputes arising from private investment contracts (entered into between the Angolan State and private entities under Angola's Private Investment Framework) that are referred to arbitration, the same applying to disputes concerning petroleum activities.

## 16 Change of Law / Political Risk

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

Typically, those agreements do not provide any particular political risk protections and the change-in-law risk is addressed by contract in the standard and international terms for project finance agreements.

## 17 Tax

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

Interest paid under a shareholder's loan to a local or foreign shareholder is subject to a 10% Investment Income Tax withholding. Any other interest derived from other loans or credit facilities paid by a local company to a non-resident entity is subject to a 15% Investment Income Tax withholding (for loans granted by resident entities, the tax should be assessed by the beneficiary of the interest). As a rule, the mere enforcement of a security does not trigger any income subject to tax. If the payment of any additional proceeds is agreed between the parties, Investment Income Tax withholding may apply.

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

Foreign investment operations may benefit from tax and customs incentives provided that the investor's project is submitted and duly approved by investment entities under the Private Investment Law. The granting of tax incentives is not automatic and must be discussed on a case-by-case basis. The key elements considered by the Angolan authorities when granting tax and customs incentives are the location of the investment (investments in the more depressed and poor regions qualify for larger exemptions) and the sector of activity (infrastructure, energy and water, telecommunications and manufacturing industries are within the so-called priority sectors).

The tax benefits available for private investment operations include temporary exemptions from corporate income tax on profits, withholding tax on dividends and conveyance tax on the acquisition of real estate property. Goods and equipment imported under a private investment project may also benefit from exemptions from customs duties and other customs charges.

Dividends paid by an Angolan resident company to its foreign shareholder – either individuals or corporate entities – are subject to a 10% Investment Income Tax withholding which is their final tax liability in Angola. Tax must be withheld and delivered to the Angolan Tax Authorities by the resident company. Said withholding tax is also applicable in the allocation of profits between a permanent establishment located in Angola and its foreign head office.

Additionally, there is a supplementary tax over dividends which was created by the new Private Investment Law. The supplementary tax is applicable whenever the amount of dividends distributed exceeds the shareholder contribution on the company's own capital, as detailed below:

(i) 15%, up to 20%;

(ii) 30%, between 20% and 50%; and

(iii) 50%, when it exceeds 50%.

The supplementary tax is not applicable whenever the dividends are reinvested in Angola.

Loans and securities are subject to Stamp Duty in Angola – rates vary from between 0.1% and 0.5% depending on the extent of the loan/guarantee – provided that one of the following requirements is met: (i) the loan/security is granted in Angolan territory; or (ii) the loan/security is granted outside Angola but submitted therein for any legal purpose. Loans and securities granted by non-resident entities to an Angolan resident entity are always subject to Stamp Duty regardless of the place where they are signed.

Securities that are deemed materially ancillary of another contract already subject to Stamp Duty (e.g. a loan agreement), provided both contracts are entered simultaneously (i.e. the guarantee must be entered within 90 days after the main contract), are not subject to Stamp Duty in Angola.

## 18 Other Matters

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

There are no other material considerations.

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

The Angolan Securities Code is quite recent and the regulations contain the organisational rules and administrative requirements for open companies and other issuers of securities admitted to trading in regulated markets. There is little experience in capital markets in Angola regarding the emission of bonds or similar capital instruments.

## 19 Islamic Finance

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

There have been no reports of the use of Islamic instruments in project finance in Angola.

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

Please see question 19.1 above.

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

It is common practice in Angola to include an interest payment in a loan agreement subject to Angolan law, which is fully valid and enforceable. The law foresees maximum rates of interest that should be quarterly updated due to the inflation rates in the country.

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# Australia


Ben Farnsworth

Michael Ryan

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## 1 Overview

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

Large economic infrastructure deals and renewable projects have dominated recent Australian project financing activity, fuelled by global and domestic investor interest in Australia's infrastructure assets.

While the federal government's asset recycling incentives ended in 2016, state governments have continued the sale of public assets, such as the privatisation of New South Wales (***NSW***) Land and Property Information, the privatisation of the South Australian (***SA***) Land Titles Office and the long-term lease of Endeavour Energy. State governments have committed to using sales proceeds towards new infrastructure projects. The pace of large-scale privatisations is slowing which may lead to a diminishing pipeline of available traditional infrastructure investment opportunities of scale, though the WestConnex sales process in NSW and the announcement by the Victorian Government to privatise its land titles office registry business will generate significant transactions. A shift in focus towards "core-plus" infrastructure assets such as land titles registries, data centres and smart metering assets is likely to continue while the availability of large-scale traditional infrastructure investment opportunities remains limited.

Renewables project financings continue apace in order to meet the federal government's Renewable Energy Target by 2020 (aiming for large-scale renewable energy generation of 33,000GWh in 2020). Wind projects continue to be well represented, and a considerable increase in solar farm deals is expected given the reduced cost of PV solar and the ongoing financial support provided by the federal government through the Australian Renewable Energy Agency (***ARENA***) and state solar offtake schemes.

In the resources sector, project financing for commodities has been relatively subdued, with resources financings being driven by divestments and acquisitions.

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

There were a number of significant deals in 2017. The long-term lease of Endeavour Energy, the third and final energy transmission and distribution network to be privatised in NSW, was granted for $7.6 billion. The $11 billion Melbourne Metro rail PPP, a project that will transform passenger rail transport in metropolitan Melbourne, reached financial close in December.

In the renewables sector, larger project financings included Goldwind's acquisition of the Stockyard Hill Wind Farm Project and AGL's Powering Australia Renewables Fund development of the 453MW Coopers Gap Wind Farm. The renewables sector has also seen the development of innovative financing structures, such as Pacific Hydro's $670 million global funding platform, which refinanced a portfolio of renewable assets, including wind farms at Portland, Challicum Hills and Clements Gap in Australia, and Punta Sierra in Chile.

## 2 Security

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

All assets security may be granted in Australia by means of a general security agreement (***GSA***), subject to contractual restrictions and, if applicable, restrictions under certain statutory licences.

A security interest in "personal property" is governed by the Personal Property Securities Act 2009 (Cth) (***PPSA***). The PPSA expressly allows for security interests over all present and future (i.e. after-acquired) property including proceeds from investments and sale of collateral. The PPSA will apply if secured property is located in Australia or if the grantor of the security interest is an Australian entity. "Personal property" under the PPSA does not include land, fixtures and certain statutory rights (including mining and petroleum titles, water rights, gaming licences and liquor licences). Security interests over these assets are generally subject to applicable state (or federal) legislation.

For most personal property, perfection of the security interest usually will be by way of registration of the security interest on the Personal Property Security Register (***PPSR***) which involves an online registration by the secured party.

The following types of collateral will also require separate perfection steps:

- certain assets which can be registered by serial number, e.g. motor vehicles and certain intellectual property;
- real property; and
- some asset classes require separate registration on the relevant federal or state register, e.g. statutory licences.

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

Yes. Security over real property will generally require registration of a real property mortgage at the relevant state land titles office and may require the grantor providing the certificate of title to the property. Where plant, machinery and equipment is included under the real property, security may depend upon whether the particular asset is a fixture under Australian law.

If not a fixture, plant, machinery and equipment is likely to be personal property subject to the PPSA, and security can be taken under a GSA or a specific security agreement in respect of the particular asset.

In many cases, infrastructure particularly for resources projects (e.g. a pipeline) may be permitted under statutory licence, such as certain mining tenements and petroleum licences. In such instances, security over the relevant licences will be governed by the relevant state or federal legislation, and will generally require registration on the relevant federal or state register.

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

Yes. Assuming the receivables are intangible property (and not financial property such as chattel paper, negotiable instruments and investment instruments), the PPSA will apply if the grantor is an Australian entity or if the intangible property is an "account" that is payable in Australia or an Authorised Deposit-taking Institution (***ADI***) account, or is created, arises or is provided for by Australian law.

Notice is not required to be given to debtors, although it may be appropriate to do so in some circumstances as it may improve the secured creditor's position.

It will be important to consider the assignability of the receivables under the relevant contract and whether the security interest is contractually prohibited. While the grantor may remain free to collect receivables in the absence of default, there will likely be priority advantages to the secured creditor in controlling proceeds.

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

Yes. Security over deposits in bank accounts is governed by the PPSA and can be addressed in a general or specific security agreement.

ADIs (an Australian government term for a financial institution which is supervised by the Australian Prudential Regulation Authority and authorised under the Banking Act 1959 (Cth) to accept deposits from the public) obtain "super-priority" in respect of security interests over bank accounts held with them. If the secured party is not the ADI (and where the relevant bank account is not an ADI account), then it would be usual to enter into agreement with the relevant bank to acknowledge the security interest and disapply any rights of set-off the bank may have.

It is also relevant to consider whether it is practical for the secured creditor to have control of the bank account (for example, through account signatories) which will be relevant to determining whether the account is a circulating asset under the PPSA and accordingly available to statutorily preferred creditors (such as employees) in priority to secured creditors during insolvency.

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

Security can be taken over shares in Australian companies.

It is important that a secured party takes possession and/or control over the shares to preserve its priority under the PPSA. While possession and control are effective methods of perfection under the PPSA, it is also usual to register a security interest over shares to guard against possession being compromised. Shares may be in certificated or uncertificated form.

In the case of certificated shares (generally unlisted companies), the secured party will generally require that original share certificates are deposited with it and obtain control by requiring the grantor to deposit with it completed or blank transfer forms as well as granting a power of attorney under which the secured party may complete and lodge these forms on enforcement.

Shares in all listed Australian companies are eligible to be traded on CHESS, a settlement system for share transfers operated by a wholly owned subsidiary of the Australian Stock Exchange.

Control over shares on the CHESS subregister will generally be established through a sponsorship agreement between the secured party and relevant person holding the shares who is entitled to participate on CHESS. Control over shares held on the Issuer-Sponsored subregister can also be established by entry into an agreement with the grantor under which the secured party may "initiate or control sending instructions by which the shares could be transferred or otherwise dealt with"; however, as more than one secured party can achieve control in this manner, conservative practice would be to require shares to be transferred to the CHESS system before security is granted.

The secured party will also wish to ensure there is no directors' discretion or other restriction on registration of a transfer of shares as a result of enforcement of its security interest under a company's constitution.

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

Notarisation is generally not required in Australia and stamp duty for security documents has been abolished in all Australian jurisdictions. Registration fees for security interests generally do not relate to property value and are usually not material.

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

Filing, notification and registration requirements in relation to security over different types of assets do not generally involve a significant amount of time and expenses are generally nominal and not material to overall financing costs.

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

Generally, specific regulatory or similar consents are not required for security over real property interests (other than certain Crown leases) or plant, machinery and equipment which constitutes personal property under the PPSA. If infrastructure access is granted under statutory licence (such as mining tenements or petroleum licences), consent from the relevant state or territory minister is generally required. The process of obtaining ministerial consent is administered by the relevant state or territory department and is generally a procedural process, provided the relevant legislative requirements are satisfied.

## 3 Security Trustee

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

Australian law does recognise the concept of a trust. It is usual for a security trustee to hold security and enforce security on behalf of financiers and to apply proceeds to the claims of all secured lenders.

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

This is not applicable in our jurisdiction.

## 4 Enforcement of Security

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

A project lender's ability to enforce the security will be governed by the terms of the relevant security agreement and relevant legislation including the PPSA and the Corporations Act.

Under the PPSA, there are rules governing enforcement of security interests, including that notices must be given to a debtor or a higher ranking security holder. Most rules can be contractually disapplied and it is normal to do so under project financing security agreements. Also, the project lender may elect to enforce the security under the common law framework rather than under the PPSA regime. Under common law, the length of notice before enforcement must be reasonable (i.e. long enough in the circumstances to allow the recipient to make the requisite payment). Notices under mortgages in certain states have statutory time limits as well as other statutory requirements. These time limits (but not the other requirements) can be, and generally are, contracted out of.

The project lender will generally have the right to enforce its security by appointing a receiver or take possession as mortgagee, although this right is not commonly exercised other than in respect of real property. Further, should the project lender hold registered security over all or substantially all of a company's assets, it may appoint an administrator. There is no requirement for the project lender to obtain a judgment before exercising enforcement rights and the project lender may enforce the security should the security documents permit it to do so.

The Corporations Act imposes a duty on receivers and other controllers of the property of a corporation to take all reasonable care to sell the property for not less than its market value, or if it does not have a market value when it is sold, at the best price that is reasonably obtainable. The common law imposes a similar duty on receivers. Provided a receiver exercises such care, it is not required to delay the sale of the secured property on enforcement. The sale may be public or private. The project lender may participate as a buyer in a sale (although in such circumstances should take care to maintain the integrity of the marketing process), and sales may be in foreign currency.

Certain types of collateral (e.g. statutory licences) relating to regulated assets may require state or federal government consents in relation to any enforcement of security or transfer. These processes may impact timing and value, and will be particular to the relevant state or federal legislative framework.

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

There are significant and complex restrictions on foreign ownership of Australian companies or assets, including mining and petroleum tenements and land. Approval from the Foreign Investment Review Board (***FIRB***) is required for a wide range of transactions. If approval is not granted and the transaction proceeds, the Treasurer has powers to impose penalties or to make an order that the transaction be unwound or that the asset be disposed of. Whether approval is required for a transaction can be a technical question, and applying for an approval will often incur significant fees.

However, there is a broad exemption for financiers. The restrictions do not apply to acquisitions of entities and land for the purposes of securing payment obligations under a moneylending agreement, or on enforcement of that security. Additional rules apply in respect of security over residential land and there are also limits on how long a security holder can hold an interest post-enforcement of security.

The FIRB regime has different thresholds for classes of transaction. Acquisitions under these thresholds may not require FIRB approval. For "agreement countries", these thresholds are higher and so capture a wider spread of transactions.

## 5 Bankruptcy and Restructuring Proceedings

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

In Australia, a company which is insolvent, or is likely to become insolvent at some future time, is likely to have an administrator appointed to it. Administration is a statutory process and, most commonly, it is the board of the relevant company who resolve to appoint an administrator. An incentive for directors to appoint an administrator is that the appointment can operate as a defence to a claim against the directors personally, by creditors, a liquidator or the regulator, of permitting the company to trade while insolvent.

The appointment of an administrator to an Australian company creates a statutory moratorium on creditors' rights for the duration of the administration. There is a stay on proceedings, winding-up applications, the exercise of third-party rights as well as enforcement against property, including by a secured project lender. However, if the project lender holds security over all or substantially all of the company's assets, it has a 13-business-day "decision period" after the administration begins in which it can enforce its rights. It is common practice for a project lender to seek security over all or substantially all of a project company's assets so it avoids the risk of moratorium on security enforcement during administration.

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

If a company is wound up and its assets liquidated, unfair preferences and uncommercial transactions can be voided. These provisions may extend to secured creditors. If a project lender enters into a secured transaction shortly before the project company becomes insolvent, unsecured creditors may be able to challenge the security on the basis that the grant of security constituted an unfair preference or uncommercial transaction. If successful, the project lender will not be able to access the assets subject to the transaction, and the assets will be distributed among all creditors including unsecured creditors.

Unfair preferences are where one creditor is unfairly preferred over others. Uncommercial transactions are those which do not involve creditors, and aim to capture disposals of property at an undervalue and other matters. The transactions must have been made while the company is insolvent, or the company must have become insolvent as a result of the transaction. The transaction must also have been entered into during the period ending on the "relation-back" day, but on or before the winding-up process began. For unfair preferences, the period is six months; for uncommercial transactions, two years; for transactions involving related parties, four years; and for transactions entered into to avoid the rights of creditors, 10 years. This is known as the "hardening period" as after this date, the transaction cannot be voided.

Secured creditors are paid in preference to all unsecured debts and claims from proceeds of the security, although circulating assets under the PPSA may be subject to statutorily preferred claims (such as employee entitlements).

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

No, there are no entities that are excluded.

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

Yes. See question 4.1 above.

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

Schemes of arrangement may be used to implement corporate restructures in distressed scenarios, particularly restructures which would otherwise involve steps requiring unanimous consent of all lenders under the facility documentation. A scheme of arrangement which is a court-approved process must be agreed to by at least 75 per cent of each class of creditors by value and more than 50 per cent by number.

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

Under the Corporations Act, a director has a duty to prevent the company from incurring a debt when the company is insolvent or from becoming insolvent by incurring that debt (either separately or at the same time as incurring other debts). A company is insolvent if it is not able to pay its debts as and when they fall due. A contravention of these duties by a director can lead to civil and criminal penalties. As noted in question 5.1 above, directors can be held personally liable for debts of the company incurred when trading whilst insolvent.

## 6 Foreign Investment and Ownership Restrictions

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

See question 4.2 above.

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

See question 4.2 above.

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

Australia is a low-risk jurisdiction for nationalisation or expropriation of project companies and assets. All levels of government in Australia may compulsorily acquire land where necessary for certain public purposes. They are obliged to pay compensation, generally based on the value of the land acquired. There has been no nationalisation of project companies in Australia in recent history.

## 7 Government Approvals/Restrictions

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

Federal and state government agencies will often have shared responsibility for typical project sectors. The relationship between federal and state authorities can be complex and will depend upon the jurisdiction, sector and sometimes the nature of the particular project. Usually, the relevant state agency will be responsible for infrastructure procurement and minerals extraction, although the federal agency will have responsibility for offshore oil and gas projects in Commonwealth waters.

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

There is generally no need for registration of financing or project documents other than the registration of security interests described above. Government authorities will need to approve any contract where the government is a counterparty, or for any licence granted by the government where taking security requires consent.

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

Regulation of these rights varies for each type of asset, but generally can be owned and operated by a foreign entity subject to foreign investment regulation.

**Mining**

Australia's mining industry is largely regulated at a state and territory level, with limited overlapping Commonwealth regulation. At law, minerals are, with few exceptions, owned by the state, and state and territory governments authorise companies and individuals to undertake specific mining activities in respect of designated areas.

Mining tenements may be granted for specific minerals or minerals generally. They may be granted over public and private land, and each jurisdiction specifies a procedure for negotiating access and landowner compensation. Ministerial consent is required to transfer most types of tenements.

In Western Australia (***WA***), state agreements can be an exception to the above regime. These are agreements between a developer and a state government for the development of a particular significant resource.

**Oil and Gas**

Ownership of hydrocarbons is vested in the Commonwealth, state or territory governments. The right to conduct petroleum activities, including exploration and production, is acquired through the grant of various licences and approvals from the government authority responsible for administering the applicable legislative regime(s). Once it has been recovered, the titleholder(s) own(s) the petroleum and the government's interest in such petroleum is limited to an economic interest in the form of a tax or royalty.

The Commonwealth and each Australian state and territory has its own legislative regime for the regulation of upstream petroleum activities. The statutory regimes are effectively separated into three distinct geographical areas:

- Commonwealth offshore (waters beyond the three nautical mile mark to the edge of Australia's continental shelf);
- state or territory offshore (waters up to the three nautical mile mark); and
- onshore (which is governed by the particular state or territory).

In Australia, it is not uncommon for offshore petroleum projects to be regulated by petroleum legislation from all three regimes; for example, where a project involves exploration in the Commonwealth offshore area, a pipeline that passes through the state offshore area and an onshore processing facility.

*Commonwealth*

Upstream petroleum activities in the Commonwealth offshore area are principally governed by the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (the ***OPGGSA***). Project proponents are granted rights to conduct petroleum exploration, appraisal, development and production activities in the Commonwealth offshore area under a statutory licensing regime. The Joint Authority and the National Offshore Petroleum Titles Administrator have responsibility for the administration of petroleum tenure under such a licensing regime.

*State*

Each state and territory has its own legislative regime regulating petroleum activities in each of their offshore and onshore areas. The types of petroleum tenure established by each of these regimes broadly mirror those contained in the OPGGSA. The relevant state or territory minister is responsible for the grant and administration of this tenure.

**Land**

Land ownership in each state and territory is based on the Torrens system of title. Land is either freehold land or Crown land, which may be leased or licensed for particular purposes.

Natural products grown on the land are generally the property of the owner of the land.

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

Royalties are generally payable to the relevant state or territory government on the extraction of minerals or the production of petroleum. While normally calculated on a gross revenue basis, the rates differ between jurisdictions and commodities.

For example, in WA, there are two systems used to collect mineral royalties. Royalties for low-value construction and industrial minerals are generally collected under a specific rate, or quality-based rate. Under this rate, royalties are calculated on the number of tonnes produced. A value-based rate of royalty is generally used for other minerals. This royalty rate is calculated as a proportion of the "royalty value" of the mineral. The royalty value is broadly calculated as the quality of the mineral in the form in which it is first sold, multiplied by the price in that form, minus allowable deductions. Different royalty rates apply for bulk material which has been subject to limited treatment, concentrate material which has been subject to substantial enrichment through a concentration plant and metal. Further, alternative royalty values sometimes apply (e.g. nickel has an alternative value).

State agreements can specify different royalty rates therefore changing the royalty system for the particular company who has the agreement with the state. Alternatively, state agreements may simply refer to the royalty provisions in the relevant legislation.

Mining and petroleum projects are also subject to industry specific taxes. These taxes and royalties operate alongside the general companies taxation regime and liability for one tax may sometimes be offset or deductible against another. The petroleum resource rent tax covers offshore and onshore oil and gas projects.

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

There are generally no exchange controls that can prevent repatriation or realisation of proceeds. Laws in connection with sanctions, terrorism or money laundering may restrict or prohibit payments, transactions and dealings in certain cases.

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

There are generally no restrictions on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions. Non-resident withholding taxes apply to payments of interest, royalties and dividends by residents of Australia to non-residents.

As for most jurisdictions, there are anti-money laundering and counter-terrorism financing standards imposed on the financial sector and related industries in Australia.

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

Yes; however, these accounts must be declared with the Australian Tax Office.

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

There are generally no restrictions on the payment of dividends from a project company to its parent company; however, non-resident withholding taxes may apply.

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

Most major projects require state or territory as well as federal approvals. Environmental approvals for resources projects are primarily regulated at state level; however, federal legislation applies where a project is likely to have a significant impact on a matter of national environmental significance. There are opportunities to streamline these environmental assessment processes to minimise procedural duplication, due to bilateral agreements in place between state and Commonwealth governments, depending on the nature of the impacts and location of the project.

Work Health and Safety legislation applies to all project sectors. The legislation is state-based, but with the exception of Victoria and Western Australia, the state legislation was modelled on the national Work Health and Safety (***WHS***) legislation. WHS law requires employers, or persons conducting a business undertaking, to do everything reasonably practicable to ensure the health and safety of workers and other persons at their workplace and any other place that is connected with their business undertaking.

Directors, officers and managers also have an ongoing due diligence duty under WHS law, which requires them to take all reasonably practicable steps to eliminate and/or minimise health and safety risks in their workplace.

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

No. There is no specific legal/statutory framework which generally applies for procurement by private sector project companies.

## 8 Foreign Insurance

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

Any person wishing to carry on an insurance business in Australia must be authorised by the Australian Prudential Regulation Authority (***APRA***) whether conducting business directly or through an insurance agent or broker and regardless of whether or not the person or company holds an authorisation in an overseas jurisdiction. There is a limited exemption to enable insurance business that cannot be appropriately placed in Australia to be provided by an unauthorised foreign insurer. Products for managing financial risk may be subject to financial services regulation and licensing requirements.

Non-resident insurers with no principal office or branch in Australia may be taxed on a deemed table income based on gross premium derived under an insurance contract from the insurance of property situated in Australia or the insurance of an event which can only happen in Australia. In certain circumstances, the insured person and any person in Australia acting on behalf of the insurer can become personally liable to pay this tax.

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

There is no specific restriction on making insurance policies for project assets payable to foreign (secured) creditors, although the application of insurance proceeds is in certain circumstances subject to a number of general law or statutory restrictions, requirements and duties.

## 9 Foreign Employee Restrictions

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

Yes. Foreign workers must hold a valid and appropriate visa to work in Australia (including on offshore projects), and are subject to Australian employment laws. Employers can sponsor foreign workers for either temporary or permanent visas.

Temporary visas are available only to workers in a specified list of occupations. In addition, employers may first be required to demonstrate they have sought to employ an Australian citizen in the role.

Visa applicants must clear a criminal records check and demonstrate English language proficiency. Employers may also be required to undertake a "non-discriminatory workforce test" to ensure that Australian workers are not being actively discriminated against, pay minimum Australian market salary rate and contribute towards training Australian workers.

## 10 Equipment Import Restrictions

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

Australia offers a straightforward framework for importation. Generally, there is no requirement to hold a licence for importation.

The import of certain goods may be prohibited or restricted, but this is unlikely to be relevant to project equipment.

The Australian Border Force must clear all imported goods. All goods imported with a value of more than $1,000 must be cleared by submitting a completed import declaration form and paying any duty, goods and services tax and other taxes and charges that may apply.

Any equipment to be used in Australia must also comply with Australian Standards and relevant codes of practice.

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

See above.

## 11 *Force Majeure*

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

*Force majeure* is not a recognised concept at common law in Australia (although Australia recognises the narrower doctrine of frustration). Allocation of risk for *force majeure* events is commonly allocated contractually.

## 12 Corrupt Practices

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

Yes. Corrupt practices are unlawful under the Criminal Code Act 1995 (Cth) (the ***Criminal Code***) and various state and territory criminal legislation.

Under the Criminal Code, it is an offence to dishonestly promise, offer or provide a benefit, or cause a benefit to be provided, with either the intention of influencing a Commonwealth public official (***CPO***), or the result that the benefit's receipt or expected receipt would tend to influence a CPO in the exercise of their duties. Bribery of a state or territory public official is prohibited under state or territory legislation. There are no statutory defences.

Also, state and territory criminal legislation concerning secret commissions prohibit private sector bribery.

The penalty for an individual who has violated the Criminal Code relating to bribery of a foreign public official is imprisonment for up to 10 years, a fine of up to $2.1 million, or both (per offence). The maximum penalty for a company is the greater of $21 million, three times the value of the benefit reasonably attributable to the conduct constituting the offence or, if the court cannot determine the value of that benefit, 10% of the company's annual turnover during the 12 months prior to the offence.

Although the Australian Securities and Investments Commission (***ASIC***) has not legislated jurisdiction over foreign bribery, it may bring civil enforcement actions in cases where a company's involvement in bribery leads to its directors facing liability under the Corporations Act. This can result in civil penalties including a fine of up to $200,000 and a ban on being a director.

Bribery of state or territory public officials and private sector bribery are also subject to terms of imprisonment and fines, which vary depending on the state or territory jurisdiction involved.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Generally, project agreements will be governed by the law of the state or territory in which the project will be located and the laws of the Commonwealth of Australia applying there.

### 13.2 What law typically governs financing agreements?

Financing agreements are typically governed by Australian law.

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

Australia has an open, efficient and transparent legal framework. While foreign law is occasionally applied for reasons specific to a particular project, it is typical for domestic law to apply to all matters relevant to a project financing in Australia.

## 14 Jurisdiction and Waiver of Immunity

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

Generally, the submission by a company that is party to a foreign law document to the jurisdiction of the courts of the governing jurisdiction in that foreign law document submission to courts of that jurisdiction, provided that the submission is in good faith and is not contrary to Australian public policy.

An Australian company is generally not entitled to claim sovereign or other general immunity from suit or execution for itself or its assets (although, for example, a company may own certain particular assets that are protected from execution by statute).

## 15 International Arbitration

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

Arbitral awards are, subject to the usual grounds for challenge, generally enforceable in Australia, regardless of the country in which they are made.

Australia has a well-developed and tried and tested legislative framework that supports the enforceability of awards produced through arbitration. The Australian Centre for Commercial Arbitration rules are in line with international best practice.

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

Australia is a member of the ICSID Convention and the New York Convention, and the UNCITRAL Model Law has effect in Australia. If a foreign award meets the conditions of the New York Convention and the Model Law, Australian courts will generally enforce it. All Australian states have a version of the Model Law, creating a uniform framework for domestic arbitration.

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

Yes, some matters are non-arbitrable as a matter of public policy. Bankruptcy and insolvency matters, some intellectual property, insurance contracts and competition law are generally non-arbitrable.

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

No statutory provisions require automatic domestic arbitration.

## 16 Change of Law / Political Risk

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

Political risk in Australia is negligible due to Australia's robust legal system, and political risk guarantees for Australian projects are unusual. Direct agreements with central government are generally not required for Australian project financings; however, where an Australian governmental agency directly contracts with a private sector entity, change of law risk may be contractually allocated between the parties.

## 17 Tax

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

Non-resident withholding taxes apply to payments of interest, royalties and dividends by residents of Australia to non-residents, although parties may commercially agree that the payer will "gross up" the payment.

Interest withholding tax applies at the rate of 10% to the gross amount of interest paid. An exemption from interest withholding tax may be available under Australia's domestic tax laws or under the terms of a tax treaty. For example, there is a commonly used exemption in respect of interest paid on a syndicated loan where the invitation to participate in the syndicated loan facility satisfied the "public offer test". There are also double tax agreements with many other countries which exempt payments of interest to resident financial institutions.

There are generally no restrictions on remittances of proceeds of investments or payments of principal, interest or premiums on loans or bonds to foreign parties.

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

There are generally no tax incentives or other incentives provided preferentially to foreign investors or creditors, nor are there taxes specific to foreign investments, loans, mortgages or security documents.

## 18 Other Matters

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

No, there are no other material considerations which should be taken into account.

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

There are no particular legal impositions to project companies issuing bonds or similar capital market instruments, and Euro-Medium Term Notes, Australian Dollar Medium Term Notes (***AMTN***), US private placements and 144A issuances are all used by project companies in the Australian project financing market.

For an institutional offering to sophisticated investors in the Australian capital markets, project companies may rely on certain exemptions from the obligation to issue and lodge with the regulator a formal disclosure documents under the Australian Corporations Act. While a formal disclosure document is not required for institutional offerings, a project company wishing to access the Australian capital markets will typically issue an offering document. The extent of disclosure contained in the offering document will differ between project companies listed on the Australian Stock Exchange (the ***ASX***) and those that are unlisted entities. Listed companies are subject to a stringent continuous disclosure regime, and as a consequence the level of disclosure in the offering document will be lower. For unlisted project companies, more fulsome business and risk disclosure will be required. AMTN issuances usually contain lighter covenant packages than other debt capital markets issuances and do not usually require auditor comfort letters. However, due to the relative depth of liquidity in the Reg S and s144A bond markets, it is common to see project companies look to these markets before or in addition to the AMTN market.

Under Australian law, certain criminal offences and civil liability may arise in relation to a project company and its directors and senior management as a result of misrepresentations in and omissions from offering documents and other marketing material. For institutional offerings, directors and senior management are not required to take personal responsibility for the offering documents; however, directors and senior management may, in limited circumstances, incur personal liability. The relevant offences do require a degree of negligent, misleading, dishonest or deceptive conduct by the director or senior manager.

## 19 Islamic Finance

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

Australian tax and accounting requirements make Islamic financing structures challenging for Australian project financings. Many Islamic financing structures are not treated as a loan for tax purposes, so are instead subject to tax under the capital gains tax or trading stock rules, and can be subject to GST or stamp duty. However, recently, commodity *Murabaha*- or *Wakala*-based structures have been used in the Australian real estate sector. While the federal government has considered modifying Australia's tax laws to facilitate Islamic financing for infrastructure projects, significant tax reform at the state and territory level would also be required.

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

Islamic financing structures have had limited use in Australia (although there are increasing examples in the real estate sector), and there is little Australian case law relevant to *Shari'ah*-compliant financing structures or conflict with local law.

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

No. Inclusion of an interest payment obligation in a loan agreement will not affect its validity or enforceability under Australian law.



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He has acted for both lenders and sponsors in a wide range of industries including mining, oil and gas, economic infrastructure, power and water as well as PPP transactions. Ben has extensive experience in export credit agency lending, as well as security structures across multiple jurisdictions.

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# Brazil

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## 1 Overview

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

The Brazilian Development Bank (BNDES) continues to play a dominant role in long-term financing in Brazil, although it has reduced disbursement prospects for the next few years. During 2016, only R$88 billion (approximately US$33.5 billion in the first semester of 2017) was disbursed – a decrease of 35% compared to 2015. BNDES has announced that the main sectors that will receive financing are healthcare, education, exportation, innovation, environment, small and medium-sized enterprises, and infrastructure projects (especially water, waste and transport). The other two relevant state-owned banks, Caixa Econômica Federal and Banco do Brasil, have increased their market share in recent years. Commercial banks have reduced their presence in the market, but continue to provide bank guarantees (to BNDES and debentures) and BNDES on-lending facilities.

BNDES is requiring project companies to come up with multiple sources of financing, including commercial banks, export credit agencies and project bonds (debentures). The challenge has been to find commercial banks willing to provide such long-term loans, and investors with the appetite to buy project bonds (debentures).

There have been some discussions in recent years on reducing the amount of recourse against sponsors during the construction phase, which has led to an interesting debate about the optimal risk allocation among the parties involved in a project. In the current market conditions, however, we expect banks to take a more conservative approach and to require full recourse against the sponsors during the construction phase.

In March 2017, the Brazilian government announced a new benchmark rate for BNDES financings – the TLP (Long Term Rate). The Brazilian government goal is to close the gap between the market interest rate and the interest rate BNDES currently charges. It is expected that in five years, TLP will reach the interest rate on Brazilian sovereign bonds.

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

During 2017, Pirapora Solar (a project sponsored by EDF Energies Nouvelles and Canadian Solar) obtained a US$165 million financing from BNDES – one of the largest financings for a solar project in Brazil and the first BNDES financing for solar generation. The project also secured a bridge loan from the Inter-American Development Bank (IDB), acting though the International Investment Corporation (IIC), in the first real-denominated, Brazilian law financing granted by the IDB/IIC.

One of the most significant projects of 2016 was the US$350 million financing provided by the Overseas Private Investment Corporation (OPIC) for the development, construction and operation of infrastructure (including dredging) related to ship-to-ship oil trans-shipment operations at Terminal 1 of Açu Port.

## 2 Security

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

In Brazil, specific agreements are required to cover different categories of assets. Brazilian law requires, among other formalities, that (i) the security agreements clearly identify the assets put forth as collateral, and (ii) the obligations being secured are described in the security agreements (i.e., principal amount, additional secured obligations, schedule of amortisation, form of amortisation, place of amortisation, interest payment, interest rate, etc.).

Most project financings in Brazil rely on the following security package:

- pledge or fiduciary sale of shares;
- pledge or fiduciary sale of assets;
- pledge or fiduciary assignment of rights and receivables;
- mortgage of land and buildings; and
- personal, corporate or bank guarantee.

In most cases, perfection of the lenders' security interest in personal property is achieved by registering the security agreement with the relevant public registry, which depends upon the type of the asset and its location, although specific requirements must be also observed when applicable (for instance, the notification of the counterparties of the rights fiduciarily assigned).

In August 2017, a new federal law was enacted (Federal Law no. 13.476) enabling the perfection of liens, individually or generally, over financial assets and securities. It is expected that such statute opens the possibility of the creation of blanket liens in Brazil. This provision, however, still needs to be regulated by the competent authorities.

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

Mortgages and fiduciary sales given as collateral are the most common forms of security granted over real estate properties to raise finance in Brazil.

A mortgage is a type of *in rem* security which is created by the registry of the public deed on the real estate record file with the relevant Real Estate Registry Office. It is important to note that Brazilian law forbids the automatic appropriation of the real estate given as a guarantee by the creditor as a result of default, hence a court proceeding with judicial auction is required to foreclose the property.

A fiduciary sale of land and buildings is created by means of a contract between the original owner and the creditor (a deed is not mandatory in this case) and shall be registered in the real estate record file with the relevant Real Estate Registry Office in order to create the lien over the real estate and be valid against third parties. In the event of a default scenario, the creditor consolidates the ownership title of the real estate and subsequently conducts an auction for the sale of the real estate through the relevant Real Estate Registry Office. No court proceedings are required.

Pledges and fiduciary sales given as collateral are also common forms of security granted over non-real estate assets, such as machinery and equipment. The agreement between the original owner and the creditor shall describe in detail the asset subject to the fiduciary sale and pledge and shall be registered with the Registry of Titles and Deeds of the debtor's domicile in order to create the lien over the real estate assets and/or be valid against third parties. In the event of a default scenario, extrajudicial foreclosure is allowed for pledges/fiduciary sales. For pledge/fiduciary sale of movable assets, however, a court proceeding is required.

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

Security granted over receivables requires, amongst other formalities, the notification of the debtor of the receivables assigned, informing him of the creation of the security, in order for the security interest to be perfected and valid against him. The receivables may be deposited in checking accounts and the monies deposited can be freely transacted; however, such structure may be considered fragile as no assurance can be given as to whether the funds deposited in such checking accounts will remain therein for purposes of security interest upon the occurrence of an event of default. Therefore, commonly in Brazil the receivables are deposited in escrow accounts which are regulated by account control agreements and enable the lender to manage/block the account in case a default occurs, preventing the chargor from collecting the receivables.

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

A security interest can be created over the cash deposited in a bank account, as well as over all proceeds contained, from time to time, therein. Therefore, security is usually granted over the bank account to encompass all monies deposited therein. The bank in which the account is held must be notified of the creation of the security for the security interest to be valid against him.

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

Security interests may be created over shares issued by Brazilian companies. In addition to the registration of the collateral with the appropriate Registry of Deeds and Documents, the security must be registered in the relevant company's share register book or, in the case of shares whose share registers are held by financial institutions in book entry form, by a register made by the financial institution in its electronic registration system. The security document usually governs the voting rights regarding the security granted over the shares.

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

Any document in a foreign language to be introduced into a Brazilian court proceeding or any other Brazilian public authority must be translated into Portuguese by a sworn public translator. Also, if documents executed outside Brazil have the signatures notarised by a notary public, the documents must be consularised at a Brazilian consulate in that country (except when such public notary is from a country that is a signatory of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents dated 5 October 1961, in which case the consularisation by a Brazilian consulate is not required as such documents will be apostilled) and then registered with the applicable Registry of Deeds and Documents in Brazil.

Costs associated with notarisation and registration of a collateral security depend upon the type of security granted and the state where the collateral is registered. Usually, filing fees vary according to the value of the secured obligations and the number of pages and parties to the document. There are no stamp duties.

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

Time and fees associated with filing, notification or registration will depend on the type of security granted and the state in which the collateral is registered. In some states, the filing and registration proceedings are time-consuming.

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

Brazilian law prohibits public assets, and assets deemed essential for the rendering of public services, from being subject to any liens or attachments.

In the case of security over (i) shares issued by a concessionaire of public services in Brazil, or (ii) assets related to certain public services, authorisation for the creation of the collateral or its foreclosure may be required from the governmental authority/agency that granted the relevant concession.

However, in the case of grants of public-private partnerships, the governmental authority is able to provide a guarantee through to a wider range of options, including constituting collateral as surety, pledge, mortgage and trust receipt.

## 3 Security Trustee

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

As a general rule, Brazil will recognise the legitimacy of a security agent to act on behalf of the lenders as an attorney-in-fact to foreclose on a security granted in their favour. Therefore, the power of attorney must clearly state the matters entrusted and the scope of the powers granted thereby.

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

Please see question 3.1 above.

## 4 Enforcement of Security

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

The steps a lender must take to foreclose on a collateral security interest in Brazil depend upon a number of factors. First, it is important to determine whether the lender has an executory non-judicial title that enables it to initiate an expedited foreclosure proceeding. Second, the nature of the asset – movable or immovable – will require particular steps and formalities. Third, the type of collateral and the provisions laid out in the agreement may also play a role when foreclosing on a collateral security interest. It is worth noting that, in specific circumstances, the courts may grant freezing or restraining orders, as well as injunctive relief. The entire process may take months or even years.

Self-help remedies are not available in Brazil and, except in very limited circumstances, the lender may not keep collateral in satisfaction of the debt. In certain cases, depending on the nature of the asset, a private sale is permissible and the mechanics of such a sale are usually set forth in the security agreement. A court-supervised sale is conducted through a public auction and the bids are presented in Brazilian currency (the *Real*). Lenders may participate as buyers in any such sale.

Additionally, for the enforcement of security over assets of a regulated company, the prior approval of the relevant regulatory body may be necessary.

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

Brazilian law provides that in order to institute a court proceeding in Brazil against the borrower, lenders domiciled abroad and with no real estate property in Brazil must provide collateral (cash or an asset) to guarantee the payment of legal fees and court expenses. Most security agreements constitute enforceable non-judicial titles, which do not require collateral in order to be enforced.

## 5 Bankruptcy and Restructuring Proceedings

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

In the event of liquidation, any enforcement proceedings filed before the issuance of the bankruptcy decree must be stayed – and any claims will be submitted to the bankruptcy court, which has jurisdiction over the debtor's assets.

Pursuant to the Brazilian Bankruptcy Law (Law no. 11.101), creditors are classified in accordance with the nature of their credits. In this regard, amounts raised at a liquidation proceeding must be used to pay the debts of the estate in bankruptcy in a particular order prescribed by Articles 83 and 84 of the Brazilian Bankruptcy Law and Article 186 of the Brazilian National Tax Code, as follows:

(i) fees of the judicial administrator and labour claims in general, as well as those related to indemnification for labour accidents, provided that such claims are related to services rendered after the bankruptcy decisions;

(ii) funds provided to the estate in bankruptcy by creditors;

(iii) expenses for the collection, administration and sale of the assets of the estate in bankruptcy, as well as for the distribution of the sales proceeds, and costs incurred in connection with the liquidation proceeding (administrative costs and expenses);

(iv) court costs relating to lawsuits and enforcement proceedings decided unfavourably to the estate in bankruptcy (court costs);

(v) obligations assumed during the judicial reorganisation (debtor-in-possession (DIP) finance, for example) or after the bankruptcy decision, and taxes relating to periods after the bankruptcy decision;

(vi) labour claims, (limited to a maximum amount of 150 minimum wages per creditor), including indemnification for labour accidents;

(vii) secured claims up to the value of the collateral;

(viii) taxes, except for tax penalties;

(ix) personal claims enjoying special privileges;

(x) personal claims enjoying general privileges;

(xi) unsecured claims;

(xii) contractual penalties and fines for breach of criminal or administrative laws, including tax-related penalties; and

(xiii) subordinated debts.

Secured credits shall be paid up to the value of the pledged asset, which shall be the amount effectively raised after the liquidation of the asset, even if it was already sold as part of a block of assets – in this case, the value of the asset should be individually appraised. In the event that the credit is higher than the value of the pledged asset, the remaining portion shall be classified as an unsecured credit (as per item xi, above).

With regard to judicial reorganisation proceedings, once the debtor files for judicial reorganisation, and provided that all legal requirements are met, the court will authorise the processing of the judicial restructuring and such order will also trigger a non-extendable 180-day protection period, during which the majority of the lawsuits filed against the debtor (including all foreclosure proceedings) will be suspended.

*NB* Although the Brazilian Bankruptcy Law provides for a non-extendable period, there are a number of court precedents extending such period, to the extent that any delays that caused such term to expire prior to the approval of a reorganisation plan were not caused by the debtor.

In addition, as secured credits are subject to judicial reorganisation proceedings, they should follow the rules that would be set forth in the reorganisation plan when and if duly approved by the creditors' general meeting.

The reorganisation plan results in the replacement and renewal of all credits existing prior to the filing of the reorganisation, and is binding on the debtor and all creditors subject to it, although it cannot affect guarantees provided by third parties.

The judicial reorganisation binds all pre-filing credits, even those not yet due, except credits arising from financial leases, fiduciary ownership or transfer of property, contracts for the sale of real estate where the contract includes an irrevocability and or irreversibility clause, and purchase agreements with title retention are not subject to judicial reorganisation or bankruptcy proceedings under Brazilian law and may be enforced by the creditors thereof.

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

The Brazilian Bankruptcy Law provides that certain transactions can be set aside if they occur within a prescribed period before the court's decision to liquidate the insolvent company ("Legal Term"). During the Legal Term, the transactions carried out by the company are either ineffective *vis-à-vis* the bankruptcy estate or can be revoked based on the assumption that during such period the insolvent company may have carried out fraudulent acts with a view to protecting its shareholders or benefiting certain creditors. Such period is fixed by the court and must not retroact to more than 90 days before: (i) the filing for bankruptcy; (ii) the filing for judicial reorganisation (if the judicial reorganisation is converted into a bankruptcy); or (iii) the first protest for non-payment of a credit instrument or security issued by the company, that has not been cancelled.

Article 129 sets forth a list of actions that shall be considered *per se* void if performed by the insolvent company during the Legal Term, irrespective of whether such actions were performed with fraud and further irrespective of whether the contracting party had knowledge or not of the economic-financial crisis then faced by the insolvent party, such as payments: (i) of a non-matured debt by the debtor; and (ii) of a matured and outstanding debt in a manner that is not provided for in the relevant agreement, are void *per se* and may be clawed back.

Article 130, in turn, determines that certain acts performed by the insolvent company may be annulled, provided that (i) they have been carried out with fraud (to prejudice *bona fide* third parties), and (ii) there is proof of such "harmful intent" and of the effective losses the bankruptcy estate as a result thereof. In this sense, any action performed with the purpose of harming creditors will be considered null and void if *proven* to have been taken by the contracting parties with the intent to defraud creditors and *proven* to have effectively harmed the bankruptcy estate.

In a judicial reorganisation scenario, there is no clawblack provision, i.e., there is no legal term. For purposes of the creditors' meeting, the creditors are classified in four classes, as follows: (i) Class I – labour claims; (ii) Class II – secured creditors (i.e., credits with guarantees *in rem*, such as a mortgage or pledge); (iii) Class III – unsecured creditors; and (iv) Class IV – creditors classified as "small sized enterprises". The plan must set forth the conditions of payment or each class, but there are no preferential rights, except that creditors in Class I shall receive their payments within 12 months after the ratification of the reorganisation plan by the court.

*NB* The class of "small sized enterprises" was created by Law (*Lei Complementar*) no. 147/15, enacted after the Brazilian Bankruptcy Law. A company may be considered a "micro-company" or a "small sized company" depending on its annual gross revenues, which must not be higher than R$360,000 or R$3,600,000, respectively.

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

In accordance with Section 2 of the Brazilian Bankruptcy Law, state-owned companies, government-controlled companies, and public or private financial institutions, pension funds, consortium, insurance companies and equivalent entities, are not subject to its provisions.

Some entities, such as insurance companies and financial institutions, are subject to specific insolvency procedures, including intervention by the relevant regulatory authority (e.g. the Central Bank of Brazil (BACEN) in the case of financial institutions, and the National Agency of Health (*Agência Nacional de Saúde*) for health insurance companies).

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

There are some processes, in very limited circumstances, as described in question 4.1 above.

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

No. The insolvency proceedings available in Brazil for a company to achieve a restructuring of its debts and/or cramdown of dissenting creditors are those set forth in the Brazilian Bankruptcy Law (Law no. 11.101), as follows: (i) judicial reorganisation proceedings; (ii) extrajudicial (out of court) reorganisation; and (iii) liquidation.

In a judicial reorganisation, the company can cramdown the plan in the event that the requirements described above are not met. The cramdown is only possible if: (i) at least 50% of the creditors (overall), by amount of claims, attending the meeting voted favourably for the approval of the plan; (ii) the plan is approved by two classes of creditors or, in the event that there are only two classes of creditors, at least one class approved the plan; and (iii) 1/3 of the creditors attending the meeting in the rejecting class voted favourably for the approval of the plan (such 1/3 can be either based on the amount of claims and/or number of creditors, depending on the class).

In a extrajudicial reorganisation, the company can cramdown the plan provided that at least 3/5 of its creditors agreed with the plan. In such a situation, the company may ask the court to ratify the plan to extend its effects for the other 2/5 of the creditors.

In a liquidation scenario, the company cannot submit a restructuring plan. The judicial administrator appointed by the court will appraise the company's assets and sell them in order to pay the creditors.

In addition, there are formal insolvency proceedings specific to entities that were excluded from the Brazilian Bankruptcy Law's provision, as described in question 5.3 above.

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

Under Brazilian law, directors shall not be held liable for continuing to trade whilst a company is undergoing financial distress to the extent that they continue to act within their regular managing powers. Directors may only be held liable for damages wilfully caused to third parties with the aim of harming creditors or obtaining undue personal gain.

Directors should be aware that certain actions, when performed within a certain timeframe – usually ninety (90) days before a bankruptcy or judicial reorganisation filing (see question 5.2) – may be voided towards creditors if harmful to them or to the insolvent estate.

## 6 Foreign Investment and Ownership Restrictions

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

Brazilian regulation permits remittances to and from abroad at any value and of any nature, provided that the payments are legal and have economic grounds, as well as the appropriate documentation.

Registration of the foreign investment is mandatory to ensure access to the foreign exchange markets for any remittances in connection with such investments. The main purpose of such registration is to provide local authorities with control over currency entering and leaving the country. The registration is made by means of a self-declaratory electronic system created by BACEN named *Registro Declaratório Eletrônico* (RDE System).

There are no restrictions on the repatriation of funds or remittance of profits in terms of the amount of capital and the length of time funds have to remain in Brazil. In addition, remittances to and from Brazil do not depend on any authorisation of local authorities, except in some specific sectors and cases, as detailed below.

The transfer of control of certain regulated companies or companies that hold public concessions or authorisations may require the prior notification or consent of the applicable governmental authority. Sectors where foreign ownership are restricted include finance, nuclear energy, oil, mining and exploration of minerals, domestic airlines, health services, media companies, telecommunication and pay-TV companies, security/surveillance services, security transport companies and fishing. Also, all transactions which, directly or indirectly, involve the acquisition of rural real estate possession, domain or any other *in rem* right located in the Border Zone (the area comprising 150 km from the border parallel to the division line of the Brazilian territory) by a foreign entity or individual, or by a Brazilian company which has the majority of its corporate capital held by a foreign company or foreign individual non-resident in Brazil, require the prior consent of the National Defence Council. This restriction does not apply to rural properties located in the Border Zone which are given as security for loans granted by foreign financial institutions. Regarding rural land not located in the border zone, some restrictions apply to foreign companies and individuals in relation to ownership and occupation of rural land. However, there is an ongoing discussion both in the courts and in the executive branch as to whether Brazilian companies in which the majority of the capital is held by foreign entities or controlled by foreigners, may be subject to such restrictions. From a practical standpoint, such uncertainty may cause problems in the achievement of business transactions involving the acquisition of rural properties by Brazilian companies in which the majority of the capital is held by foreign entities or controlled by foreigners, therefore this should be considered an issue to be properly addressed. No restrictions apply to the creation of other *in rem* rights over rural land.

Foreign companies and individuals, on the other hand, are free to purchase, lease, possess or create *in rem* rights over commercial, industrial and residential buildings, and no restrictions apply whatsoever.

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

There is no international investment treaty in force in Brazil. However, with a view towards the avoidance of double taxation, Brazil has entered into tax treaties with the countries listed below. These treaties follow the model of the Organisation for Economic Cooperation and Development. Brazil's treaty partners currently are: Argentina; Austria; Belgium; Canada; Chile; China; the Czech Republic; Denmark; Ecuador; Finland; France; Hungary; India; Israel; Italy; Japan; Luxembourg; Mexico; the Netherlands; Norway; Peru; the Philippines; Portugal; the Slovak Republic; South Africa; South Korea; Spain; Sweden; Trinidad and Tobago; Turkey; Ukraine; and Venezuela.

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

The government is entitled to expropriate an asset upon due process of law and prior indemnification. Expropriation may occur in case of: (i) public need, which is justified by means of urgency and emergency situations; (ii) public interest, which is the basis for most of the expropriations of land to serve project companies to build the project facilities; or (iii) social interest, which is justified by the non-fulfilment of the social function of the property in accordance with the provisions of Brazil's Federal Constitution.

There is no form of investment that is specially protected. However, it is worth noting that project companies commonly benefit from government expropriation, using expropriated areas for the construction of project facilities.

## 7 Government Approvals/Restrictions

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

In Brazil, the relevant regulatory agencies for the typical project sectors are:

(a) ANA – water resources.

(b) ANAC – civil aviation.

(c) ANATEL – telecommunications.

(d) ANEEL – electric power generation, transmission and sale.

(e) ANP – oil, gas natural and biofuels.

(f) ANTAQ – waterway transportation services and public ports and waterways.

(g) ANTT – railway and road services.

(h) DNPM (to be replaced by ANM) – mining.

States have also formed their own regulatory agencies, but made through a single regulator covering different areas, such as Amazonas, Goias, Mato Grosso, Minas Gerais, Pernambuco, Rio Grande do Norte, Rio Grande do Sul and Santa Catarina.

On the other hand, other states have chosen to set up specialised agencies in given sectors, such as Bahia, Distrito Federal, Rio de Janeiro and São Paulo, replicating the structure used at the federal level. In São Paulo we can highlight the institution of ARTESP (*Agência de Transporte do Estado de São Paulo*).

Likewise, municipalities have opted to establish regulators for specific services.

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

In general terms, except for documents creating a security interest, there is no requirement that project or financing agreements be registered with any governmental authority in order to be valid and enforceable in Brazil. It is not unusual, however, for lenders such as BNDES to require that a credit agreement be registered with the Registry of Deeds and Documents in Brazil in order to give notice to third parties.

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

According to the Brazilian Federal Constitution, natural resources are owned by the federal government. The use of resources (such as oil and gas, minerals and hydro-electric power, including the transportation of natural gas through pipelines) therefore requires government authorisation, licensing, or the grant of a concession.

In those cases, natural resource development may only be performed by a company incorporated under Brazilian law and having its head office in Brazil. Such companies may be controlled by foreign entities; provided, however, that certain sectors and industries are controlled by Brazilians, as described in the response to question 6.1.

In addition, the operation of certain specific assets of infrastructure sectors, such as ports and highways, are subject to concession, subject to prior bidding and with the power to implement eventually being granted.

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

For the extraction of oil and natural gas, royalties are due for both onshore and offshore production. With regard to the Concession Regime, the royalty rate varies from 10% to 5% of the total amount of the monthly volume of oil produced, depending upon the geological risks at a given field. There is also the special participation, which is an extraordinary financial compensation payable in the event that high volumes of hydrocarbons are produced or a certain field enjoys high profitability. With regard to the Production Sharing Regime, the Pre-Salt Law (Law no. 13,351/10) establishes that a royalty rate of 15% over the monthly volume of oil produced – no special participation is due. Royalties and special participation are distributed to federal, state and local governments and agencies, in accordance with the provisions of the Pre-Salt Law and the Petroleum Law (Law no. 9,478/97).

With respect to mineral activity, any revenue is subject to “Financial Compensation on Revenue from Exploitation of Mineral Resources” (CFEM), which is due and payable upon sale of the mineral or its beneficiation or consumption by the mining company. CFEM’s tax rate ranges from 0.2% to 3% and varies according to the type of mineral. Compensation equal to half of the CFEM is also due to the landowners where the mine is located. Additionally, during the exploration phase, an annual occupation fee per hectare (TAH) is collected by the National Department of Mineral Production.

Regarding the development of hydropower resources, the concessionaire shall pay: (i) a fee to the federal government for the use of public assets; (ii) a fee regarding the use of water (CFURH) of 6.75% of the value of the energy produced; and (iii) an annual inspection fee of 0.4% to ANEEL.

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

Subject to the requirements and limitations provided in question 6.1 above, Brazilian regulation permits remittances from and to abroad at any value and of whatsoever nature, provided that payments are legal and count with economic grounds, as well as appropriate documentation. For that purpose, foreign exchange transactions must be performed by and between a financial institution authorised to operate in FX markets and the person interested in receiving a remittance from abroad or performing a remittance to another country.

The “IOF-Exchange” tax is levied upon sums converted from foreign currency into Brazilian *Reais* (inflow of funds) and from Brazilian *Reais* into foreign currency (outflow of funds). The currently applicable rates for investments made by non-residents in Brazilian companies are generally: (i) 0.38% for the corresponding inflow of funds for the acquisition of the equity interest (if investment is made on stock market, the IOF rate is 0%); (ii) 0.38% for the return of the capital invested; and (iii) 0% for remittances of dividends and interest on net equity. The currently applicable IOF-Exchange rates related to foreign loan transactions are the following: (i) for the inflow of funds, the rate is 0% if the minimum average maturity term of the loan transaction is longer than one hundred and eighty (180) days, or 6% for transactions with shorter periods; and (ii) for the outflow of funds (payment of interest or repayment of principal) the applicable rate is 0%, regardless of the term of the transaction. Please note that the federal government may increase the current IOF-Exchange rates at any time, up to a maximum rate of 25%. Any such new rate would only apply to future foreign exchange transactions.

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

Subject to the requirements provided in question 6.1 above, there are no restrictions on the repatriation of funds or remittance of profits in terms of the amount of capital and the length of time funds have to remain in Brazil. In addition, remittances to and from Brazil do not depend on any authorisation of local authorities, except in some specific sectors and cases.

Some remittances, however, may be subject to withholding taxes. Gains on the sale or redemption of shares are generally subject to 15% capital gains tax (or 25% if the transaction originates in a favourable tax jurisdiction). As of January 2017, new tax rates on capital gains are in force, ranging from 15% to 22.5% on gains above R$30 million.

Cross-border payments of Interest on Net Equity (*Juros sobre o Capital Próprio)* are also subject to 15% withholding income tax (or 25% if the transaction originates in a favourable tax jurisdiction). Tax treaties may function to reduce withholding.

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

In projects, only companies engaged in transportation headquartered abroad and companies in the energy sector can establish and maintain onshore foreign-currency accounts.

On the other hand, any company located in Brazil can establish and maintain offshore accounts in another jurisdiction, provided that their use is limited to the interests of the own company (and not of any third party).

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

Generally, there are no restrictions with respect to the payment of dividends to residents in Brazil or to non-residents in Brazil, subject to the requirements and limitations detailed in question 6.1 above.

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

Under Brazilian law, projects potentially harmful to the environment are subject to environmental licensing. Most infrastructure projects require an environmental impact assessment (EIA) and an environmental impact report (RIMA), which may be time-consuming to produce. Additional licences may be required, depending on the activity.

Moreover, to undertake activities with significant environmental impact, it is necessary to provide financial resources to create or maintain a specially protected environmental area. Such obligation is determined during the environmental licensing proceedings and the specific compensation to be paid must be calculated based on the environmental impact that cannot be avoided or reduced through pollution control systems. Nevertheless, the applied rate tends to be up to 0.5% of the total amount for implementation of the endeavour, not including costs related to developing environmental programmes and plans.

Health and safety laws and regulations may be applicable depending upon the type of activity that the project involves.

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

No, provided that the parties of the project are not state-controlled companies.

## 8 Foreign Insurance

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

Yes. As a general rule, individuals or legal entities domiciled in Brazil are not allowed to purchase insurance coverage overseas.

However, there are some exceptions to this prohibition, allowing certain individuals/entities to obtain insurance coverage abroad in specific circumstances, as follows:

(i) if the insurance coverage is not offered in Brazil, provided it is not a coverage prohibited according to local laws and regulations;

(ii) coverage for risk located abroad, provided that the insured is an individual resident in Brazil and the policy's duration is limited to the period the insured is abroad;

(iii) insurance which is the object of international treaties ratified by the Brazilian National Congress;

(iv) for hull, machinery, and civil liability risks of ships or vessels duly registered under the Brazilian Special Registry (REB) in case (a) such insurance coverage is not available in Brazil, or (b) local rates are not compatible with the international market; and

(v) if the insurance was purchased abroad, according to regulations applicable before Complementary Law no. 126, dated January 2015, was enacted.

Finally, please note that the law also imposes restrictions on the activities of foreign reinsurers. As a general rule, only a reinsurer licensed with Brazil's private insurance regulatory body, SUSEP, as a local, admitted, or occasional reinsurer, will be permitted to operate in Brazil.

Insurance transactions between a Brazilian entity and a foreign insurer located abroad typically generate the following taxes: (i) Withholding Income Tax (WHT); (ii) PIS/COFINS-Import Tax; and (iii) IOF-Exchange. Rates vary depending upon the line of business covered.

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

Yes. Foreign (secured) creditors may be indemnified in connection with insurance retained in Brazil, as long as they are specified in the insurance policy as third-party beneficiaries or co-insured parties.

## 9 Foreign Employee Restrictions

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

The Brazilian labour laws limit the number of foreigners hired as employees in a company to 1/3 of the total number of employees. Furthermore, the total amount paid to foreigners cannot exceed 1/3 of the cost of the payroll. This mandatory quota, however, is not applicable to technicians without employment agreements in Brazil who come to Brazil on short-term assignments and thus are entitled to a technician visa, or to executives who perform management activities (legal representatives) and are thus are entitled to a permanent visa.

The type of visa and relevant restrictions will be determined according to the position that the individual will hold in Brazil and the duration of the assignment.

It is important to stress that the project company shall engage the foreign workers, technicians, engineers or executives and request the respective visas prior to the individuals' entry into Brazil. Additionally, if the project company's activity is regulated, it may be necessary to obtain the approval of the applicable regulatory authority.

## 10 Equipment Import Restrictions

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

All the restrictions, exemptions, controls and taxes are defined according to: (i) the specific product code in the "Harmonised System Tariff Schedule"; (ii) the state where the equipment is cleared; and (iii) usage in Brazil/purpose of the project. Brazil has a restriction on importation of second-hand equipment on a permanent basis, unless it is proven that no equivalent equipment is produced locally.

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

Taxes regularly levied upon imports that must be collected upon clearance of goods are the Import Tax, Excise Tax, PIS Tax and COFINS Tax, as well as the ICMS (state value-added) Tax. Rates vary according to the product. Foreign exchange transactions related to such import transactions are exempt from the IOF-Exchange.

Tax incentives may be available in relation to the importation of equipment and materials that depend upon the specifics of each project and which are granted on a case-by-case basis. It is not possible to list all of the exceptions available, but in general, permanent assets, information technology and products that do not have similar equivalents in Brazil tend to be subject to tax reductions.

## 11 *Force Majeure*

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

Exemptions from liability due to *force majeure* events are available and enforceable in Brazil. Brazilian court precedent differentiates between *force majeure* and "fortuitous" events, although both are treated in the same manned under the Brazilian Civil Code. *Force majeure* is an event whose effects were impossible to avoid or prevent, such as acts of God (floods, hurricanes, earthquakes, etc.). Fortuitous events are events which are beyond the control of the affected party, such as wars, strikes, etc. In both circumstances, the affected party is exempt from liability and from performing its obligations. However, those definitions are based on court precedents on the matter. As there is no strict definition of *force majeure* or fortuitous events in the law, we note that in certain contracts, such as construction agreements, it is common to list events that will not be deemed *force majeure* or fortuitous events.

## 12 Corrupt Practices

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

The main legislation relating to anti-bribery and anti-corruption in Brazil is as follows: Decree-Law no. 2,848 of 7 December 1940 ("Penal Code"), Law no. 8,429 of 2 June 1992 ("Law against Improbity in the Government") and Law no. 12,846 of 1 August 2013 ("Anti-Corruption Law"). Such laws cover not only anti-bribery and anti-corruption, but also a number of other crimes and infractions. These laws apply to all sectors and there are no specific rules targeting the projects sector.

The Penal Code imposes criminal penalties on: (i) individuals who directly or indirectly promise, offer or give any unlawful advantage to a public official in order to influence him/her to do, omit or delay any official act; and (ii) public agents who directly or indirectly request, demand, charge or accept, to the benefit of him/herself or of a third party, any undue advantage or promise of advantage. There is no legal definition of undue advantage. Brazilian law does not impose criminal liability on companies for corruption. Penalties applicable in such cases include imprisonment from two (2) to twelve (12) years, and fines. The penalties may be increased by 1/3 if, as a result of the advantage or promise, the public officials delayed or omitted an official act or infringed their duties.

Although targeted at public officials, the sanctions provided in the Law against Improbity in the Government may also be imposed on private parties should they participate in any of the illegal conduct provided therein. Among other types of improbity infraction, the Law against Improbity in the Government provides that an infraction occurs if a public official "receives, for oneself or to a third party, money, a movable or unmovable asset, or any other economic advantage, directly or indirectly, on a basis of commission, percentage, gratification or gift, from one that has an interest, directly or indirectly, that may be attained or supported by an action or omission as a result of the actions or inactions from the responsibilities of the public official". Penalties and sanctions for this type of infraction include fines of up to two times the amount of damages suffered by the government and/or three times the value of the illegally afforded benefit, confiscation of illegally obtained assets, and prohibition to enter into contracts with the government or to receive tax or financial incentives, which may extended to companies in which the implicated entity owns a majority stake.

Brazil's Anti-Corruption Law, issued on 1 August 2013 and in force since 29 January 2014, is targeted at legal entities, foundations, associations or foreign companies with headquarters, a branch or representation in Brazil (with or without registered corporate rules of organisation). The Anti-Corruption Law provides that liability for acts covered therein shall be applied in accordance with the strict liability doctrine; that is, irrespective of an assessment or proof of the legal entity's fault or intent. The list of prohibited conduct includes: (i) to promise, offer or give, directly or indirectly, an undue advantage to a public official or to a third person related to him/her; (ii) to manipulate or defraud public bids or public contracts; (iii) to finance, fund, sponsor or in any other way subsidise the practice of harmful acts pursuant to the Anti-Corruption Law; (iv) to use third parties, individuals or corporate entities, and to hide or disguise real interests or the identity of the beneficiaries for the acts; and (v) to hinder investigations or oversight by agencies, entities or regulatory bodies, or interfere in their acts. As per the Penal Code, Brazil's Anti-Corruption Law does not define undue advantage.

If a company is found liable for any of the prohibited conduct provided in the Anti-Corruption Law, it can be subject to administrative and court-enforced sanctions. At the administrative level, the following sanctions may be applied, jointly or independently: (i) fines ranging from 0.1% to 20% of the gross revenue, which should never be less than the advantage amount obtained through the unlawful act; and (ii) extraordinary publication of the condemnatory decision, at the implicated entity's own expenses. In the event that it is not possible to estimate the gross revenue, such fine shall be assessed in an amount between R$6,000 and R$60,000,000. Court-enforced sanctions may include: (i) the confiscation of assets, rights, or value obtained from the illegal act; (ii) partial suspension or prohibition of activities; (iii) compulsory dissolution of the implicated legal entity; and (iv) prohibition against the receipt of donations, grants, subsidies or funding from public entities and financial institutions, from one (1) to five (5) years.

Facilitation payments to public agents are not allowed under Brazilian law and may be considered a violation according to the laws described.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Under Brazilian law, there is no restriction as to the governing law of project agreements. Brazilian law is widely used for project documents, such as construction contracts, supply agreements, and offtake agreements.

### 13.2 What law typically governs financing agreements?

Foreign lenders typically request New York law as the governing law for financing agreements and for any collateral located outside Brazil, such as offshore accounts.

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

Agreements providing for the creation of security interests over property located in Brazil must be governed by Brazilian law, while agreements executed by governmental authorities usually need to be governed by such law, which is also commonly used for personal guarantees given by Brazilian residents.

## 14 Jurisdiction and Waiver of Immunity

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

Except with respect to certain matters for which a Brazilian court would have concurrent or exclusive jurisdiction (e.g. disputes regarding real estate located in Brazil), a Brazilian party can validly submit to the jurisdiction of a foreign court or to an international arbitral tribunal based outside Brazil in international contracts. Waiver of sovereign immunity is possible, but please note that it has not been well tested in court due to the limited number of practical cases. Governmental entities may, however, enter into arbitration agreements with foreign and domestic investors, and this practice has become generally used in construction agreements.

## 15 International Arbitration

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

Yes. The parties can validly submit their disputes to international arbitration (provided that it refers to disputes related to freely transferable patrimonial rights), and may freely choose the seat of the proceedings (however, limitations on the possibility of choosing a seat may apply to disputes involving governmental entities). Domestic arbitral awards are enforceable by Brazilian courts like any other court judgment, and, therefore, without re-examination of the merits. If the award was rendered outside Brazil, it must first be confirmed by the Brazilian Superior Court of Justice (STJ) prior to enforcement. The STJ will confirm the award without re-examination of the merits if it complies with the requirements set forth under the New York Convention and the Brazilian Code of Civil Procedure.

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

Yes. Brazil became a contracting party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002. Brazil is also a signatory to: (i) the Geneva Protocol on the Arbitration Clause; (ii) the Brasília Protocol on Dispute Resolution; (iii) the Ouro Preto Protocol on the MERCOSUR institutional structure; (iv) the Las Leñas Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labour, and Administrative Law Matters; (v) the Inter-American Convention on Territorial Validity of Foreign Awards; and (vi) the Inter-American Convention on International Commercial Arbitration (Panama Convention). Brazil is not a signatory of the Washington Convention of 1965 (ICSID).

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

Yes. The Brazilian Arbitration Act states that arbitration can be used only to settle disputes involving freely transferable patrimonial rights between persons capable of entering into contracts. However, there are court precedents that limit the use of arbitration to certain disputes, such as employment-related matters and consumer rights.

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

No, there are no types of dispute which are subject to such proceedings.

## 16 Change of Law / Political Risk

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

No, there has not.

## 17 Tax

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

Interest payments made by foreign borrowers to domestic lenders are treated as general income and shall be subject to the tax regime applicable to the specific domestic lender, and foreign tax credits may be deducted on certain conditions; however, transfer pricing rules might come into play.

As a general rule, interest payments made to foreign lenders are subject to 15% withholding income tax. If the lender is resident in a favourable tax jurisdiction, as defined by applicable legislation, the applicable rate is 25%. A lower tax rate may be available in the event that there is a tax treaty in effect between Brazil and the country where the lender is domiciled. Financing agreements in Brazil usually contain gross-up provisions whereby the borrower undertakes to make payments net of tax deductions and withholdings of any nature, including any other taxes that may be applicable in the future, or any increases in the rates of existing taxes. Moreover, please note that transfer pricing and thin capitalisation rules might come into play on such foreign loan transactions.

The proceeds arising out of the enforcement of guarantees or security interests are generally subject to the same rules applicable to the original amounts guaranteed under such instruments as if the borrower itself had made the payments.

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

There are several tax incentives given by the federal government to non-resident investors (NRIs) that vary depending on the project itself, the borrower or even the financing structure. As a general rule, there is no difference between domestic and foreign investments for the purposes of effectiveness or registration.

By way of an example, it is worth noting that, in an attempt to boost investments in infrastructure, legislators enacted Law no. 12,431/11, which established that earnings by NRIs resulting from investments in publicly traded bonds and securities issued by non-financial Brazilian corporations for the purpose of financing projects, will benefit from 0% withholding tax. NRIs may also enjoy more favourable tax treatment when investing in the local capital markets. In addition, there are incentives offered by states and municipalities in order to foster local production and exports. These incentives are usually available to attract new projects to the respective states and municipalities, providing exemptions and/or reductions in taxes, fees, utilities and other expenses.

## 18 Other Matters

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

The main source of financing in Brazil is Brazil's development bank, BNDES, which usually relies upon its own loan documentation for project financings. This practice poses additional challenges in multi-source financing involving foreign lenders, as such lenders are used to dealing with loan and project documentation that conforms to international standards.

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

No, as long the project company satisfies the requirements set forth in the Brazilian Corporate Law (Law no. 6.404/76), the relevant offering rules issued by Brazil's securities and exchange regulatory body, the *Comissão de Valores Mobiliários* (CVM), which may require, in certain cases, a feasibility study. As a general rule, project bonds are offered in Brazil to the general public, pursuant to CVM Instruction no. 400/03, or to professional investors (e.g. financial institutions and pension funds), pursuant to CVM Instruction no. 476. Debentures issued under Law no. 12,431/11 must comply with certain requirements related to the project in which funds will be invested (e.g., detailed information on the current status and expected date for conclusion of the project, and, in some cases, the approval of the competent Brazilian Ministry) and with the terms and conditions of the debentures (e.g. a minimum weighted average term of four (4) years, remuneration based on certain pre-fixed rates to be paid within a minimum period of time, restrictions on the pre-payment and/or redemption of the debentures, among others).

## 19 Islamic Finance

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

This is not applicable.

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

This is not applicable.

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

This is not applicable.


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As a leading firm in project development and finance in Brazil, Mattos Filho advises clients in structuring, developing and financing infrastructure projects, representing companies, sponsors, lenders and suppliers. We are active in a broad range of industries, including energy, telecommunications, mining, sanitation, highways, ports, aviation and airports. Our services include preparation of the full array of agreements required for a project, including engineering, procurement and construction (EPC) agreements, operations and maintenance agreements, and other operating agreements, as well as arrangements to secure project funding, such as financing agreements, shareholder support agreements, account management agreements, and security documents.

# Canada


Alison Manzer

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## 1 Overview

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

All levels of government in Canada have created a focus on infrastructure development throughout Canada at the federal, provincial and municipal level. Attention is particularly being paid to sectors such as renewable energy, transportation, highways and housing infrastructure. Government programmes are creating a focus on these sectors by facilitating grants, guarantees and loan programmes designed to encourage involvement in project development underpinning these infrastructure needs.

Project finance, particularly for infrastructure projects having this public policy focus, is generally available from the regulated financial institutions in Canada. This will include construction and development and take-out loans available through the banking, life insurance and pension sectors. Equity investment underpinning project finance is also generally available from some of these same regulated financial institution players, particularly the pension sector. There is a significant interest in infrastructure project development with the pension plans, as a longer-term timeframe and regulated returns from infrastructure projects fits well with pension plan investment objectives.

The primary trends are the development of finance structures allowing access to these government incentives, tapping the interest of financial institutions with assured revenue streams.

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

Canada continues to have a focus on renewable energy, attempting to meet its international carbon commitments by the development of hydroelectric, wind and solar energy projects. The largest of the projects in Canada have involved hydroelectric development, with the most recent being the Lower Churchill River hydroelectric power projects being developed with the provinces of Newfoundland and Labrador and Nova Scotia. This $12.5 billion development will add significantly to the renewable energy capacity in Canada, and it is anticipated for completion in 2020.

Other projects of significant size in Canada focused on the Toronto area, with the development of the facilities of the Pan American and Parapan American Games in 2015, and the development of an Eglinton Cross-town Light Rail Transit Project. The continued development of public transit throughout the Greater Toronto area remains a significant focus, and large-scale projects are being developed, proposed and supported by the government in this sector.

These large-scale projects have combined private funding sources with government incentives, including guarantees. The Lower Churchill River hydroelectric power projects involved very significant support from the federal government of Canada in the form of a credit substitution guarantee ensuring a AAA credit rating for the issued debt and thereby greatly enhancing the economic viability of the project.

## 2 Security

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

Personal property security is taken in Canada under a personal property security system in all provinces except Québec, which has a generally similar system under the *Québec Civil Code*. These systems allow the taking of security using a written agreement on an all assets basis. Perfection of the security interest is completed generally by registration, with some limited classes of assets which can also have security taken by possession. There is no requirement for separate security agreements, all assets can be taken using a general security agreement, or its equivalent. The forms of these agreements, the nature of the security taken, substantially resembles that of the United States of America under the Uniform Commercial Code.

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

There are two systems for the taking of security in Canada, one for personal property security as previously outlined and the second for real property security. Real property security interests are taken using documentation which is registered against the title to the real property, on a title-by-title basis. Mortgages are taken to a grant a charge over the real property itself, and other types of security documentation can be used to take interests in real property interests which do not constitute the real estate itself. The system generally uses written documentation, with registration, with priority of rights dictated by the order of registration, against the real property register. Security can be taken in assets related to the real property such as machinery and equipment which is attached to the real property, including pipelines, whether underground or overground. Real property interests can be taken on the basis of a fixtures filing, which is completed under the personal property security system and then registered against title to the real property. Real property interests can include interests which are less than the ownership interest in the real property, including licences, leases, ground leases and easements.

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

Security over account receivables can be taken by written agreement, which is registered under the applicable *Personal Property Security Act* or *Québec Civil Code*. The granting of security can leave the charger with the right to collect the accounts receivable, until a trigger event or default occurs. Notice to the account debtors is not required; however, the secured party can run the risk that if the account debtor has made payment to a person other than the secured party prior to the time of receiving notice of the assignment to the secured party, then that debt will be discharged by that payment whether the secured party has received the payment or not. The risk is one of not being able to enforce double payment, where payment is made to the charger or another party, rather than to the secured creditor. It is not an issue of perfection of the security interest over the accounts receivable which is accomplished without notice to the account debtors.

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

Security can be taken over cash deposited in a bank account. The security interest is taken in the same manner as security over other personal property, by written agreement, and registration under the *Personal Property Security Act* or *Québec Civil Code*. While there are law reform discussions considering the requirement for the use of a control agreement in connection with the taking of security over cash in an account, these have not been completed to law. Generally, a secured creditor will take a form of control agreement over an account, in order to expedite the steps taken for realisation, although it is not necessary to perfect the security interest. Note should be made that, under banking law, banks can have a priority of interest as to cash in the account based upon legal principles such as the bank's right of set-off.

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

Security can be taken over shares of a corporation by written agreement, and either registration or possession of the shares. Under the *Securities Transfer Act*, in all of the provinces of Canada, security over certificated securities is taken, preferably, and with priority, by possession of the share certificate. The norm is to complete a share pledge or charge agreement, and to take possession of the share certificates, while completing registration under the applicable *Personal Property Security Act* or *Québec Civil Code* registry. If the shares are uncertificated, then it will be necessary to take the security by registration, and using a control account agreement where the shares are held in an uncertificated, third-party controlled, account arrangement.

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

There is no significant cost to the taking of security based upon the value of the asset. Registration is generally a fixed amount, and is relatively nominal. In the province of Québec, notarisation of security can be required; however, the notary fees are generally at a fairly nominal level.

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

Generally, the taking of security, and its perfection, in Canada is readily accomplished. Taking of security over personal property involves registration in the relevant provincial, central, *Personal Property Security Act* Registry or the *Québec Civil Code* Registry. This is generally capable of being done in real time, using electronic registration procedures, and does not represent a time-consuming activity for either the registration or the confirmation of registration. Registration of security interests in real property in most provinces is also completed on an electronic basis, and while access may be limited to persons entitled to complete registrations in the system, usually lawyers, the time for completion of registration, and confirmation of registration, is generally the same day.

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

There are generally no regulatory or other consents required with regard to the creation of security interests over assets related to real property, including, plant, machinery and equipment which is attached to the real property. In general, the party holding the real property interest can simply provide security, and will not require any governmental or other regulatory authority for the provision of security. Some limited forms of asset, generally if there is a government licence or ownership aspect, may require consents or specific consideration to the ability to transfer the asset for realisation.

## 3 Security Trustee

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

Canada, and all provinces of Canada, recognise the concept of a trust and trustee. A role of a security trustee or agent will be recognised and accepted, in the ordinary course. The trustee or agent will have the ability to enforce security, and apply the proceeds of security to the claims of lenders in accordance with the written agreement between the borrower, trustee or agent and lenders. There is no legal restriction or failure to recognise these roles and responsibilities.

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

All Canadian legal jurisdictions recognise the security trust concept. Accordingly, an alternative is not required.

## 4 Enforcement of Security

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

There are no significant restrictions that impact the timing and value of enforcement. Upon a default event in Canada, secured lenders are generally permitted to exercise the remedies which are specified in the documentation between the debtor and the secured creditor. The terms of the *Personal Property Security Act* and *Québec Civil Code* for personal property and the terms of the relevant provincial *Mortgages Act* will specify statutory rights which will include the ability to seize and take *in lieu*, or seize and sell assets. Relatively limited time periods will be specified for notice, generally in the range of 15 days for personal property and 30 days for real property, these notice periods give the debtor the opportunity to rectify the default or complete repayment. If a bankruptcy intervenes, stay periods may be imposed; these are generally relatively short timeframes and once the secured creditor verifies the status of the security, and the value of the asset, they will be free to take the assets and complete realisation. There is no dictated necessity for court intervention in realisation proceedings in Canada. The choice as to whether to use court order proceedings will depend upon the circumstances at hand, and may be selected by secured creditors in some circumstances to deal with priority, or access issues.

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

There are no specific restrictions applied to foreign investors or creditors in the event of realisation on security. If the foreign investor intends to complete the sale of assets to a foreign purchaser, or to take the foreign assets and hold them in their own ownership, they may need to comply with *Investment Canada Act* and *Competition Act* requirements, but these are generally applicable to the purchase and sale of businesses, and are not unique to realisation pursuant to security held.

## 5 Bankruptcy and Restructuring Proceedings

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

A bankruptcy proceeding, or the equivalent *Companies' Creditors Arrangement Act* proceeding, can result in some delay in realisation by a secured creditor. Initially, the *Bankruptcy and Insolvency Act* requires a 15-day notification prior to the taking of steps to realise; during that period of time, the debtor may file a Notice of Intention to undertake a restructuring plan pursuant to the statute. If the borrower does not chose to access the right to undertake a restructuring plan, then secured creditors may proceed with the usual notice periods for sale or seizure of the asset, generally 15 days for personal property and 30 days for real property. If the debtor chooses to access insolvency protection, then there may be a longer period of stay imposed on the secured lender. In general, the stay period is to be a period of 45 days, although extensions can be obtained. During that period of time, no steps can be taken to realise. Once the initial stay periods have passed, including any extensions, the secured creditor will prove that the security is valid, and will generally then be free to proceed with realisation steps. A trustee may determine to complete payment to the secured creditor, and will do so in circumstances where the value of the assets exceeds the secured debt.

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

There are very limited preference periods and concerns in Canada, particularly in a commercial transaction. Preferences will generally only arise in circumstances of non-arm's length arrangements or arrangements where security has been taken or a transfer completed for undervalue within a specified time period prior to the date of the bankruptcy. This is generally three months for arm's length transactions and 12 months for non-arm's length transactions. The transfer must have been at undervalue and have been taken with the intent to defeat or defraud creditors. It is rare that a preference will defeat a secured creditor's rights where value has been given and the security appropriately taken, notwithstanding the close context to a bankruptcy.

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

The *Bankruptcy and Insolvency Act* provides that it is binding on her Majesty in Right of Canada or a province, meaning that government agencies are subject to the terms of the *Bankruptcy and Insolvency Act*. There are, accordingly, no persons that are exempt or excluded from the application of the Act. In Canada, there is also a *Companies' Creditors Arrangement Act* which provides for a scheme of restructuring in insolvency circumstances; this act has more limited application being confined to corporations having a specified debt profile.

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

Realisation can proceed in Canada, including seizure and taking *in lieu* or seizure and sale, without the intervention of the courts. This is true for both personal property and for real property, other than where a secured creditor proposed to take ownership of the real property under a foreclosure process, in which case court intervention is required. Otherwise, secured creditors can proceed based upon the contractual agreement they have reached with the debtor as to the notice, steps and bases for the realisation process. There are some minimum statutory notice periods, a 15-day notice prior to the commencement of steps under the *Bankruptcy and Insolvency Act* and sale notice terms under both personal property and mortgage law, generally 15 and 30 days. Otherwise, the creditors may proceed by public auction or by private sale, as they have agreed with their debtor. The requirement is merely that the secured creditor must act in a commercially reasonable manner in undertaking the realisation process.

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

The statutory processes which are available to achieve a restructuring of debt, including some limited ability to cram descending creditors, is the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. These both constitute formal insolvency proceedings, and will involve court intervention. Processes which do not involve the statutory rights, and the intervention of the court, will generally require a consensual arrangement; the required agreement of creditors will depend upon the contractual arrangements between the debtor and its creditors.

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

Directors in Canada do not face the same liability regime for continuing to trade that are faced by many directors in European countries. Directors liabilities in Canada are relatively limited, the directors will face personal liability for environmental liability, certain employee obligations, the failure to withhold and remit certain taxes; these generally would not be considered continuing to trade liabilities or obligations. They are, however, frequent causes of director liability in circumstances where a company does encounter financial difficulty. A director will need to have proceeded in a reckless or fraudulent manner in the undertaking of business, generally with a concept of inducing parties to continue to trade with knowledge that they are not likely to be repaid. The test would be a high test of intent and knowledge on the part of the director.

## 6 Foreign Investment and Ownership Restrictions

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

There are no restrictions, controls, fees or taxes generally on foreign ownership of projects in Canada. The *Investment Canada Act* regime is applicable for foreign ownership of certain very large projects, and triggering thresholds will need to be met before the Act will prevent foreign ownership. In general, most projects will require only notification of ownership by the foreign entity. The threshold level for review is $1 billion in enterprise value for investments to directly acquire control of a Canadian business by WTO investors that are not a state-owned enterprise, and by non-WTO investors where the business has been controlled by a WTO investor. There are higher thresholds, $1.5 billion in enterprise value, for trade agreement investors. The foreign investor may also be subject to the requirements of the *Competition Act*, which applies to domestic and foreign investors equally, and requires review and approval for transactions over specified sizes. In general, pre-notification will be required for transaction sizes of $88 million and more. There are multiple thresholds which will need to be considered. As noted, the *Competition Act* requirements apply equally to domestic investors as to foreign investors.

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

Bilateral investment treaties will provide some additional protection to foreign investors. Where there is a bilateral trade treaty, the review levels will generally be higher, and the criteria for considering approval of the transaction may be more readily accomplished. The participation by Canada in the International Treaty on Investment Disputes, the ICSID convention, also provides rules for the resolution of investment disputes that can be beneficial to foreign investors. Canada has several bilateral treaties, and a Foreign Investment Promotion and Protection Agreement which provides assistance to foreign investors in Canada.

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

Canada is a country which abides by the concept of no expropriation except for fair and reasonable consideration. In general, expropriation in Canada will be limited to specified social and public purposes; generally, the requirement of the taking of land to support infrastructure projects. Parties which are affected by the expropriation will be paid compensation based upon the value of the property and assets expropriated. Expropriation tends to be rarely exercised as a government right in Canada.

## 7 Government Approvals/Restrictions

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

Canada is a bi-level form of government, the federal government has jurisdiction over specifically dictated public matters and the provinces and territories have the remaining public sector matters. The municipal authorities are a subset of the provincial authorities and obtain their powers and authority from the province. There is an element of government regulation, federal or provincial, in many sectors where project finance might be undertaken including oil and gas, mining, refining, water treatment, power generation and transmission, transportation, ports, telecommunication and similar. Each of these sectors has had over the history of project finance some element of state ownership. For many of these sectors, private delivery is expanding to meet public delivery requirements, and the government authorities have been withdrawing from those sectors, but continue to have a degree of regulation. Oil and gas, mining, refining and telecommunication are largely private at this stage. Government ownership continues in areas such as water treatment, power generation and transmission, and with more limited ownership in transportation, ports and telecommunication.

In the power generation sector, interprovincial and international power distribution is governed by the National Energy Board, and the Canadian Nuclear Safety Commission has jurisdiction over nuclear power. Otherwise, the power generation and transmission is regulated by the provincial authorities. Natural resource development will have a significant government involvement with both federal and provincial natural resource departments having authority over both renewable and extracted non-renewable resources. Federal and provincial authorities continue to have rights to significant portions of the land base, including the subsurface and above surface rights attendant on land ownership. Provincial governments are very large holders of undeveloped resource rights. The orientation of the provinces differs, with Alberta being interested in oil and gas, Manitoba, Québec, Newfoundland and Labrador in hydroelectric power, and Saskatchewan in uranium and potash, as primary areas of sector interest.

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

Financing and project documents generally do not need to be registered or filed with a government authority, nor must they comply with legal formalities other than the necessity of perfecting a security interest. Financing documentation creating a security interest will require compliance with the relevant personal property or real property registration systems, which will have statutorily dictated forms. Otherwise, project finance documentation does not have any need for registration, filing or approvals, nor is there intervention of government authorities.

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

Canada does not generally differentiate between foreign and domestic owners of projects. Ownership of land is generally not restricted, and land may be owned by other domestic or foreign persons in essentially all parts of Canada. Some portions of natural resources may require licensing, but licensing will not generally differentiate between a Canadian or a foreign entity, provided that *Investment Canada Act* aspects have been dealt with as noted previously.

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

Payments can be required to be made with regard to the extraction of natural resources, these vary by the industry, resource and jurisdiction in Canada. Exploitation, by extraction of natural resources, will generally require permitting, and the basis and nature of that permitting will dictate the nature of the payments required. There is generally no distinction between the charges that will be payable by domestic and foreign parties. Rather, the differences are dependent upon the nature of the exploitation rights and the resource. In general, if the resource being extracted is part of the attributes of real property ownership, taxation will be the applicable form of payment. Where the resources being exploited using the grant of a right, the rights will generally have charges ranging from lease payments, to licence fees, to permits, costs, royalties and taxation. Oil and gas production is generally royalty based, generally imposed by provincial legislation. Northern and offshore exploitation is generally under federal authority and will usually require royalty or taxation payments.

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

Canada does not impose restrictions, controls, fees or taxes on foreign currency exchange. Foreign currency exchange can be freely engaged in Canada, and the cost of such will be negotiated cost of the fees for exchange with the foreign exchange trader.

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

There are generally no restrictions, controls, fees or taxes on the remittance and repatriation of investment returns or loan payments. Canada generally will permit the payment of interest on foreign debt without the imposition of withholding tax. Payments which are made by way of lease, licence, royalty or dividend payments may attract withholding tax based upon the concept of taxation on income earned in Canada. In general, taxation on these types of payments will be approximately 35%, but will be reduced by bilateral tax treaties which have been entered into between Canada and a very significant number of foreign jurisdictions. Canada's international tax rules generally adhere to the tax models promoted by the Organization for Economic Co-operation and Development. Foreign investors doing this in Canada using a Canadian legal entity will be considered to be Canadian-resident and will be taxed as such in Canada. Canada does, however, use the international models that are intended to avoid double taxation using tax credits and exemptions. If a non-resident of Canada does business in Canada through a permanent establishment, then income tax may be payable on the income earned in Canada, generally statutory 25% but may be reduced by one of Canada's many tax treaties.

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

Canada does not restrict project companies from establishing or maintaining foreign currency accounts, whether in Canada or offshore in other jurisdictions.

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

There are no restrictions generally applicable to the payment of dividends between corporations, including from a Canadian subsidiary to a non-resident parent company. The general rules of corporate law which do not permit the payment of dividends in circumstances where such payment would render the company insolvent will continue to apply, this applies to domestic or foreign shareholders. There is no exchange control or other law which prohibits the payment of dividends from a Canadian corporation to a foreign parent company. Notes should be made of the withholding tax and in Canada taxation, discussed previously. Otherwise, there are no restrictions which would prevent the payment of the intended dividends.

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

Canada imposes environmental, health and safety and similar laws and regulations, which will affect most projects. The legislative authority in this area is split between the federal and provincial authorities, and the regulatory body that will administer these laws will depend upon the applicable authority. In some instances, there may be overlapping authority, and the need to satisfy multiple environmental authorities and laws. Water is a particularly crucial area for environmental protection regulation in Canada, which includes water, fisheries, protection of the arctic, migratory birds, wild animals and plant protection. Aboriginal rights may also have an effect on the monitoring and implementation of environmental legislation regulation. Workplace health and safety at both the federal and provincial level is legislation which will affect project development and finance, and requires consideration in project planning. Industry-specific legislation may also be applicable as legislation and regulation exists in sectors such as telecommunication, transportation, rail transportation, marine transportation, shipping and others. Where there is a potential adverse effect on the environment, there will generally be environmental legislation intervening. Extensive legislation will also apply to projects in the mining and oil and gas sectors.

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

There is no legal or statutory framework as to procurement by project companies. If a project involves a government agency, as proponent, guarantor, financer or otherwise, then government procurement rules may be applicable to the project. This, however, relates strictly to the involvement of the government authority or agency, and the specific procurement rules for public procurement. Private companies are not subject to regulation as to their basis for procurement.

## 8 Foreign Insurance

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

Insurers may not carry on business in Canada unless they are appropriately regulated under Canadian laws to both ownership and products. Regulation can be federal or provincial depending upon the business of the insurer and the products to be provided. Insurance can be provided to Canadian projects outside of Canada for risks in Canada, this is true for both Canadian domestic enterprise or foreign entities carrying on business in Canada. The insurer must not be found to be carrying on business in Canada, and in that circumstance insurance policies can be provided to persons resident or domestic to Canada. Fees and taxes will not be applicable in Canada because the transaction will be found to be carried on entirely outside of Canada if appropriately undertaken.

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

Insurance policies provided by foreign insurers, outside of Canada, for Canadian risk, may be payable to foreign secured creditors without the involvement of Canadian considerations.

## 9 Foreign Employee Restrictions

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

Canada does impose immigration restrictions on persons seeking to enter and work in Canada. Visas, permanent residents and/or citizen status, will be required for foreign workers if they are intending to work in Canada. The ability to obtain a work visa in Canada will depend on the nature of the enterprise and the intended involvement of the foreign workers sought to be brought into Canada. In general, where Canadians are not available, such as where there is specialised expertise or a shortage of Canadians available for work, work visas will generally be available upon application and justification for the need of those workers in Canada. Canada has a temporary foreign worker programme which will also allow some limited hiring of foreign workers to fill temporary labour shortages. Approvals will be needed from Employment and Social Development Canada for the hiring of foreign workers. There will, in all circumstances, need to be labour market opinions verifying the need for the foreign workers because of a shortage of Canadians reasonably able to undertake the job.

## 10 Equipment Import Restrictions

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

Project equipment can generally be freely imported into Canada. There are two aspects to importation that need to be considered: the ability to import the goods; and the taxes which be payable upon the importation of the goods. Foreign Affairs, Trade and Development Canada oversees the import of goods into Canada. The Canada Revenue Agency, Excise Duties and Tax Division receives payment of taxes on importation into Canada. There are some limited restrictions on the importation of goods where they are required to meet health and safety standards, labelling standards, and similar. These requirements would be similar to the standards imposed on the manufacturer of the goods in Canada. Generally, equipment will need to meet the health, safety and labelling requirements applicable in general. Generally, once these safety standards are met goods can be freely imported, subject only to the payment of import duties. Import duties will frequently be the subject matter of bilateral agreements between Canada and foreign jurisdictions, reducing the duties otherwise payable.

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

Import duties are payable on many classes of goods to be imported into Canada. There are extensive rules which are published by the Canada Revenue Agency, Excise Duties and Tax Division. These duties are frequently reduced or eliminated by bilateral trade agreements between Canada and its trading partners.

## 11 *Force Majeure*

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

*Force majeure* exclusions may be agreed to contractually among the parties to a project finance transaction. *Force majeure* clauses are enforceable in accordance with their terms.

## 12 Corrupt Practices

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

The *Corruption of Foreign Public Officials Act* is the principle legislation in Canada to combat bribery of foreign public officials. This will be particularly applicable to international business transactions. The Act prohibits anyone from giving or offering a loan, reward, advantage or benefit of any kind or a foreign public official to obtain a business advantage. The Act provides that a violation is subject to a fine which is in the discretion of a court, and may involve imprisonment of up to 14 years. There are also provisions of the Canadian Criminal Code that prohibit persons from offering a loan, reward, advantage or benefit to a federal or provincial government official in Canada as consideration for co-operation, assistance or exercise of an influence. Criminal Code offences are punishable by a combination of fines and possible imprisonment.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Canadian law recognises the ability of parties to elect the jurisdiction to govern the contractual agreement provided that there is a reasonable connection to the selected jurisdiction. Financing agreements are generally governed by the jurisdiction which is selected by the lender, usually being the jurisdiction of the location of the lender. Canadian law, provincial law specifically, is generally selected to deal with the taking or granting of security in Canada as it tends to be lender friendly. Canada does not prohibit the choice of other jurisdictions to govern contracts where there is reasonable basis for the selection and it is not contrary to public policy.

### 13.2 What law typically governs financing agreements?

The choice of law will generally reflect the preferred jurisdiction of the lender. If the law selected is not Canadian, the most common foreign law selected is New York.

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

The taking of security over assets located in Canada will generally be governed by the law of the province where the assets are located.

## 14 Jurisdiction and Waiver of Immunity

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

Yes, as long as the selection of jurisdiction is not contrary to public policy, which would seldom be the case. Canadian courts will generally recognise a choice of jurisdiction.

## 15 International Arbitration

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

Yes, these provisions are enforceable in Canada.

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

Canada is a signatory to the international treaty on investment disputes. Canada has accepted and ratified the ICSID convention and therefore accepts the rules under which investment disputes between states and nationals may be resolved using conciliation or arbitration. Canada also has Canadian bilateral treaties and the foreign investment promotion and protection agreement which will also dictate the application of the ICSID convention. Courts in Canada will generally recognise such an agreement choosing mediation or conciliation.

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

There are no types of disputes that are not arbitrable under local law in Canada.

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

There are no types of dispute that are subject to mandatory domestic arbitration proceedings in Canada.

## 16 Change of Law / Political Risk

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

There has not been any particular attention paid to a need for political risk protection involving projects in Canada. Canada does have some bilateral investment treaties which protect Canadian investors in those foreign jurisdictions. Canada is generally not considered to be a politically risky jurisdiction.

## 17 Tax

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

There are no requirements to withhold tax from interest payable on third-party loan payments made to foreign lenders. This is qualified only where the basis for the interest payment is a participating interest, which would be considered to be akin to a dividend, and withholding tax would remain. Withholding tax is payable on other forms of payment such as lease, licence, royalty and dividends, generally at a 35% rate with reduction based upon bilateral treaties. Canada, however, has eliminated withholding tax on interest payable on debt. There is no requirement to deduct or withhold tax from payments of a claim under a guarantee or the proceeds of enforcing security, these will be considered repayment of loan and will not be the subject matter of withholding tax.

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

Canada does not provide a system of tax incentives or other incentives for foreign investors or creditors. In general, foreign investors or creditors will face the same tax regime as domestic investors. Canada generally adheres to the tax model recommendations of the Organization for Economic Co-operation and Development. Taxes generally will not apply to foreign loans, mortgages nor will there be taxes or charges for security documentation for effectiveness or registration. Canada has eliminated withholding tax on loans allowing interest to be paid free of withholding tax. A foreign investment which involves a participation in the project, resulting in the earning of revenue, and the payment of dividends, royalties or other payments may be subject to taxation in Canada, and withholding tax on the payment when remitted from Canada to the foreign jurisdiction.

## 18 Other Matters

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

Generally, foreign investors, whether equity or debt, will be treated in the same manner as domestic investors and lenders in Canada. There are no material considerations which need to be taken into account that would differentiate between foreign and domestic investment or lending. In general, investors may freely participate in ownership of projects in Canada, will face Canadian taxation on the revenue earned in Canada, and there may be withholding tax on dividends or similar payments paid. These payments will frequently be reduced by bilateral tax treaties. Lenders are able to lend into Canada without withholding tax being applied.

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

Capital market instruments can be issued with regard to projects, whether sponsored by foreign or domestic entities in Canada. The public market system will be the subject matter of securities law and listing requirements. Securities law will generally provide protections to the investors who are domestic to Canada, with securities law in Canada focusing on the jurisdiction of the investor. Prospectus and dealer registration will generally be required for the public issuance of bonds or similar instruments. The prospectus will require clearing by a provincial securities authority, and if listed on the public markets will require listing approval by the applicable exchange. Non-public placement of bonds is available in the exempt market in Canada, eliminating the need for prospectus and dealer registration, and clearing. The system for the regulation of the issuance of debt in Canada is similar to that of the United States and Europe, differentiating between the public and the exempt market.

## 19 Islamic Finance

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

There is no restriction in Canada on the use of Islamic project financing structures. They are not, however, commonly encountered, and there is some question as to whether an agreement not to recognise the jurisdiction of the courts in Canada would be recognised. Otherwise, the Islamic law-based instruments will be considered contractual obligations that will generally be honoured in accordance with their terms.

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

*Shari'ah* law may be selected as the governing law. However, in Canada, the jurisdiction of the courts may not be ousted by such a contractual agreement, and in circumstances where the courts may be requested to take jurisdiction they may do so despite the ousting of the courts in favour of *Shari'ah* law. There have been no notable cases in Canada with regard to the application of *Shari'ah* law and its intersection with local law.

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

There are very limited laws affecting the ability to charge interest in a debt transaction. These laws in Canada prohibit the charging of interest, which includes required additional fees and other payments, in excess of 60% *per annum*. This is a Criminal Code matter in Canada. Otherwise, interest payments will be enforceable, provided only that they need the disclosure requirements set out in the *Interest Act*, as federal legislation, and dependent upon the nature of the relationship under provincial consumer protection law.

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Chapter 9

# Colombia


Manuel Fernando Quinche

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## 1 Overview

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

During the last years, Colombia has been experiencing an infrastructure and project finance boom. The fourth generation of toll road projects (the "4G Program"), which comprises 42 projects aimed at building roads totalling approximately 7,000 km in length and requires an investment of around US$20 billion, is underway.

Given the strategic importance of the 4G Program, the Colombian government has implemented several actions to provide support and enhance the risk profile of investments in the 4G Program. A decisive action was the enactment of Law 1508 of 2012 governing the legal framework for public-private partnerships ("PPPs") in Colombia, and Law 1682 of 2013, which aims to offer quick solutions to the most common bottlenecks in road construction related to land acquisitions, environmental licences and relocation of public utility networks. More recently, in January 2018, the President of Colombia approved Law 1882 of 2018, which amends certain provisions of the infrastructure regime regarding public procured contracts, such as: (i) the structure of the public tenders; (ii) the responsibility of advisors, auditors and consultants; (iii) the implementation of mandatory standard documents in public procurement proceedings; (iv) inter-administrative agreements; (v) transport infrastructure projects; and (vi) the settlement of PPP contracts in case of annulments.

The 4G Program has faced several challenges and complexities, but the National Government has taken actions and issued regulations to provide a solid legal framework for this ambitious plan to move forward.

The National Infrastructure Agency ("ANI"), which is the government entity in charge of structuring, tendering and supervising the performance of projects under the 4G Program, is seeking to attract foreign lenders (including capital markets financing), infrastructure funds and first-level domestic and international contractors with sufficient experience, financial strength and technical standards.

Other than the 4G Program, Colombia has a healthy stream of infrastructure projects in diverse sectors. The most important public procurement projects include: (i) the first line of the Bogotá metro project (27 km), which is currently finalising the structuring phase and entails investments in the region of US$6 billion; (ii) an additional airport for Bogotá, called El Dorado II, which ANI is currently structuring and which entails investments in the region of US$800 million, and is expected to handle more than 7.5 million passengers per year; and (iii) the construction and operation of a liquefaction, regasification and storage unit for the processing of natural gas which will be located on the Colombian Pacific Coast.

In addition, Law 1715 of 2014, "through which the integration of non-conventional renewable energy to the National Energy System is regulated", and Decree 2143, published by the Colombian government in November 2015, aim to promote research, development and investment in the generation and use of non-conventional renewable power, which translates into business opportunities in the renewable energy market. This regulatory framework is complemented by resolutions issued by the Commission for the Regulation of Energy and Gas (*Comisión de Regulación de Energía y Gas*) that establish, among others: (a) the rules on supply contracts for agricultural-origin fuel for a reliability charge; (b) the methodology to determine the firm energy of geothermal plants; (c) the methodology to determine the firm energy of wind farms; and (d) the methodology to determine the firm energy of photovoltaic solar plants. Furthermore, the government is currently drafting a Decree which will regulate the offering of non-conventional renewable energy to the National Interconnected System. The purpose of this initiative is to facilitate the access of non-conventional renewable generators into the electric market.

Finally, Colombian foreign exchange regulations were recently reformed to allow foreign entities to grant loans to Colombian residents in Colombian Pesos. This recent development grants local borrowers access to new resources without assuming any foreign exchange risk. For foreign lenders and investors, it will open the loan secondary market, allowing for a more efficient and profitable use of resources. In order to perform these operations, foreign entities are required to complete all transfers through bank accounts held in local foreign exchange intermediaries.

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

The most significant project financings that have taken place in Colombia in recent years are as follows:

- Cartagena Refinery: US$3.5 billion financing for the expansion and modernisation of the Cartagena refinery.
- El Dorado Airport: US$500 million refinancing for the construction, expansion and modernisation of the El Dorado Airport in Bogotá, Colombia, along with a US$130 million financing for the construction of the voluntary works (*obras voluntarias*) in the El Dorado Airport.
- Puerto Bahía: US$370 million financing for the construction of a multi-purpose port located in Cartagena, Colombia.
- Pacífico 2 (4G Toll Road Project): US$250 million and COP510,000 million (approximately US$59.7 million) financing for the construction of the Pacífico 2 98 km toll road project.

- Conexión Norte (4G Toll Road Project): US$250 million and COP540,000 million (approximately US$186.2 million) financing for the construction of the Conexión Norte 145 km toll road project.
- Perimetral de Cundinamarca (4G Toll Road Project): US$173 million and COP864,000 million (approximately US$59.7 million) financing of the Perimetral de Cundinamarca 153.8 km toll road project.
- Transversal del Sisga (4G Toll Road Project): US$225 million financing of the Transversal del Sisga 137 km toll road project which will be financed in COP.
- Autovía Neiva Girardot (4G Toll Road Project): US$276 million financing of the Autovía Neiva Girardot 196.85 km toll road project which will be financed in COP. This is the first private initiative to have achieved financial closing in Colombia.
- Mar 1 (4G Toll Road Project): US$116 million bridge financing for the development, design, construction, improvement, rehabilitation, operation, and maintenance of the Concesión Autopista al Mar 1 toll road and its ancillary facilities.
- Aeropuerto Ernesto Cortissoz (4G Airport Project): COP173,000 million (approximately US$59.7 million) and US$50 million financing of the modernisation of the Ernesto Cortissoz Airport in Barranquilla, Colombia.
- Sociedad Portuaria el Cayao: US$110 million financing of the development and operation of the first regasification terminal in Colombia, located on the Colombian Atlantic Coast.
- Canacol: US$305 million refinancing for the repayment of Canacol Energy Ltd.'s existing debt, thereby granting financial flexibility and allowing the company to pursue its stated gas production goal.

## 2 Security

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

In principle, it is possible to create a blanket lien or ongoing concern pledge over a group of assets. In this case, security may be granted by means of either a commercial establishment pledge agreement (*garantía mobiliaria sobre establecimiento de comercio*) or an assets pledge agreement (*garantía mobiliaria sobre activos*) and shall be registered before the national registry for security interests over movable assets (*Registro Nacional de Garantías Mobiliarias*), which provides priority and enforceability against third parties.

Furthermore, it is also possible to grant security over assets by transferring these to a security trust. For this purpose, parties should execute a trust agreement with a trustee and register such agreement before the said national registry.

However, security over certain assets such as real estate, aircraft and ships must be created by means of mortgage agreements and cannot be part of a general security agreement.

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

Yes. For real property, a mortgage agreement must be executed and registered before the relevant public instrument registry office (*Oficina de Registro de Instrumentos Públicos*). Security over movables (e.g. machinery and equipment) is created through a security trust agreement or a pledge agreement. However, if the relevant movable assets are attached to real estate and cannot be separated without deteriorating, those assets may be covered by the mortgage.

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

Yes, it is possible to provide security over receivables where the chargor is free to collect the receivables in the absence of an event of default. To this effect, the receivables must be described in the text of the security agreement. In these events, it is not necessary to notify the debtor of the receivable unless the parties to the underlying agreement have explicitly agreed to this. Nevertheless, if the parties have agreed to issue the above-mentioned notice and the debtor is not notified, the chargor is required to indemnify the debtor for all the costs, damages or prejudices stemming from such breach of the agreement, and the debtor will be released of its obligation by paying the receivable to the chargor.

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

Yes. Law 1676 of 2013 ("Law 1676") sets forth the possibility of entering into a control agreement to secure the cash deposited in a bank account. Security over funds deposited in a bank account is perfected: (i) when the relevant bank is the secured party, by the execution of a security agreement in respect of the account (in which case the secured party shall be deemed to hold possession of the secured assets); or (ii) when the bank is not a secured party, by the execution of a control agreement between the bank, the guarantor and the secured party.

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

Yes. In Colombia, if the company's shares are materialised in certificates, security may be taken over the shares by means of a share pledge agreement (*garantía mobiliaria sobre acciones*) or trust agreements, whereby property of the shares is transferred to the trust. In both cases, registration of the security in the company's stock ledger is required. In this scenario, notwithstanding the fact that the shares are represented by certificates, it is not necessary for the guarantor to deliver the share certificates to the creditor.

It is also possible to issue shares in uncertificated form (or dematerialised shares); however, Law 1676 is not applicable for security over that kind of shares. In these events, a share pledge may be granted over the dematerialised shares and the relevant share pledge agreement must be registered with the applicable registry (e.g. *Depósito Centralizado de Valores*).

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

The cost of a mortgage, notarial expenses, registration tax and registration rights are required as follows:

(i) Notarisation fees may range between 0.471% and 0.57% of the value of the mortgage.

(ii) For the registration tax, tariffs range between 2% and 2.5% of the value of the mortgage, depending on the municipality in which the mortgage is registered.

(iii) Registration rights tariffs are 0.3% of the value of the mortgage, which corresponds to the value determined for the calculation of notarial expenses. In case the mortgage does not specify an amount, the registration rights will be US$20.

Registry costs to complete the registry of security interests over movable assets are approximately US$15.

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

Filing, notifications and registration requirements in respect of security over movable assets can be undertaken online at https://www.garantiasmobiliarias.com.co/ and therefore the amount of time and expenses is marginal.

Mortgage filings, notifications and/or registration requirements may vary depending on the region. In general, the procedure may take from one to four months.

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

In general, there are no regulatory or similar consents required with respect to the creation of security over real estate property, plant, machinery and equipment. Depending on the particular case, regulatory approvals may be required.

If the project assets are built over public land granted by the government by means of a concession agreement, such project assets incorporated into the concession cannot be taken as security.

## 3 Security Trustee

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

Colombian law does recognise the concept of a "trust" as well as the role of security trustees and agents, and allows them to act on behalf of different lenders. The role of a security trustee and the scope of its powers will depend on the particular trust agreement.

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

This is not applicable in Colombia.

## 4 Enforcement of Security

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

The general restriction regarding mortgages is that the seizure of any mortgaged collateral requires a judicial proceeding and a judicial auction whereby the proceeds of the auction are delivered to the creditor. If the auction is unsuccessful, the collateral will be delivered to the creditor. Any provision in a mortgage agreement whereby the creditor will be entitled to claim or acquire property over the asset directly is not expressly permitted by law. For pledges over movable assets, pursuant to Law 1676, the creditor will be entitled to directly claim or acquire property over the pledged asset through a direct payment mechanism, special foreclosure of the security or judicial proceedings.

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

No, there are no restrictions that exclusively apply to foreign investors or creditors in foreclosure events. The granting of loans as well as the entry and exit of foreign currency, performed as a consequence of the disbursement and repayment of loans (including the event of foreclosure), must be completed through the foreign exchange market and must be registered before the Central Bank.

## 5 Bankruptcy and Restructuring Proceedings

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

Upon the commencement of a reorganisation proceeding in Colombia, secured creditors are granted priority over unsecured creditors for payment (including that of employees' salaries and taxes). Therefore, secured creditors are allowed to enforce their security interests during the reorganisation proceeding under certain circumstances; for instance, if the secured assets are not deemed necessary for the continuation of the operations of the debtor's business. In general, from the date of commencement of the reorganisation proceeding, any demand for execution or any other collection proceeding against the debtor regarding movable assets or real property necessary for the operation of the debtor's business will be stayed. Please note that a claim filed by a creditor under an insolvency proceeding will be deemed to be secured up to the value of the encumbered asset.

Upon the commencement of judicial liquidation proceedings, the debtor's encumbered property may be excluded from the liquidation estate for the benefit of the secured creditors or beneficiaries of the security interest, subject to certain rules. Therefore, if there is no reorganisation agreement and the company enters into liquidation, creditors will be paid in their respective order of priority, with preference to the specific assets over which said creditors have security interests (provided that there are still available funds and assets after paying creditors with a higher ranking).

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

In the course of insolvency proceedings, any creditor, the *promotor* or the liquidator may request reversal or declaration of fraudulent transfer of some acts executed by the debtor when such acts adversely affect any creditor or the priority order among creditors. Pursuant to Article 74 of Law 1116 of 2006 ("Law 1116"), the acts that may be revoked by the insolvency court are the following:

(i) Any act that results in the transfer or conveyance of property, including: transfer to a trust with collateralisation purposes; payment of a pre-petition claim; granting or cancellation of a lien; and execution of a lease agreement that obstructs the insolvency proceeding, if such act took place within 18 months prior to the commencement of the insolvency proceeding.

(ii) Any gratuitous act executed within 24 months prior to the commencement of the insolvency proceeding. The Superintendence of Companies has held that the act shall be presumed to be gratuitous if: (a) the act was verbally concluded; (b) the parties did not agree on compensation for the debtor; or (c) although the parties agreed on compensation for the debtor, there is no evidence that such compensation was actually paid.

(iii) Any amendment to the by-laws executed within 6 months prior to the commencement of the insolvency proceeding in either of the following cases: (a) if the equity of the debtor was reduced; or (b) if the liability regime of the shareholders was altered.

Additionally, under Colombian law, claims are classified as follows: (1) first-class claims (judicial costs, salaries and other payments derived from employment contracts, and liabilities in favour of the tax authorities); (2) second-class claims (claims secured with a pledge); (3) third-class claims (claims secured with a mortgage); (4) fourth-class claims (obligations with suppliers of raw materials or services related to the core business); and (5) fifth-class claims (all other creditors). In principle, the claims of each category must be paid in full before any claim in the next category receives any distribution. However, pursuant to Law 1676, secured creditors now have privileges within insolvency proceedings. Moreover, under certain circumstances, the priorities may be modified in the reorganisation plan with the approval of the creditors representing at least 60% of the votes recognised by the insolvency court.

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

The general bankruptcy regulation is Law 1116, which applies to all entities unless a specific exception is applicable. In general, State-owned entities at the regional level (*nivel territorial*), State-owned universities, health promotion agencies (*entidades promotoras de salud*), stock exchanges, entities under surveillance of the Superintendence of Finance (*Superintendencia Financiera* – SFC) or the Superintendence of Solidary Economy (*Superintendencia de la Economía Solidaria* – SES), companies with public capital, companies that provide public services and non-trader individuals, have a different regulation in connection with bankruptcy proceedings than all other individuals or entities.

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

Yes. Within the special foreclosure proceeding of security interests over movable assets, the creditor may foreclose the secured assets before chambers of commerce or notaries.

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

No. Only judicial reorganisation proceedings under Law 1116 are binding on dissenting creditors. However, according to Law 1116, business reorganisation may be carried out not only by means of a judicial proceeding, but also by means of a private agreement between the debtor and its creditors with the further approval of the insolvency court. Once the insolvency court has approved the agreement, such agreement will be binding on all creditors recognised within the proceeding, including absent and dissenting creditors.

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

Pursuant to Law 1116, since the filing of the application to a reorganisation proceeding, directors are not allowed to transfer a company's assets or make operations that are not related to the ordinary course of the debtor's business, without previous approval by the insolvency court. Failing to comply with said limitations will cause the directors to be jointly liable for the damages caused to the company, the shareholders or partners, and the company's creditors. The directors may be removed from their office, and may be sentenced to pay successive fines of up to 200 legal minimum monthly wages (approximately US$54,600) until the operation is reversed.

According to Article 82 of Law 1116, if the debtor's equity is reduced due to wilful or negligent conduct attributable to the shareholders, directors, auditors or employees, these shall be liable for the payment of the liabilities of the entity. Said article expressly provides that the shareholders who did not have knowledge about the action or omission, or who voted against it and did not take part in its implementation, will not be subject to this kind of liability.

In cases of breach of duties or *ultra vires* acts, or breach of laws or bylaws, the negligence of the persons involved will be presumed. Furthermore, any contractual provision that exonerates the shareholders, administrators, auditors or employees of the aforementioned liabilities or that limits such liabilities to the amount of the bond given in order to exercise their duties, will not be enforceable. The liability will arise only to the extent that the assets of the company are insufficient to pay off creditors.

## 6 Foreign Investment and Ownership Restrictions

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

Foreign investments are granted equal treatment *vis-à-vis* those of Colombian investors, with certain exceptions; namely, for investments in the following industries: (i) national defence and national security activities; (ii) disposal and processing of toxic, dangerous or radioactive waste; and (iii) TV broadcasting (foreign investors can hold up to 40% of the shares in such companies).

Since capital contributions are considered direct foreign investment, these must be registered before the Colombian Central Bank. Any other foreign exchange operation must be completed through the foreign exchange market.

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

No. There are no bilateral treaties that prevent an investor from having to complete its operations through the foreign exchange market. However, Colombia has several bilateral investment treaties pursuant to which investors are granted: (i) national treatment and most-favoured-nation provisions; (ii) no expropriation without compensation; and (iii) general promotion and protection of investments.

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

Expropriation or nationalisation of assets may only take place for previously defined reasons of public utility or social interest. The Colombian National Constitution states that any expropriation by the government must be undertaken with due process and be fairly compensated. Except in case of war, the government cannot expropriate without prior payment of compensation to the person from whom assets are expropriated. Expropriation may be undertaken only if a judge orders so, or, exceptionally, through an administrative act which, nonetheless, may be subject to further judicial review.

## 7 Government Approvals/Restrictions

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

(i) Finance
- (a) Ministry of Finance and Public Credit.
- (b) National Treasury Department of the Ministry of Finance (*Dirección del Tesoro Nacional del Ministerio de Hacienda y Crédito Público*).

(ii) Environment
- (a) Ministry of Environment and Sustainable Development.
- (b) National Agency of Environmental Licences (ANLA).
- (c) Regional Environmental Authorities (*Corporaciones Autónomas Regionales*).

(iii) Infrastructure
- (a) National Infrastructure Agency (*Agencia Nacional de Infraestructura*).
- (b) Law 1682 of 2013 gave special powers to the President of Colombia to create the Unit of Transportation Infrastructure Planning (*Unidad de Planeación de Infraestructura de Transporte*) and the Commission for the Regulation of Infrastructure and Transportation (*Comisión de Regulación de Infraestructura y Transporte*).

(iv) Oil & Gas
- (a) Ministry of Mining and Energy (*Ministerio de Minas y Energía*).
- (b) National Hydrocarbons Agency (*Agencia Nacional de Hidrocarburos*).
- (c) National Agency of Environmental Licences (ANLA).
- (d) Mining and Energy Planning Unit (UPME).

(v) Mining
- (a) Ministry of Mining and Energy (*Ministerio de Minas y Energía*).
- (b) National Mining Agency (*Agencia Nacional de Minería*).
- (c) Mining and Energy Planning Unit (UPME).

(vi) Energy
- (a) Ministry of Mines and Energy (*Ministerio de Minas y Energía*).
- (b) Commission for the Regulation of Energy and Gas (*Comisión de Regulación de Energía y Gas*).
- (c) Mining and Energy Planning Unit (UPME).
- (d) Superintendence of Public Utilities (*Superintendencia de Servicios Públicos*).

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

In general, the enforceability of financing documents and project documents does not require any filing or registration (with the exception of the above-mentioned registration requirements before the national registry for security interests over movable assets, before the public instrument registry office (*Oficina de Registro de Instrumentos Públicos*) for security over real property, and before the Central Bank). Nevertheless, agreements with governmental entities must be previously authorised by the corresponding governmental authority of the national, regional or local order, and must be published in an official database.

In addition, indebtedness of public entities must fulfil certain requirements. Specifically, foreign indebtedness must be authorised in advance by the Ministry of Finance and Public Credit. Also, local indebtedness of public entities must be authorised in advance by the Ministry of Finance and Public Credit and requires the previous issuance of a favourable opinion of the Colombian National Planning Department (*Departamento Nacional de Planeación*).

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

In general, licences to hold land, natural resources or a pipeline depend on the particular case and project. Foreign entities are allowed to hold such licences. However, the exploitation of certain assets, including oil fields, mines and water sources, requires a concession granted by the competent public authority. Foreign entities may obtain any such concessions. A foreign entity that is a party to a concession agreement must establish a subsidiary or a branch in Colombia.

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

Yes. Under the Colombian National Constitution, the Colombian government must be compensated, through the payment of royalties, for the exploitation of non-renewable natural resources. The amount payable depends on the type of non-renewable natural resource. The general taxation regime would be applicable.

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

Other than the obligation to complete foreign exchange operations through the foreign exchange market, there are no restrictions, fees or taxes applicable to foreign currency exchange.

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

There are no currency exchange restrictions or controls. However, it is necessary to complete the repatriation of investments or loan payments to parties in other jurisdictions through the foreign exchange market. Additionally, withholding tax will apply to the payment of any revenue arising from a Colombian source or to the payment of interests in the case of loan agreements.

Regarding taxes, and in accordance with Law 1819 of 2016 (the "Tax Reform"), if dividends from the project company were taxed at the project company level, from 2017 onwards such dividends will be taxed at the level of shareholders (foreign entities or individuals) with a dividends tax at a 5% rate. No additional taxes would accrue. However, please bear in mind that if such dividends were not taxed at the company level, the company would have to withhold taxes before the remittance of dividends abroad at a consolidated tax rate of 38.25% (general tax rate of 35% + dividends tax rate of 5%), absent any applicable tax treaty. Finally, it is important to consider that no dividends tax would be applicable for the distribution of dividends by the project company to another national legal entity, as long as the dividends were taxed at company level.

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

Project companies incorporated in Colombia are not entitled to maintain onshore accounts in foreign currency.

Project companies incorporated in Colombia are entitled to maintain offshore foreign currency accounts. Said accounts are subject to special registration and reporting obligations before the Colombian Central Bank, when used for certain foreign exchange operations (i.e. investment or indebtedness).

Onshore foreign currency accounts maintained by non-Colombian residents are subject to numerous restrictions and are permitted only for specific purposes.

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

In the case that the parent company of a project company is incorporated abroad, the corresponding foreign investment must be registered before the Central Bank. Foreign investment duly registered with the Central Bank confers the investor with the right to: (i) transfer abroad the dividends resulting from the investment; (ii) reinvest dividends and income derived from the disposal of such investment; and (iii) transfer abroad any income derived from the sale of the investment, the liquidation of the company or portfolio or the reduction of the company's capital. If the parent company is incorporated in Colombia, there is no restriction on the payment of dividends from the project company.

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

It is likely that the requirement for licences in relation to environmental or construction matters will impact a project financing materially. However, depending on the particular project there may be additional environmental, health and/or safety laws or regulations that may impact the project financing. The main governmental authority in charge of administering the issuance of environmental licenses and permits is the National Agency of Environmental Licences (ANLA).

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

Project companies deemed to be private entities are not subject to specific procurement rules or regulations. In the case that the project company is a State-owned entity, public procurement laws may be applicable, with the exception of special cases regarding certain industries with special regulations.

## 8 Foreign Insurance

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

Colombian residents may enter into insurance agreements with foreign insurance companies, except for the following cases: (i) social security related insurances; (ii) mandatory insurance policies; (iii) insurances in which the insured party is required to provide evidence of a mandatory insurance policy or that it is up to date with its obligations regarding a social security requirement; or (iv) insurances in which the insured party is a State-owned entity.

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

Yes. Insurance policies over project assets may be payable to foreign secured parties (unless this is specifically restricted by any project document). In any case, the payment of any amounts resulting from insurance policies to foreign creditors must be reported to the Central Bank for statistical purposes.

## 9 Foreign Employee Restrictions

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

In general, there are no restrictions on foreign workers in Colombia. However, certain professions and activities (e.g. engineering activities) have special regulations which require authorisations/permits granted by certain professional councils (e.g. the Engineering Professional Council). In such cases, foreign workers would need to apply for a temporary professional permit before the relevant professional council or validate their professional degree or diploma.

From an immigration law standpoint, foreigners entering Colombia for the performance of business or working activities require a proper visa or an entry permit, depending on the case. The appropriate type of visa or entry permit would depend on the nationality of the applicant, the activities to be performed, the length of stay and/or the existence of a local employment relationship.

## 10 Equipment Import Restrictions

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

In general, there are no restrictions on importing project equipment or equipment used by construction contractors. However, there may be import fees applicable depending on the particular asset being imported, and the customs regime imposes two types of restriction, namely: (i) the importation of certain goods is subject to the obtainment of a licence; and (ii) the importation of some other goods is prohibited.

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

As a general rule, the importation of goods triggers the payment of tariffs and VAT. The specific amount of these duties, and particular exceptions, will vary depending on: (i) the tariff classification of the goods; (ii) the origin of the goods (applicable, for example, to goods imported from free trade agreement countries); and (iii) the import regime.

Import duties vary depending on whether there is a valid and enforceable free trade agreement with the corresponding country.

## 11 *Force Majeure*

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

Yes. Colombian law sets forth *force majeure* exclusions which are available and enforceable even if the parties do not include them in the project or financing documents. In events of *force majeure*, the parties will not be forced to comply with their obligations under the affected agreement and will not be liable for any default thereunder.

## 12 Corrupt Practices

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

Yes. Colombia has developed several mechanisms to control and prevent corrupt business practices and bribery. Penalties for bribery range from imprisonment to a fine of up to 200,000 times the legal monthly minimum wage (approximately US$54,500,249). Additionally, there may be the annulment of ownership over the involved assets and civil liability for any damages caused by the criminal conduct. According to Law 1778 of 2016, individuals condemned for corrupt practices cannot enter into contracts with the government, nor the companies in which they are majority shareholders, officers or directors, for up to 20 years. Moreover, very strict compliance and anti-money laundering mechanisms have been adopted by the different actors of the 4G Program, which go beyond the legal requirements.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

According to the Colombian Code of Commerce, agreements to be performed in the Colombian territory are subject to Colombian law. If substantial parts of the agreement are to be performed outside Colombia, agreements may be governed by foreign law, depending on applicable conflict-of-law rules.

### 13.2 What law typically governs financing agreements?

Financing agreements, in the context of cross-border financing transactions involving Colombian residents and foreign lenders, are typically governed by New York State law or English law. However, financing documents between Colombian residents and local banks must be governed by Colombian law, while trust agreements and security documents over assets in Colombia are usually governed by Colombian law. Therefore, cross-border multi-currency loans involving foreign and local banks would require certain financing agreements (e.g. local loan agreements) in order to be governed under Colombian law.

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

Agreements to be performed in Colombia are governed by Colombian law (e.g. concession agreements, onshore trust agreements and engineering, procurement and construction (EPC) agreements). Agreements pertaining to *in rem* rights over assets located in Colombia (including agreements for the transfer of property and mortgage agreements) must be governed by Colombian law.

## 14 Jurisdiction and Waiver of Immunity

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

Parties may validly submit to foreign jurisdiction. Nevertheless, if a Colombian judge has jurisdiction over a matter, the said judge may assume jurisdiction if the specific criteria for assumption of jurisdiction listed in the Colombian General Procedural Code applies. In such an event, the parties to the litigation should request from the Colombian judge a dismissal or stay of the Colombian proceedings.

Waiver of immunity will be valid and enforceable, provided that only the individual rights of the waiving party are affected.

## 15 International Arbitration

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

There are contractual provisions requiring submission of disputes to international arbitration. If the following criteria are met, parties may agree to submit their disputes to international arbitration. According to the Colombian Arbitration Statute, parties may agree on international arbitration if at least one of the following requirements is met:

(i) the parties have their domiciles in different countries;

(ii) a substantial part of the obligations will be performed outside of the country in which the parties have their principal domicile; or

(iii) the dispute relates to international commercial interests.

For the enforcement of an international or foreign award by the Colombian authorities, a recognition proceeding must be fulfilled unless the seat of the tribunal is in Colombia.

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

Colombia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as to the 1975 Inter-American Convention on International Commercial Arbitration, and the 1965 Washington Convention for the Settlement of Disputes between States and Nationals of Other States.

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

Every dispute is subject to arbitration unless said conflict is not susceptible to being transacted (a "transaction" is a specific form of private agreement whereby the parties terminate their present or potential conflicts). As a general principle, it is possible to transact over economic rights subject to any waiver (certain private economic rights are not subject to waiver, including certain labour and social security rights) that does not affect the rights of third parties.

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

No. The Colombian Constitutional Court has generally rejected any law or regulation that has attempted to include arbitration or other non-judicial venues as mandatory conflict resolution proceedings.

## 16 Change of Law / Political Risk

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

No. Nevertheless, the Colombian government has established a fund to cover contingent obligations of governmental entities derived from contracts. The fund is called the *Fondo de Contingencias* and is administered by the Ministry of Finance. In addition, in the context of some 4G project financings, the government has entered into memoranda of understanding with concessionaires to clarify certain aspects of 4G concession agreements, such as: (i) availability payments; (ii) lenders' step-in rights; and (iii) a termination payment formula.

## 17 Tax

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

All interest rate payments will be subject to a withholding tax at a 15% tax rate. This rule may vary depending on any double taxation treaties in place and any special rules for a specific project finance (e.g. long-term infrastructure projects, as explained in question 17.2 below).

Since withholding tax must be applied by the payer, gross-up clauses are used whenever parties have agreed on a specific net amount.

Loans granted abroad to Colombian credit establishments and loans granted to Colombian public entities are not subject to any withholding. Multilateral agencies in which Colombia is a Member State are generally exempt from all Colombian taxes.

There is no specific tax applicable to the proceeds in connection with enforcement of a security interest, to the extent that any such payment is not sourced as Colombian income. Note, however, that if a guarantee is granted by a Colombian party to a foreign related party (principal debtor), transfer pricing rules may apply and require for the Colombian guarantor to charge an arm's length consideration for the guarantee.

Regarding the requirements to deduct the interest paid, it is important to mention that if no withholding applies, such payment of interest made by the project company will not be deductible. Conversely, if the interest payments made are subject to the corresponding withholdings, they will be fully deductible.

According to Colombian thin capitalisation rules, interest payments will not be allowed as a deduction if they originate on loans whose average amount throughout the corresponding fiscal year exceeds the result of multiplying by three the taxpayer's net worth determined at December 31 of the preceding fiscal year. These Colombian thin capitalisation rules are aimed at limiting the deductibility of interest payments/accruals derived from debts that exceed the taxpayer's net equity (*patrimonio liquido*) by more than three times (a 3:1 ratio). Note that Colombian thin capitalisation rules apply to both local and foreign loans as well as debts with related and unrelated parties.

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

Currently, there are no specific incentives for foreign investors or creditors. Nonetheless, please note that some incentives may apply depending on the type of project that is being financed in Colombia. For example, interests on loans granted to special-purpose companies engaged in public-private partnerships for infrastructure projects may be subject to a preferential 5% withholding if the term of the loan is at least eight years. Also, certain relief or reduced withholdings may apply if the investor or creditor is a resident of a country with which Colombia has a treaty to avoid double taxation (e.g. Canada, Chile, Mexico, Portugal, Spain and Switzerland, among others).

Foreign investment and loans are typically subject to income tax to the extent that they produce Colombian-sourced income (e.g. dividends, interests, royalties, etc.). Since 2015, a net wealth tax was created that also applies to foreign persons who hold Colombian assets in excess of a specific amount (i.e. COP1 billion or approximately US$294,117). Certain assets can be excluded from the tax base amount (e.g. shares in Colombian companies), while others must be included and taxed (e.g. loans to Colombian debtors).

Finally, it is noteworthy that a registration tax may apply on any document that requires registration with the Chamber of Commerce or the Office of Public Records (e.g. public deeds or mortgages). A case-by-case analysis is required to determine if registration taxes will be applicable, and the tax base amount.

## 18 Other Matters

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

Since the enactment of Law 1676, security structures have been modified for projects in Colombia. However, since the implementation of such regulation is fairly recent, the actual enforcement of said interests is yet to be tested.

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

The public offering of securities in Colombia is strictly regulated, with regard not only to the issuance of shares, but also to the processes for the offering of bonds, notes and securitisations. Project companies must comply with certain requirements to register before the National Registry of Securities and Issuers (*Registro Nacional de Valores y Emisores*), managed by the SFC, and before the Colombian Stock Exchange (*Bolsa de Valores de Colombia*), for the purposes of issuing bonds or similar capital market instruments.

Any offering of securities addressed to the public at large or to 100 or more determined investors must be authorised by the local regulator. For such purposes, project companies must file before the SFC the prospectus of the offering, along with the financial statements of the last three years. If the company does not have such financial information, it is advisable to present to the SFC feasibility evaluations of the underlying project. Usually, project finance is structured through a securitisation process. Hence, the securities derived from a securitisation have an underlying asset including cash flows, economic rights, real estate property, etc. It is also necessary to subscribe a trust agreement with a trustee entity that would become the administrator of the securitisation, as well as the relationship between the issuer and the investors.

## 19 Islamic Finance

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

Please refer to question 13.1 regarding conflict of laws. There is no known precedent in Colombia regarding Islamic project financing.

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

That will depend on the conflict of law rules; please refer to question 13.1 above. There are no known precedents of *Shari'ah* applicable to the Colombian financial sector.

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

No. It is common to include interest payment obligations in loan agreements and such obligations do not affect the validity of enforceability of these type of agreements. Such obligations must comply with legal maximum interest rate regulations and other financial consumer regulations.

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Mr. Quinche's project finance experience includes advising either financiers or project developers in toll road projects, ports, oil & gas transportation infrastructure, liquefied natural gas facilities, airports, power generation facilities, public transportation infrastructure, telecommunications infrastructure, downstream, midstream and upstream oil & gas infrastructure and, in general, public infrastructure developed under PPP programmes. Highlights from Mr. Quinche's recent work include the US$3.5 billion Ecopetrol Cartagena Refinery Project, the US$370 million Puerto Bahía Port Project, the US$250 million and COP510,000 million financing for the construction of the Pacífico 2 toll road project, and the US$173 million and COP864,000 million financing of the Perimetral de Cundinamarca toll road project.


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With more than 15 years of experience, César Felipe Rodríguez has participated in numerous financial transactions representing lenders and borrowers, private and public entities and local and international institutions. Mr. Rodriguez advised IFC, K-EXIM and HSBC as local counsel for the financing of Bogota´s bus Integrated Public Transport System. Mr. Rodríguez advised Banco Itaú and Davivienda in the refinancing of Termovalle and assisted BBVA, Helm Bank and Bancolombia with respect to a US$75 million syndicated facility provided to ATC Sitios, for the development of telecom infrastructure. Mr. Rodriguez also worked as Foreign Legal Consultant from August 2015 throughout July 2016 in Allen & Overy's New York Office.

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Brigard Urrutia

The Banking and Project Finance Team at Brigard Urrutia (BU) is highly known in the Latin American market in the context of high-profile, cutting-edge financial transactions, project finance and syndicated lending.

Additionally, since BU provides legal advice and assistance in all relevant areas of business, BU lawyers are highly trained in management and international financial dynamics in all industries, which enables them to understand the needs of a diverse client base.

BU encourages a strong commitment to providing innovative legal solutions to clients and has consistently been a pioneer in the design of legal structures enabling clients to achieve their goals. BU has been present in ground-breaking, landmark transactions and has played a central role in developing the practice of law relating to infrastructure in Colombia.

BU has a unique Projects practice area comprised by two highly specialised teams: Infrastructure; and Project Finance. Over the years, BU has been a pioneer and leader in providing legal advice in the development of the most complex and breakthrough infrastructure projects completed in Colombia.

# Cyprus


Stella Strati

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## 1 Overview

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

**Overall**

In the last few decades, Cyprus has established itself as an international business, financial, shipping and service centre and is classified by the World Bank as a high-income country. Cyprus' accession to the European Union ("EU") in 2004 with the subsequent adoption of the Euro in 2008, was the catalyst for its transformation into a financial hub. Cyprus has a common law system and a fully EU-harmonised legislation. Following the 2013 banking crisis, the economy has been recovering with growth rates well above the EU average. This is somewhat a consequence of major projects that have been under way in the past few years. Increasing tourist interest, a key driving force for the Cyprus economy, has boosted projects focused on tourism, retail and leisure, and direct revenues are estimated to be around €2.5 billion for 2017. Moreover, the successful Cyprus Citizenship-by-Investment Programme has provided a boost to real estate projects.

The discovery of natural gas and potential oil deposits in Cyprus' Exclusive Economic Zone ("EEZ") in the Mediterranean Sea through drillings by the US company Noble Energy, which confirmed natural gas reserves of 4.54 trillion cubic feet ("tcf"), have attracted international energy heavyweights, such as Total, Eni, Kogas and Exxon Mobil, who have obtained licences and are planning infrastructure projects to commercially exploit the findings.

**Domestic**

Over the past decade, project finance transactions have resulted in major public infrastructure projects, such as the Larnaca and Paphos International Airports, the Limassol and Ayia Napa Marinas, as well as several government buildings and other projects (desalination plants and sewerage management projects). The model usually followed in Cyprus projects is that a consortium of contractors, investors, plant and system operators will form a private company to act as a special purpose vehicle ("SPV") that will construct the project, operate it for a set amount of years and then transfer it back to the sponsoring authority. Financing usually comes from multilateral or bilateral agencies as well as guarantees. In most cases, the sponsoring authority will retain ownership of the land and lease it to the parties for a fixed number of years (this is common with the Marina projects).

**International**

Apart from the domestic aspect, a number of international finance projects are structured, negotiated and documented through Cyprus, although the underlying project is located elsewhere. Such projects include international airports in the Russian Federation, international fashion and jewellery retailers, malls, retail and real estate development in the CIS countries, as well as energy, rail, mining and natural resources projects in Russia. Such financing may include infrastructure projects such as oil and gas pipelines from Russia to Europe. Corporate structures in project financing including Cyprus SPVs are also being increasingly used by leading airlines to finance and/or lease commercial aircrafts.

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

The Limassol Marina, a €350 million waterfront development able to accommodate 800 vessels is currently being developed, with the first residential, commercial and retail establishments already in operation. This is a notable BOT example, whereby the project will be transferred to the Republic of Cyprus after a fixed time period.

Also, the Ayia Napa Marina, a €220 million project able to accommodate 600 vessels, has commenced construction in 2016, following the Limassol Marina model. Similar projects are currently in the design and licensing stage in Paralimni, Larnaca and Paphos, as the government is keen on using the privatisation and BOT models to attract more investment in the yachting, tourism and real estate sectors.

Both the Larnaca and Paphos International Airports are operated by Hermes Airports Ltd under a 25-year BOT concession agreement with the Republic of Cyprus. Hermes – a Cyprus SPV – is an international consortium, representing a mix of Cypriot and international partners, including major French construction groups as well as International Airport Operators. The construction contract is the biggest ever undertaken in Cyprus. Together, the two airports handle over seven million passengers, annually.

An integrated casino resort will be developed in Limassol by a consortium formed between Melco International and Cyprus Phasouri (Zakaki) Limited who have successfully obtained a 30-year licence agreement to develop and operate an integrated resort. The overall investment will exceed €500 million, as it is expected to be the biggest casino resort in Europe. The casino licence will be valid for 30 years, while for the first 15 years it will be an exclusive concession and will allow for the licensee to operate satellite casinos in other cities.

Also, the discovery of gas fields in the Cyprus EEZ has initiated the government's planning for a liquefied conversion ("LNG") plant that will enable international exports. Aiming at the management and utilisation of the findings, and recent private investments in a major Oil Terminal by VTTI in the Vasilikos area, the government is aiming to create a Master Plan for the area that will involve most hydrocarbon-related infrastructure.

## 2 Security

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

According to standard practice, a separate agreement is entered into in relation to each type of asset. This is due to the fact that different registration requirements may exist for different types of security. A security agreement creating a charge is registrable with the Cyprus Registrar of Companies ("ROC") against the Cyprus company chargor, pursuant to s.90 of the Cyprus Companies Law, Cap.113 (the "Companies Law") in order to be valid against such company's liquidator or any creditor thereof. It must be registered within 21 calendar days (if executed in Cyprus) or within 21 days after the date on which the same could, in due course of post, and if dispatched with due diligence, have been received in Cyprus (if executed abroad). In the latter case, the ROC has as a rule of practice which allows the registration of charges created abroad to take place within 42 days from the execution thereof. Also, s.99 of the Companies Law provides that a security agreement must be entered into the register of charges or mortgages of the company, accordingly. Mortgages are also subject to registration (as will be analysed below), while other perfection requirements apply for Cyprus pledges (as per question 2.5 below).

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

The main type of security taken over immovable (real) property is a mortgage. It must be registered at the land registry department of the district where the land is located in order to be valid. The mortgagee should also be registered with the land registry. A mortgage constitutes a contractual right for the benefit of the mortgagee and constitutes a charge on the property. If a mortgage is given by a Cyprus company, it must also be filed with the ROC for registration and be entered into the company's register of mortgages.

Equipment, machinery and other goods are most commonly secured by a floating charge.

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

Usually, security is taken over receivables through a security assignment. Receivables may be assigned by an assignment agreement, and if such agreement is creating a charge, this is registrable with the ROC pursuant to s.90 of the Companies Law and is entered in the register of charges of the chargor as s.99 dictates.

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

A security can be taken over bank accounts and such security is usually a pledge. If such bank account pledge is entered by a Cyprus company, then such security is registrable with the ROC pursuant to s.90 of the Companies Law and in the register of charges of the pledgor pursuant to s.99 of the Companies Law.

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

Security can be taken over shares in companies incorporated in Cyprus; the most common type of such security is a pledge. Shares in Cyprus companies are in certificated form and a certificate under the common seal of the company specifying the shares held by a member; the certificate is a *prima facie* evidence of title. The Companies Law specifically exempts from registration pledges of shares in Cyprus companies given by Cyprus company pledgors. Nevertheless, a pledge over shares in Cyprus companies must be perfected in accordance with the requirements of the Cyprus Contract Law, Cap.149. Namely, the formalities to be fulfilled include that: (a) the pledge has to be evidenced by a written contract, signed by the pledgor and the pledgee in the presence of two witnesses; (b) notice of the pledge has to be given by the pledgee to the company whose shares are being pledged; (c) a memorandum of pledge has to be entered into the register of members of the company whose shares are being pledged; and (d) the company secretary must issue and deliver to the pledgee a certificate confirming that a memorandum of pledge has been entered in the register of members in favour of the pledgee.

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

Cyprus Stamp Duty Law No. 19/1963 ("Stamp Duty Law") subjects to *ad valorem* stamp duty all documents (including contracts) concerning property situated in Cyprus or concerning matters to be executed or take place in Cyprus, subject to certain exceptions, irrespective of where the same are signed.

For contracts the value of which ranges between €5,001–€170,000, the current rate of stamp duty is €1.50 for each €1,000 or part thereof; for contracts the value of which is over €170,000, the current rate of stamp duty is €2 for every €1,000 or part thereof, with a ceiling of €20,000. This maximum amount of stamp duty is payable on any document or on any transaction which has several documents; in a transaction having several documents, the parties may designate the main document, which will be subject to the full stamp duty. The other transaction documents may be stamped as secondary documents, in the amount of €2 each, provided they are dated the same day as, or very close to, the main transaction document. Paying the stamp duty late will result in penalties, which range according to the period which elapsed between the date the stamp duty arose and the date of submitting the documents for stamping.

In order to determine whether a document is subject to stamp duty in Cyprus, the documents can be sent to the Stamp Duty Commissioner for a ruling under s.31 of the Stamp Duty Law.

S.21 of the Stamp Duty Law provides that any document drafted outside Cyprus and which is subject to stamp duty pursuant to the provisions of the Stamp Duty Law will not be considered as being drafted or having effect in Cyprus until the applicable stamp duty is paid. However, any document which was signed abroad and which is subject to stamp duty in Cyprus will be considered as having been signed in Cyprus on the date on which it was received in Cyprus and in such case, the document may be stamped within 30 days from its receipt in Cyprus. Therefore, if a document which attracts stamp duty under Cyprus Law is signed and kept abroad, the stamp duty will not need to be paid until the same is brought into Cyprus.

Not paying the stamp duty is a regulatory penal offence, which does not render a document void but merely requires in the future that the applicable stamp duty plus a penalty be paid; further, in the case of court proceedings, the court will not recognise the document as evidence unless it is stamped. Therefore, if the document is not stamped because it was executed outside Cyprus and kept there, it will need to be stamped in order to be recognised if proceedings need to be issued in Cyprus.

The registration of a charge with the ROC pursuant to s.90 of the Companies Law is subject to the payment of a nominal fee, while the fees for registration of a mortgage on immovable property are calculated on the secured amount and constitute 1% thereof.

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

As mentioned above, the registration of an agreement creating a charge must be effected within 21 calendar days (if executed in Cyprus) and within 42 calendar days (if executed abroad). For the registration of a charge with the ROC, a copy of the executed agreement is required, together with a duly completed prescribed form. If the relevant agreement is drafted in a language other than Greek or English, then a certified true translated copy of the same is also submitted to the ROC. The submission of the relevant form can be effected within a business day, while the ROC usually requires up to three weeks to issue the corresponding certificate of registration of charge. The entry of a security agreement into the register of charges or mortgages of a Cyprus company can be made within a day. Similarly, the registration of a mortgage with the relevant land registry department is quite straightforward, and the submission of a prescribed form together with the payment of the relevant fee is required.

The fees for the registration of different types of security are included in the answer to question 2.6 above.

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

No consents are usually required for the creation of security over immovable property. Certain industrial plots and/or property situated in industrial zones or other specific areas (e.g. residential property in the Marinas) are held under a leasehold agreement entered into with the Cyprus government. In these cases, a consent from the Cyprus Ministry of Energy, Commerce, Industry and Tourism is required before mortgaging the relevant leasehold property and registering the relevant mortgage with the competent land registry department.

## 3 Security Trustee

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

Cyprus, in general, recognises the concept of a "trust". Similarly, it is possible for a security trustee or agent to be used for the purposes of enforcing security. In such cases, the relevant security is granted to the security trustee or agent in favour of all or some of the lenders. The underlying documents would usually specify the powers of such security trustee or agent. Where a security trustee is involved, the relevant security agreement is registered with the ROC as a charge over the assets of the Cyprus company (chargor) in favour of such security trustee or agent.

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

Please refer to the answer to question 3.1 above.

## 4 Enforcement of Security

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

In general terms, no. There is no requirement for a public auction following enforcement of security. It is generally possible for a security agreement to be enforced judicially and a judgment for the sale or the secured assets to be obtained.

Certain security agreements may be enforced out of court and in accordance with their terms. Namely: (a) a floating charge over the assets of a company may be enforced out of court, by the appointment of a receiver over the relevant assets; (b) a pledge over shares in a Cyprus company, provided that the relevant mechanism allowing out of court enforcement has been incorporated into the pledge agreement (i.e. documents allowing the transfer of the shares on the name of the pledgee have been exchanged); and (c) a mortgage over immovable property.

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

Foreclosure is regulated by the Transfer and Mortgage of Immovable Properties Law 1965 (as amended) by which the mortgagor's rights in a secured asset are extinguished either via an auction or sale and the secured asset is transferred to the buyer. The proceeds of the sale are applied against the secured amount and any remaining amount is paid to the mortgagor. A creditor enjoys the right of foreclosure only when the mortgage has been registered in the relevant land registry department and such right cannot be exercised where there are pending court proceedings for the secured amount. Foreign investors and creditors, provided the exercise of the statutory foreclosure right is in compliance with the applicable procedure, will not be treated differently from local creditors.

## 5 Bankruptcy and Restructuring Proceedings

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

Certain transactions can be declared void due to fraudulent preference if entered within six months of the commencement of the winding-up (as will be explained below). Also, floating charges created within 12 months of the commencement of the winding-up may be considered invalid.

As already mentioned, for a charge/security to be valid against the liquidator of a Cyprus company (in case of its winding-up), it must be duly registered with the ROC (in accordance with the procedures explained above). Therefore, a project lender will be able to enforce its rights if the security has been properly registered or perfected.

Where there is a fixed charge, the net proceeds from the sale of the secured assets will primarily be used for the settlement of amounts secured thereby. Preferential creditors will not have any right or priority with respect to the proceeds from the sale of secured assets which will be used for the settlement of the amounts secured by the charge; they will nevertheless have a right of priority with respect to any balance thereto. If there is a surplus from the sale of such secured assets subject to the charge, the surplus becomes part of the general pool of assets and is distributed as set out in the answer to question 5.2 below. If, on the other hand, there is a shortfall, namely the proceeds from the sale are not sufficient to cover the secured amount, then the secured creditor concerned will be deemed to be an unsecured creditor, only with respect to such shortfall and will thus rank after the costs of the winding-up, preferential debts and any floating charge holders and will therefore rank at least *pari passu* with all the other unsecured creditors.

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

In accordance with the provisions of the Companies Law, the preferential debts are the following:

a. The costs and expenses of the winding-up.

b. The following preferential debts:

   i. Rates and taxes including all local rates and all government taxes due from the company at the relevant date, and having become due and payable within 12 months immediately before that date; in the case of assessed taxes, not exceeding in the whole one year's assessment.

   ii. Any salary owed to an employee and any sum withheld by the employer from the employee's salary for the payment of any obligations of the employee or otherwise that the employer has not paid, and any other sum or benefit of the employee that arises as a result of an agreement or employment relationship, including any sum owed to a recognised union that arises from the employment relationship between the employer and the employee or otherwise, that the employer has not paid.

   iii. Any amount of compensation which the company is obliged to pay to an employee, on account of bodily harm suffered by him as a result of an accident caused by his employment and during his employment. An employee of a private company who is a shareholder thereof is exempted, unless the company is voluntarily wound-up or wound-up for reconstruction or merger purposes.

   iv. Any amount due to the employee, excluding an employee of a private company who is a shareholder thereof, concerning the leave which such employee is entitled to from his/her employment in the company for an employment period of only one year.

The above shall rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge. If any amounts remain available, they will be used to cover any amount secured by floating charges and finally the unsecured creditors.

Any transaction made by a company (a wide-ranging concept that includes payments, deliveries of goods, mortgages and conveyancing, as well as executions or other acts relating to property) made or done by or against a company within six months before the commencement of its winding-up may be considered to be a fraudulent preference against its creditors and be rendered void. On the question of fraudulent preference, the court will look into the intentions behind the transaction. The onus is on those who claim to avoid the transaction (whether creditors or liquidator) to establish that the actual intention was to make a preference among creditors.

Also, floating charges are valid up to the extent of any cash paid to the company at the time of the creation of the charge. In any case where a company is being wound up, a floating charge on the undertaking or the property of the company created within 12 months of the commencement of the winding-up shall be invalid, unless it is proven that the charge was made while the company was solvent.

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

Under the laws of Cyprus, there is no exclusion of any entity, corporate or personal, from insolvency proceedings, other than the Central Bank of Cyprus, which is constitutionally established.

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

Assets may be seized with out-of-court pledge enforcement, where the company is obliged to deliver the pledged assets to the pledgor in the event of default. An alternate process whereby assets of a company may be seized out of court is when a receiver is appointed in a company under a contractual obligation in order to seize assets and then resign once these assets have been sold for the benefit of the other party. Following receivership, a company may continue its business operation.

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

The concept of examinership was recently introduced. Examinership is a process providing for the financial reorganisation of a viable company with liquidity problems that aims to keep the business alive and pay back creditors over time. It also seeks to provide relief from the actions of creditors of the company, so that the company has the time to reorganise its financial affairs.

The court may appoint an examiner in the event that the company is open to claims or will be unable to service its debts; no liquidation against the company has been approved and published in the official gazette and no court order has been issued for the liquidation thereof.

The court will only issue an order for examinership if the company is found to be a "going concern" and has a reasonable prospect of survival. This is determined by a report that is prepared by an independent adviser.

Applications for examinership may be made, jointly or severally, by the company itself, any creditor or future creditor, including a company employee, members of the company who, at the time of the application, hold no less than 10% of the paid-up capital of the company that has voting rights attached to it and a guarantor thereof.

With the submission of the relevant application, the company is under court protection for a period of four months. During this period, a receiver cannot be appointed and the company cannot be placed under liquidation. In addition, no actions can be made against its assets without the consent of the examiner (this includes mortgages, confiscations and lease agreements).

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

Where the company continues trading while being insolvent, the directors face the risk of incurring personal liability for fraudulent trading; however, such claims are rare in Cyprus. The Companies Law provides that any person who knowingly takes part in trading with the intention to defraud creditors or for any other fraudulent purpose will be guilty of an offence. Similar provisions exist as regards interested persons who were involved performing activities with the intention of defrauding creditors or for any other fraudulent purpose and had knowledge of this fact. The general provisions of fraudulent trading allow for the court to pursue directors personally, in order to pay creditors who have been defrauded due to the directors' misconduct. Such sanctions are usually brought in the civil courts, although it is possible, given the circumstances, for criminal charges to be brought.

## 6 Foreign Investment and Ownership Restrictions

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

In general terms, there are not restrictions on foreign ownership of the shares of a Cyprus company. On the contrary, foreign shareholders enjoy certain tax exemptions, as it will be hereunder analysed. In relation to property investment, there are no restrictions on Cyprus and EU nationals. However, nationals of non-EU countries must first seek the approval of the Council of Ministers before real estate can be registered in their names. A company whose majority of directors and shareholders are EU nationals is not considered to be a foreign company for the purposes of owning immovable property in Cyprus.

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

Cyprus has entered into several bilateral investor treaties, which offer protection for investor rights with more than 27 countries.

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

Cyprus is a full EU Member State and therefore nationalisation, expropriation, transfer and currency restrictions are regulated under EU Law and EU Policy. Furthermore, Article 23 of the Constitution of Cyprus safeguards the right to acquire, own, possess, enjoy or dispose of any movable or immovable property. No deprivation or restriction or limitation is allowed, except for restrictions or limitations which are absolutely necessary in the interest of: public safety; public health; public morals; town and country planning; development and utilisation of any property for public benefit; or protection of the rights of others, and only if imposed by law. Just compensation must be paid for any such restrictions or limitations which materially decrease the economic value of such property. Such compensation, if not agreed, is determined by the courts. In certain cases, nationalisation of financial institutions, such as the Cyprus Central Cooperative Bank, has been pursued by the government as a form of state intervention to assist with stability and liquidity. Recently, the Cyprus Grains Commission, previously a state monopoly company that was forced to operate under free market conditions, is now ailing and may be nationalised in order to safeguard its strategic role.

## 7 Government Approvals/Restrictions

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

Depending on the project, there are several government agencies that might exercise authority or supervise operations. For example, in matters relating to the exploration, prospection and exploration of hydrocarbons, the Hydrocarbon Service of the Ministry of Energy, Commerce, Industry and Tourism will license the participating entities. Any construction project should be licensed by the Town Planning Service and possibly by the local authority who may request environmental impact assessments. Tourism sector projects will require licensing by the Cyprus Tourism Organisations, whilst specialised large-scale projects like the integrated casino resort currently under construction will be regulated by the National Betting Authority (in matters relating to its casino operations). Also, construction projects will need to comply with the Department of Labour Inspection guidelines.

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

There are no formal registration requirements with any governmental authority, except those that pertain to the issuing of government licences relating to the operations of the project (i.e. environmental, health and safety). Finance documents might be subject to stamp duty. Security documents may also need to be registered with the ROC, as already explained.

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

Depending on the project/business, the legislation requires a number of conditions to be met prior to commencing work thereon. For example, the Town and Country Planning Law No. 90/72 (as amended) and the more recently enacted Estimation of Repercussions on the Environment for Specific Construction Work Law No. 140(I)/2005 require the issue of certain licences relating to town planning. Construction methods and environmental impact of the project will need to be meet the standards. The latter Law No. 140(I)/2005 applies to larger projects that may have an adverse environmental impact (i.e. hotel resorts, golf courses, marinas). There are no restrictions on foreign entities applying for such licences. In relation to natural resources, specific legislation exists for each type thereof. For example, in relation to mining, the Mining Service of Cyprus will need to license any exploration and exploitation of minerals as per the Mines and Quarries Law, Cap.270 (as amended). A more recent addition, due to the recent offshore hydrocarbon findings, is the Hydrocarbon (Prospection, Exploration and Exploitation) Laws of 2007 to 2015. The provisions of the EU Directive on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons (Directive 94/22/EC) have been incorporated into Cyprus law by the abovementioned legislation.

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

A 5% withholding tax on gross income derived from within Cyprus (by non-residents without a Cyprus permanent establishment) relating to the extraction, exploration or use of the continental shelf, subsoil or natural resources, as well as the installation and exploitation of pipelines and other installations on the ground, seabed and on the surface of the sea is levied.

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

There are currently no capital restrictions in Cyprus. As with other EU countries, travellers to Cyprus must declare cash sums greater than €10,000 upon arrival.

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

There are no restriction on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions.

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

There are no restriction on maintaining foreign currency accounts in Cyprus and/or operating through offshore accounts based in other jurisdictions, provided that the relevant Anti-Money Laundering requirements and Know-Your-Client procedures set out by the Central Bank of Cyprus are fulfilled.

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

There are no restrictions on payment of dividends from a project company to its parent company, irrespective of where it is incorporated. It is important to note that dividends are only distributed out of realised profits. Also, a Cyprus tax-resident company is deemed to distribute as a dividend 70% of its accounting profits two years from the end of the tax year in which the profits were generated. However, this applies only to profits attributable to Cyprus tax residents.

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

There are a number of local regulations and laws that may affect the total cost, operating overheads and by a certain extent the financing and sustainability of certain projects. For example, the Safety and Health at Work Law of 1996 (L.89(I)/1996) does affect any construction works relating to any building that is being built in Cyprus. Similar provisions apply for factories, heavy industry installations as well as any workplace (where minimum safety requirements must be met).

Environmental factors may also impact project financing as (where applicable and/or necessary depending on the type of project) obtaining environmental licence approvals may significantly alter and/or affect the viability of a project, as discussed in more detail above under questions 7.1 and 7.3.

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

Law on Public Procurement No. 73(I)/2006 (as amended) is the principal legislation governing public procurement contracts in Cyprus. It transposes EU Procurement Directives 17/2004 and 18/2004 into Cyprus legislation, provides for the coordination of procedures for the award of public works contracts, public supply contracts, public service contracts and related matters.

## 8 Foreign Insurance

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

There are no restrictions, controls, fees and/or taxes insurance for foreign insurance companies operating in Cyprus as long as they have obtained proper licensing from the Insurance Companies Control Service, the local regulator. EU Member State companies must comply with the General Good Requirements that are issued by the local regulator in order to freely offer services in other Member States.

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

Yes, provided that such foreign (secured) creditors are insured by the insurance company.

## 9 Foreign Employee Restrictions

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

As per EU Law, there is no restriction on the freedom of movement of individuals to Cyprus from all EU and EEA Member States. There are no restrictions on third-country nationals; however, the appropriate work permits/business visas will need to be obtained by the project company.

## 10 Equipment Import Restrictions

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

There are no special restrictions, controls, fees and/or taxes on importing any equipment used by construction contractors other than customs fees and import taxes that would be incurred from importing goods. Any goods imported from EU and EEA countries are imported within the EU customs union and no taxes and/or custom fees apply. All machinery and equipment imported into the EU need to comply with minimum EU certifications and guidelines for health and safety.

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

Cyprus has fully adopted the EU's Common Customs Tariff ("CCT") for third countries. EU products enjoy zero tariff rates. Value Added Tax ("VAT"), which is applied throughout the EU in the country of consumption, will likely apply. Exceptions are available for a number of inter-governmental organisations, the military, re-exports as well as for any discretionary exemptions that may be provided by the Council of Ministers to specific individuals or legal entities. The law governing the import duties is the Excise Duties Law No. 91(I)/2004 (as amended) as well as the Regulatory Administrative Acts issued under the above Law.

## 11 *Force Majeure*

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

*Force majeure* clauses are commonly encountered in a great number of documents. Such clauses are enforceable under Cyprus law, provided that they can be clearly defined and properly incorporated in the relevant agreement.

## 12 Corrupt Practices

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

The Attorney General examines findings of the police and decides whether a case should be heard by a court. The main body entrusted with investigating bribery and corruption allegations and complaints is the Cyprus police, which cooperates with specialist financial intelligence units such as the Unit for Combating Money Laundering ("MOKAS"). The Audit Office of the Republic may also refer incidents of bribery. The legal framework against bribery and corruption involves the Prevention of Corruption Law, Cap.161, Civil Servants Law, L.1/1990, The Criminal Code, Cap.154, Law Ratifying the Criminal Law Convention on Corruption, L.23(III)/2000, Political Parties Law, L.175(I)/2012, Law on the Illicit Enrichment of Public Officials and Officers, L.51(I)/2004. A range of monetary penalties (according to the nature and severity of the offence) as well as imprisonment is applicable for corruption offences.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

The proper law of a contract is the law which the parties wish to apply thereto. Usually, the parties freely agree the law which will govern the relevant contract. Typically, project agreements involving projects in Cyprus are subject to Cyprus law.

### 13.2 What law typically governs financing agreements?

This will mostly depend on the jurisdiction of the lender. Usually, international banking institutions prefer for the law of their jurisdiction to govern the relevant financing agreements.

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

There are no specific rules which subject security agreements to any particular choice of law. The parties are free to agree upon the governing law. Even when a security agreement is governed by a foreign law, mandatory Cyprus law provisions will, in any case, apply in relation to the registration of charges or perfection of pledges. Typically, security agreements over assets situated in Cyprus (e.g. mortgages or Cyprus pledges) are governed by domestic law.

## 14 Jurisdiction and Waiver of Immunity

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

A foreign party's submission to Cypriot courts' jurisdiction either via a contractual agreement or via the party's appearance in court proceedings will be binding and enforceable. As a general remark, state immunity is recognised and respected by Cypriot courts, provided that such immunity is not consensually waived and that a state is not acting under private or commercial capacity.

On another note, a judgment obtained as a result of a party's submission to a foreign jurisdiction will be legally binding and enforceable in Cyprus, provided that the conditions for the recognition and enforcement of judgments are fulfilled. In particular, civil and commercial judgments of EU Member States' courts are enforceable under the Brussels Regulations (EU Regulation 44/2001 in relation to proceedings instituted before 10 January 2015, EU Recast 1215/2012 in relation to proceedings instated on or after 10 January 2015). Civil and commercial judgments of Iceland, Norway and Switzerland will be enforceable pursuant to the Lugano

Convention. Foreign judgments from uncontested claims can also be enforceable pursuant to the provisions of Regulation 805/2004. If a bilateral treaty on recognition and enforcement has been concluded between Cyprus and another state, then the procedure of the Law on Foreign Courts Judgments No. 121(I)/2000 must be followed in seeking recognition and enforcement of a foreign judgment. Foreign judgments issued by courts of a commonwealth country will be enforceable under the Foreign Judgments Law 1935, Cap.10.

## 15 International Arbitration

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

Cyprus courts do recognise contractual provisions requiring submission of disputes to international arbitration, as well as awards by arbitration bodies. Domestic arbitration is governed by the Arbitration Law, Cap.4 ("Cap.4"); whilst international commercial disputes are governed by the International Arbitration in Commercial Matters Law of 1987 ("L.101/1987"). All the mandatory provisions contained in the UNICTRAL Model Law were adopted by L.101/1987, regulating only international commercial arbitrations.

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

Cyprus is a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), which has been ratified and implemented in Cyprus with the Law on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification) No. 84/1979. Cyprus is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

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

Any matters relating to criminal law, family law or which may have public policy implications are considered to be non-arbitrable. Public policy issues may include foreign commercial contracts that would otherwise be considered illegal under Cyprus law. Further, Cap.4 provides that when fraud is raised by one of the parties, Cyprus courts have the competence to decide on such matters and to cease the effects of any arbitration agreement between the parties.

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

There are no types of disputes subject to mandatory domestic arbitration proceedings.

## 16 Change of Law / Political Risk

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

Cyprus has been a signatory of the Multilateral Investment Guarantee Agency (World Bank Group) since 1988. However, it has never sought any political risk insurance for any of its projects. Cyprus has been a full EU member since 2004, and therefore nationalisation, expropriation, transfer and currency restrictions are regulated under EU Law and EU Policy.

## 17 Tax

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

Cyprus does not levy a withholding tax on dividends, interests and royalties paid to non-residents of Cyprus, except in the case of royalties earned on rights used within Cyprus which are subject to withholding tax of 10%. There is also no withholding tax on the proceeds of a claim under a guarantee or the proceeds of enforcing security.

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

All Cyprus tax residents are taxed on all chargeable income accrued or derived from all sources in Cyprus and abroad. Individuals who are not tax residents of Cyprus are taxed on certain income accrued or derived from sources in Cyprus. The applicable corporate tax rate is 12.5%. For non-domiciled individuals residing in Cyprus or for non-Cyprus tax residents, there is a range of tax benefits. For example, there is no withholding tax on dividends, no tax on interest income and on gains arising from disposal of investments (including shares and securities). The Special Defence Contribution tax is not applicable to non-doms or non-tax residents. For taxes and fees relating to finance and security documentation and their registration, please refer to the relevant paragraphs above. It is important to highlight that, in relation to project financing, a 5% withholding tax on gross income derived from within Cyprus (by non-residents without a Cyprus permanent establishment) relating to the extraction, exploration or use of the continental shelf, subsoil or natural resources, as well as the installation and exploitation of pipelines and other installations on the ground, seabed and on the surface of the sea is levied.

## 18 Other Matters

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

EU restrictive measures and UN sanctions should be taken into account, especially if a project involves dealing with a sanctioned entity.

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

There are no legal requirements that apply exclusively to project companies. The use of construction surety bonds is fairly common in Cyprus, especially in projects with considerable construction works. In public tender contracts, surety bonds are usually obligatory.

Surety bonds are issued by a bank/credit institution and cash equalling the limit guarantee amount is paid in the event of the default by the project company (or other guarantor) to uphold its obligations.

A wide range of Cyprus laws, including the Companies Law, provide for the issuance of capital market instruments, the extensive analysis of which is outside the scope of the present.

## 19 Islamic Finance

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

The relevant instruments are not used in Cyprus. However, the Cyprus Stock Exchange during the last few years has made certain efforts towards the possible development of Islamic financial instruments complying with *Shari'ah* law, also known as *Sukuk*.

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

There have been no cases concerning the applicability of *Shari'ah* law and the conflict of *Shari'ah* and local law relevant to the finance sector.

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

In general, the inclusion of an interest payment in documentation would not affect validity and/or enforceability unless the interest payment rate is considered to be illegal and/or excessive under local legislation and/or the common law principles applied by the courts. Courts will consider the commercial aspects of an agreement and the negotiations that took place between the parties before rendering any interest payment to be invalid.


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Chapter 11

# Ecuador


Mario Flor

Daisy Ramirez

Flor & Hurtado


## 1 Overview

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

Ecuador has undertaken a series of actions to modernise its economy based on a scheme defined by international trends, the globalisation of the economy and the opening of markets. Ecuador is modernising its legal structures to facilitate options for becoming concessionaires in the "strategic sectors", which include telecommunication, non-renewable natural resources, transport, refining hydrocarbons, biodiversity, water and radio spectrum frequency.

The Constitution, enacted in 2008, promotes private investment, guarantees freedom for companies, and guarantees free competition and competitive markets. Moreover, the Constitution contains rules for protecting private property. With the interest of promoting investment, in December 2015, the Ecuadorian legislative branch enacted the Private-Public Partnerships Act which establishes the guidelines and incentives for project implementation in the form of public-private partnerships as well as the institutional framework governing their implementation. Public-private partnership contracts are aimed for projects in areas of general interest – usually strategic sectors and public services managed by the Central Government or autonomous governments, determined in the law, such as: infrastructure; urban development; real estate projects; and those related to roads, ports and airports infrastructure.

The PPP Law applies to public-private partnerships for the provision of goods, works or services to be provided by the Central Government and the autonomous governments. The PPP Law creates a series of tax benefits available for projects implemented under such a structure. Furthermore, Ecuadorian legislation does not impose legal requirements for external financing; it provides a non-discriminatory treatment to foreign investors, guarantees private property and allows the free movement of capital. These elements are usually considered fundamental for the successful implementation of project finance in Ecuador.

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

In recent years, the most significant projects implemented in Ecuador have been mainly in the transportation area. In 2005, a group of sponsors from Canada and the US assumed the development, construction and operation of the Quito International Airport project, which required a USD376 million financing granted by the Overseas Private Investment Corporation, the Export Import Bank, the Export Development Canada and the Inter-American Development Bank. The project's costs reached approximately USD413 million, the construction contract was signed in 2005 and the new airport officially began operations in 2013, following renegotiations that took place between 2009 and 2011.

As of 2014, the national government began the process of changing the energy matrix – currently fossil fuel intensive – with a main focus on renewable energy projects; during said process, several permits were granted in favour of private operators for the development and construction of power stations. In 2015, in order to increase the country's power generation capacity and the supply of the electricity system, the national government granted a licence in favour of Hidroalto S.A. for the construction of a hydroelectric power station with water with an installed power capacity of 49.7 MW which includes interconnection facilities to a substation, the project is located near the Dué river in the province of Sucumbios and required an investment of USD22 million dollars financed by Corporacion Andina de Fomento.

In addition, also in the electricity generation field, the company Gransolar S.A., received financing for the construction, installation and start-up of two photovoltaic plants with an aggregate installed capacity of 3 MW, for a total of USD6.5 million, to support the change in the energy matrix.

The current administration is actively concentrated in promoting foreign investment; for this purpose, it has prepared the Ecuadorian project's catalogue which offers 40 projects in the following sectors: ports and airports; basic industries; environment; industrial; infrastructure; real estate; and tourism. The projects are either greenfield, in operation or suspended due to the economic meltdown caused by the decline in oil prices. The delegation models the government is currently willing to offer are international cooperation and public-private partnerships.

## 2 Security

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

Ecuadorian legislation does not provide for general security agreements nor floating charges; as per Ecuadorian legislation, each type of asset requires a specific security contract, movable property is secured by a pledge, while immovable property is secured by a mortgage. These types of security interests do not impose any transfer of title to the creditor. However, the most relatable legal figure to a general security under Ecuadorian legislation is a guarantee trust; a trustee is the party in charge of controlling the security (movable and immovable) property granted by the debtor, in this case the security trust becomes the legal owner of the assets. It is common that guarantee trusts are created separately for: i) the project's revenues (over credit rights); ii) the company's assets (movable and immovable); and iii) the project company's shares.

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

Security over real property can be created by means of a mortgage; movable property including machinery and equipment are subject to pledges. However, movable assets that are permanently fixed to the land are considered to be part of the mortgaged land they are attached to. Pledges are divided into three categories:

i) ordinary commercial pledge (applicable for any movable asset such as shares of the project company or intellectual property);

ii) special commercial pledge (available only for registered traders); and

iii) agricultural or industrial pledge (applicable for agricultural products, equipment and machinery). By law, a pledge imposes the transfer of possession of the pledged assets; however, the law allows parties to agree otherwise.

Both traditional security documents (mortgage and pledge) can be replaced through guarantee security trusts which provide a stronger security in favour of lenders.

Property dedicated to the provision of public services or for the exploitation of natural resources have a general legal encumbrance in favour of the State.

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

Yes, there are two ways to create security over receivables:

i) By creating a guarantee trust to which the project company assigns receivables so that funds are collected by the trust in a separate bank account managed by the trustee in accordance with the instructions given by the parties in the trust agreement. Such instructions are subject to conditions; therefore, in case of an event of default, creditors can take control over all funds without notification or objection from the debtor since the title of such receivables is already transferred to the trust.

iii) By creating a fiduciary mandate (*encargo fiducario*); in such case, the receivables are collected in the debtor's accounts but it gives irrevocable instructions to a local trustee by means of a fiduciary mandate, such instructions involve the administration of the funds on an ordinary basis and the enforcement of the security in case of default. It should be noted that this security does not isolate the funds from the debtor's patrimony.

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

The Financial and Monetary Resolutions establish that security over cash deposited in bank accounts constitutes a valid guarantee, the procedure for its creation follows the general rules of security included in the Civil Code and is often instrumented in a contract by which the bank act as depositary of the funds until security is enforced or terminated.

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

Yes, the way to create security over shares in companies incorporated in Ecuador is by means of a pledge agreement or a transfer to a guarantee trust.

Pledge over shares in a limited liability company (*compañía de responsabilidad limitada*) are created by means of a public deed duly registered at the Mercantile Registrar and notified to the Superintendence of Companies. Pledges of shares of a stock company (*sociedad anónima*) are created when signing an endorsement of the share certificate by way of security and perfected once it has been registered in the company's Shares and Shareholders Book; it is recommended that the legal representative of the company makes the corresponding pledge notification to the Superintendence of Companies.

The creation and registration of security by transferring the title of the shares to a guarantee trust is slightly similar to the pledge. This type of security allows lenders to have full control of the shares and in terms of enforcement is a better security for lenders.

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

The costs and fees depend on the type of security and the type of asset. Security over land is created by means of a mortgage, and, as per the Civil Code, mortgage agreements must be mandatorily executed before a notary public; the costs vary each year and are established by the National Judicial Council, the fees established for the year 2018 go from USD20 to USD480. As mentioned above, security over movable assets is created by pledges, the law provides that a pledge agreement can be implemented in a private document or executed before a notary public, the fees established for the year 2018 go from USD20 to USD480. The final fee is fixed based on the contract's amount.

Mortgages and industrial pledges must be registered with the Property Registry and the Mercantile Registry, respectively, registration must be performed with the registry of the municipality where the asset is located, fees are established every year by each Municipal Council and the registration fee is calculated over the asset's value.

In case the chosen security is a guarantee trust, notarial fees must be considered; the fixed fees for creating a guarantee trust are USD16 per page, and a guarantee trust does not require registration for its perfection.

Ecuadorian legislation does not contemplate stamp duties or other additional fees besides the notarial and registration costs mentioned above.

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

Once the documents are filed for registration, it takes between two to three weeks to have the security registered. Expenses only involve notarial and registration fees which, as described above, are charged in accordance to the approved annual fees chart.

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

Ecuadorian legislation does not provide for approvals or authorisations to be obtained prior to the creation of security. Nevertheless, in case of goods deemed to be affected to a public service or used for exploiting natural resources, creation of security may require a consent to the grantor of the concession or delegation because these assets are reverted to the State at the end of the concession or delegation granted by the State.

## 3 Security Trustee

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

Ecuadorian legislation recognises the concept of a security trust, the trustee is in charge of administering the trust and acting for the benefit of the lenders/creditors in order to: i) comply with instructions prior enforcement; and ii) conduct enforcement of the assets transferred as security and distribute the proceeds among the secured parties. The guarantee trust allows the possibility to isolate assets from the debtor's estate as a consequence of the transfer of property of those assets to the trust.

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

The concept of parallel debt is not recognised nor regulated in Ecuadorian legislation; in general terms, creditors can coexist – however, in terms of security, the one created first prevails over subsequent security. Under a fiduciary mandate, which is an irrevocable power of attorney granted in favour of a trustee or fiduciary agent to comply with certain instructions on behalf of the principal (borrower), a creditor or a group of creditors can be beneficiaries of common enforcement instructions so security is not enforced separately.

## 4 Enforcement of Security

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

Traditional security, such as pledges and mortgages require enforcement conducted through a judicial process which necessarily includes a public auction. The enforcement process is ordered by the judge who establishes the public auction's time and date, as well as the amount in which the asset is offered in auction – the amount is fixed in accordance with a valuation report provided by an expert; once the process has initiated, proposals can be filed by any person after depositing 10% of the offered amount, and once the offers have been verified, the judge will award the asset to the highest bidder. Once the payment of the auctioned asset has been verified by the civil judge, the secured creditor who initiated enforcement will receive its owed values and the surplus will be returned to the debtor, unless a judge has ordered a retention. Regulatory consents are not required for the enforcement of security.

In the case of guarantee trusts, enforcement is not conducted through a judicial process, the process is held privately and depends on the terms agreed on the guarantee trust agreement, among the project company/debtor (trustor), lenders (beneficiaries) and the trustee. Commonly, the process consists of a private sale of the assets conducted by the trustee, and the proceeds of the sale are then given to the beneficiary pursuant to the trust instructions. This process is certainly more expeditious than the traditional security enforcement.

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

There is no restriction or special requirement for foreign creditors when foreclosing local security.

## 5 Bankruptcy and Restructuring Proceedings

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

Ecuadorian laws contemplate a process aimed to help distressed companies to enter into debt workouts agreements with their creditors with the purpose of preserving the company's ongoing business. The process is regulated by the Concordat Law (*Ley de Concurso Preventivo*) and controlled and overseen by the Superintendence of Companies, and constitutes a requirement prior to the company's bankruptcy declaration. Said debt workout process suspends the effects of every claim initiated against the company by any creditor; therefore, secured creditors are prevented from enforcing their security against the project company. Once bankruptcy is initiated, the only privileges and preferences for credits are the ones recognised by law.

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

The Concordat Law establishes a suspect period of six months prior to the admission of the workout procedure in favour of the project company. The law provides that every act or contract implying the creation of security or transfer of property without any representation constitute enforceable acts. However, the law does not provide for clawback effects; nullity actions must be brought by any affected party, and these actions must be exercised within one year. As per Ecuadorian laws, preferential creditors are employees, tax and social security debts; during the workout process, the administrator must make special assignations to cover preferred debts first – however, when it comes to foreclosing security, as a general rule, secured creditors have preference of payment up to covering the value of the debt (capital, interests and costs). The company will have the right to receive any excess unless a judge has ordered otherwise; during the enforcement process, no other party will have the right to claim any value from secured assets.

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

Bankruptcy and debt workout proceedings are available to companies subject to the control of the Superintendence of Companies, which are private and mixed economy companies (companies with State participation). As a general rule, governmental entities and State-owned companies, banks and insurance companies are excluded from those proceedings and subject to specific insolvency regulations.

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

Creditors, whether secured or unsecured, must initiate court proceedings in order to seize assets of the project company; the only case in which court proceedings can be avoided is by enforcing guarantee trusts. It should be noted that in Ecuador trusts hold title of the assets held in trust; when the trusts are established, debtors transfer ownership of assets.

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

As mentioned in question 5.1 above, the Concordat Law establishes a regulated debt workout process in which the distressed company can reorganise its debts and enter into agreements with creditors; the term of the process is established by the Superintendence of Companies on a case-by-case basis – however, no debt workout arrangement can exceed seven years. In addition, the Civil Code establishes the Settlement Agreement, and defines it as a contract by which parties settle and terminate any out-of-court claim or prevent an eventual claim; these type of agreements are not regulated or supervised by any entity of court and are not tied to insolvency proceedings, therefore a project company can restructure its debts by entering into a Settlement Agreement with its dissenting creditors.

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

The Concordat Law establishes that the administrators or persons who have signed or authorised any act or contract of a company under this law, without the approval of the Superintendence of Company's supervisor, shall be personally and financially liable.

## 6 Foreign Investment and Ownership Restrictions

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

The Constitution establishes that the State shall encourage domestic and foreign investment, and shall establish specific regulations depending to the types of investment, giving priority to domestic investment. Accordingly, certain regulated sectors mandatorily require a delegation made from the State, so a private company can engage in such activities; those sectors are deemed "strategic" as mentioned in question 1.1 above and include telecommunication, non-renewable natural resources, transport, refining hydrocarbons, water and radio spectrum frequencies. Besides the delegation of strategic sectors, Ecuadorian legislation does not contemplate any type of restriction, control or additional taxes on foreign investment; the Production Code states that domestic and foreign investors, companies, firms or entities, and their legally established investments, shall be treated as domestic investors which translates into equal conditions with respect to the management, operation, expansion and transfer of their investments, and shall not be subject to arbitrary or discriminatory measures.

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

The prior administration considered the existing bilateral investment treaties opposed the Constitution (enacted in 2008); therefore, on May 3, 2017, the legislative branch decided on Ecuador's withdrawal from 16 bilateral investment treaties, all of them, however, included grandfathering clauses which provide for a five to 15 years continuation for investments made prior to the effective termination date. The current administration, whose aim is to promote foreign investment, has announced that it has initiated the renegotiation of new bilateral investment treaties that will replace those that were terminated last year.

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

The Constitution prohibits all forms of confiscation; in addition, the Production and Investment Code states that investor property is protected under the terms and conditions established in the Constitution and further relevant laws. Therefore, confiscation and nationalisation of domestic and foreign investments is prohibited by law. However, the State may declare, under exceptional cases and in accordance with the law, the expropriation of assets with the sole purpose of executing social development plans focused on the collective wellbeing. In all cases, expropriation shall abide the defined legal procedure in a non-discriminatory manner, and owners shall receive payment pursuant to an appraisal that will fix a fair and adequate compensation.

## 7 Government Approvals/Restrictions

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

The relevant government ministries and agencies regulating projects will depend on the sector in which the project is being implemented. For instance, in airports, ports and roads projects, the main relevant authority is the Ministry of Transport and Public Works; in addition to this, investors will have to deal with the authority having competence to control and regulate the specific project. In addition to the project contract, investors may opt to sign investment protection agreements, which have to be signed by the relevant controlling entity of the sector where the project is being implemented after the approval of the Strategic Committee for Investment Promotion.

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

Financing documents must be registered with the Central Bank of Ecuador for reporting and control purposes, and in order to be eligible for the 5% capital outflow tax when paying capital and interest offshore, this registration is required to comply with financial regulations and does not affect the financing documents' validity and enforceability.

As for project documents, registration requirements will depend on the type of project and the type of document; for instance, in the mining sector, concessions and exploitation-related agreements must be registered with the National Mining Registry, in other sectors, however, such type of formality is not required. With regards to financing documents, Ecuadorian legislation does not contemplate any type of registration or requirement for obligations to be valid and enforceable. Securities created over those project documents must be registered (e.g. conditional assignment of rights of a concession agreement). In addition, security documents must be registered as mentioned in questions 2.5 and 2.6 above.

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

Ownership of land by foreign entities does not require any specific licence or permit. As for developing a project related to natural resources (including oil pipelines), the Constitution establishes that those activities mandatorily require a delegation made by the State, and the delegation can occur through a concession, public-private partnership, association contract or any other type established by law.

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

The royalties and taxes vary depending on the industry. A general guideline stated in the Constitution mentions that the State shall share the profits obtained from the sale of natural resources at least in an equal amount with the company that exploits them. In the mining industry, each mining concessionaire shall pay a royalty equivalent to a percentage of the sales of the main and secondary minerals, which shall be not less than 5% of the reported sales and, in the case of gold, copper and silver, not more than 8%. In the hydrocarbons industry, it will depend on the contract modality chosen by the parties. Service Contracts do not establish payment of royalties, they have a fixed per barrel fee in favour of the contractor, risk is not shared since the State owns 100% of the extracted oil. In Production Sharing Agreements (so-called Participation Contracts), the practice is to abide by the minimum royalties established in the law for other modalities no longer used: this is a minimum of 12.5% of extracted crude oil up to 30,000 barrels per day, if extraction exceeds 30,000 barrels per day, the royalty (or participation percentage of the State) shall increase to 14%; likewise, if extraction increases to 60,000 barrels per day, the royalty (or participation percentage of the State) will go up to 18%. In addition, for Production Sharing Agreements, the law establishes a "Price Royalty" by which the State will have the right to receive 70% of the gross revenues obtained by the contractor above a certain agreed threshold; for example, if the agreed threshold is USD70 per barrel, and the contractor is exporting its share at USD80 per barrel, the State shall have right to 70% of the excess USD10 per barrel.

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

There are no restrictions, fees or tax over currency exchange. Ecuador uses the US Dollar as the country's official currency. The US Dollar replaced the national currency (*sucre*) in the year 2000, as a consequence there are no foreign exchange controls.

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

The Constitution and further lower-level laws guarantee the free remittance and repatriation of funds. Ecuadorian laws establish a 5% capital outflow tax for transfers of money outside the country, except when the funds are i) loan payments (capital and interest), and ii) investment returns in the form of dividends of local companies.

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

As per the Financial and Monetary Code, all financial transactions, operations and accounting records must be expressed in US Dollars. Onshore foreign accounts are not allowed. There is no restriction for project companies and their subsidiaries to establish and maintain offshore accounts; however, every transfer of money made from Ecuador is subject to the 5% capital outflow tax unless it falls within the exemptions mentioned above.

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

After the corresponding payment of income taxes, a project company can freely transfer dividends; however, the income tax rate for corporations for the year 2018 is 25%, and if 50% or more of the company's shareholders, partners or beneficiaries are residents or established in tax havens or regimes of lower taxation then the tax rate will increase by 3 percentage points. Ecuadorian laws do not impose any type of restriction on the payment of dividends to the project company's parent company.

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

As a general rule, every activity in Ecuador must obtain the corresponding environmental authorisation, lower-impact activities are required to obtain an environmental permit, while large-scale projects are obliged to obtain an environmental licence which includes several obligations such as: periodic inspections; filing of reports; guarantees; and implementation of remediation plans (the authority in charge of granting the environmental licence is the Ministry of Environment). In addition, labour laws require that every employer must implement health and safety regulation, such regulation is approved by the Ministry of Labour.

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

Ecuadorian law does not establish any specific legal framework for procurement by project companies. In some cases, the concession contract may impose certain conditions to be met by subcontractors as well as subcontracting thresholds, which the project company must comply with.

## 8 Foreign Insurance

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

The Public Procurement Act states that all insurance policies over assets as well as performance bonds must be provided by entities established in the country. In addition, the Monetary Code establishes that insurance policies for or related to assets located within the Ecuadorian territory or risks that may occur in Ecuador must be provided by insurance companies duly established in the country and authorised to provide insurance services.

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

Yes, this could be implemented through a conditional assignment of rights made by the beneficiary in favour of foreign creditors. The assignment of rights must be approved by the insurance company.

## 9 Foreign Employee Restrictions

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

The hydrocarbons and mining sectors establish specific restrictions on foreign workers. The Hydrocarbons Law states that at least 95% of the employees (specifically, for workers and administrative positions) hired by companies involved in the exploration, exploitation, refining, transport and commercialisation of oil must be Ecuadorian nationals, and 75% for technical positions. Moreover, the Mining Law establishes that the minimum percentage of employees of Ecuadorian nationality hired by mining companies for its activities is 80%. There is no other restriction on foreign employees besides the two abovementioned cases; as a general rule, foreign workers are free to work in any company after complying with the migratory requirements.

## 10 Equipment Import Restrictions

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

General customs duties are imposed on goods imported for the project, either if importation is made by the project company or by subcontractors. The Production Code provides for a special import regime available for entities in charge of the construction or provision of public services, said regime is known as the temporary admission for reexportation; the term for which the goods can remain in the country is the same term of the delegation contract. This regime is available for contractors, only subcontractors are not eligible.

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

Import duties will be determined based on the official tariff schedule in force at the time of the importation of the goods. The Production Code establishes an exemption of duties for imports directly allocated for the execution of public projects under a public-private partnership modality. For this purpose, the delegating public entity shall issue a certificate stating: i) the destination of the goods to be imported; and ii) the quantity and quality of the goods to be imported for the project.

## 11 *Force Majeure*

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

Yes, they are available and enforceable. *Force majeure* is regulated by the Civil Code, which defines *force majeure* as any unforeseen event that it is not possible to resist, like a shipwreck, earthquake, the capture of enemies, the acts of authority exercised by a public official, etc.; judicial decisions have concluded that any case of *force majeure* is formed by two elements, which are: i) the unpredictability of the event; and ii) the irresistibility of the event.

## 12 Corrupt Practices

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

Yes, the Constitution states that public officers, officials and their delegates or representatives of State institutions will be subject to the sanctions established for crimes of embezzlement, bribery, concussion and illicit enrichment. The actions to prosecute them and the corresponding penalties are imprescriptible. The Criminal Code provides that criminal penalties for the crimes of embezzlement, bribery, concussion and illicit enrichment are up to seven years of imprisonment.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

All project agreements signed with State entities are typically governed by Ecuadorian law. Other kinds of project agreements are usually governed by Ecuadorian laws; however, other laws (i.e. New York or English law) are also agreed.

### 13.2 What law typically governs financing agreements?

Financing agreements are typically governed by English or

New York law; however, onshore security is often governed by Ecuadorian law.

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

Generally, security documents for assets located in Ecuador are governed by domestic law. Personal obligations undertaken by the company, such as promissory notes, are also governed by Ecuadorian law.

## 14 Jurisdiction and Waiver of Immunity

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

Submission to a foreign jurisdiction is valid and enforceable; however, when one of the parties is a State entity, submission is permitted only after having the approval of the Attorney General.

Under Ecuadorian law, certain assets such as moneys deposited by State entities in accounts held by the Central Bank of Ecuador are not seizable for they have sovereign immunity, said immunity cannot be waived.

## 15 International Arbitration

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

Ecuadorian legislation allows the inclusion of international arbitration clauses; in case of contracts with State entities, the clause must be approved by the Attorney General for it to be valid and enforceable. Arbitral awards are recognised by local courts to the extent that the award is final and conclusive and the following requirements are met: (a) it does not contravene public order or the national laws of Ecuador and are the result of an "*in personae*" action; and (b) the documents evidencing the award are in an authentic form, have been duly legalised by a Consul of Ecuador and the award has been duly translated into Spanish. The processes for homologation of international rulings and enforcement of international arbitral awards is regulated by the Organic Procedural Code.

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

Ecuador ratified the New York Convention in 1982.

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

The Ecuadorian Arbitration Law establishes that arbitration is permitted for disputes on matters subject to settlement. The Civil Code establishes the matters on which a person can dispose of are subject to settlement as well. Generally, non-arbitrable matters are those which cannot be settled or waived by the interested parties or which affect the public interest and relate to family law, antitrust law, criminal offences, etc.

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

Arbitration is possible only if parties agree to submit to it. Ecuadorian legislation does not establish mandatory domestic arbitration for any case.

## 16 Change of Law / Political Risk

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

Although direct agreements are not fully regulated, they are common as they have been implemented in several projects in Ecuador. In view of its materiality and common use, a recent regulation issued in the mining sector establishes that direct agreements can be entered by the relevant State institution with the lenders. The terms usually employed in this kind of agreements are: (i) the possibility that the lenders are notified prior to the initiation of an administrative procedure for termination of the project contract; (ii) the right to intervene and cure, on behalf of the project company, any obligations that may lead to the declaration of termination of the project contract; and (iii) the substitution of the borrower in case of default. It is also agreed in direct agreements the terms of payment of non-amortised loans – considered as an indemnification payment – when a concession of delegation agreement is terminated by the State.

## 17 Tax

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

The Internal Tax Regime Code provides that interest is exempt from income tax (and therefore not subject to any deduction and withholding) to the extent that the loan exceeds 365 days, it is registered with the Central Bank of Ecuador, and is provided by a financial institution or by a specialised non-financial institution registered with the Superintendence of Banks in Ecuador. Proceeds resulting from a claim under a guarantee or enforcing security are not subject to income tax as per Ecuadorian tax laws.

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

The main tax incentive for foreign creditors is the exemption of the 5% capital outflow tax for payment of capital of interests. The registration of loans, mortgages and security documents have the same costs for domestic and foreign investors.

## 18 Other Matters

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

It is important to note that Ecuador allows the execution of Investment Protection Agreements (IPAs); the Production and Investment Code establishes that the Ecuadorian State and a private investor may sign an investment contract, which can contain the contractual commitments that are necessary for the development of the new investment project. IPAs may confer stability on tax incentives and regulatory framework during the lifetime of the project.

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

Capital market instruments may be issued by legal entities (corporations), branches of foreign companies domiciled in Ecuador, and by those established by the Monetary and Financial Policy and Regulation Board. The issuance of bonds is implemented through a contract granted by the issuer which must contain the characteristics as well as the rights and obligations of the issuer, the bondholders and the representative of the latter. All issuance of bonds will require a risk rating, carried out by risk-rating companies registered in the public registry of the Ecuadorian Securities Market. During the term of the issue, the issuer must maintain the rating, updated in accordance with the standards established by the National Security Council. All issuance will be covered by general and specific guarantees.

## 19 Islamic Finance

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

*Istina'a*, *Ijarah*, *Wakala* and *Murabaha* are not instruments expressly recognised under Ecuadorian law. However, their elements can be implemented in Ecuador as long as they do not contravene existing laws.

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

There are no cases in which *Shari'ah* law has been the governing law of a contract or a dispute. *Shari'ah* law may be the governing law of a contract or a dispute if private parties so agree.

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

As per Ecuadorian law, the inclusion of interest payment obligations is valid and enforceable. It should be noted that the Civil Code expressly prohibits compound interest provisions and limits interest rates to the ones fixed by the Central Bank of Ecuador.


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His experience includes multiple project and corporate finance, cross-border acquisitions and cross-border commercial transactions. Mario has acted as counsel of Corporacion Andina de Fomento (CAF), the Inter-American Development Bank, Inter-American Investment Corporation, Export Development Canada, Export-Import Bank of the United States, Overseas Private Investment Corporation as well as commercial banks in projects implemented in Ecuador. Mario acted as local counsel for the financing of the new international airport of Quito. Furthermore, Mario provided legal services to EOLICSA S.A., a company in charge of the construction and operation of the first wind project in Ecuador (located in the Galapagos Islands), and he also represented Lafarge in in the acquisition of the largest cement plant in the country.


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FLOR & HURTADO

Flor & Hurtado is a new firm in the Ecuadorean legal market, formed by very well-reputed professionals with large experience in local and cross-border transactions, following international standards as main rule of practice. The firm consists of 10 lawyers and one financial advisor, the firm's practice is focused in the main business areas of the Ecuador's economy, including banking and finance (project finance and corporate finance transactions), natural resources (oil, gas, mining), tax and tax planning, corporate and commercial, antitrust, telecommunications, electricity, domestic and international arbitration; highly rated professionals are leading each of the mentioned areas.

The professional experience of partners and associates of Flor & Hurtado include providing legal assistance in the major financing projects carried out in Ecuador in recent years, principally providing assistance to multilaterals and commercial banks.

# England & Wales

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## 1 Overview

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

2017 has been an interesting year for project finance in and from the UK, not least given the continued uncertainty following the UK's 2016 referendum vote to exit the European Union.

The sector gained confidence over 2017, however, leaving commentators with an optimistic view of 2018.

The UK market breaks (broadly speaking) into two quite distinct halves – a UK-oriented market where local (as in UK-sited) deals are structured and financed, and a much larger and more geographically diverse finance market where (for one reason or another) international finance is structured, negotiated and documented in the UK (in practice, London), but the underlying project is located elsewhere. The two markets are both relatively large in terms of capital and debt requirements and flows, but the international English-law finance market far outstrips the domestic UK market in both volume and size of deals.

As the UK emerges from the economic slowdown and moves into a period of economic growth, there is considerable demand for upgrading existing infrastructure or investing in new, greenfield projects. Each year, the UK Government publishes a "National Infrastructure and Construction Pipeline" (the "NIP"). This year, the NIP confirmed that the current value of UK projects, relating to the transport, energy, utilities, digital infrastructure and flood and coastal, science and research and social infrastructure sectors was at over £460 billion (combined public and private investment), of which over £240 billion is expected to be delivered by 2020/21. Through these investments and projects, the government aims at increasing living standards, driving economic growth and boosting productivity. The Conservative Government expects that over the next decade to 2027, total public and private investment in the sector is expected to reach around £600 billion. Already, public and private infrastructure investment has gradually increased over the past three decades (since 2010, 4,500 infrastructure projects have been delivered). The two largest sectors, energy (which boasts investment of £191,338.5 million from 2017/18 to 2020/21) and transport (£135,276.9 million from 2017/18 to 2020/21), account for 70% of the infrastructure pipeline's total value.

In the UK, the divide between conventional project finance and the bond and leveraged finance markets continues to narrow. The market saw a continuation of diversification of both sources and types of project-related debt. As with the project bonds market, the trend comes in part from the US; 2016–2018 has seen a number of infrastructure and energy sponsors experimenting with Term Loan B structures – sometimes as refinancing tools, sometimes to sit alongside conventional financings and/or less conventional financings – for example, inventory and receivables financings.

Multilateral and bilateral institutions have continued to participate in the market, and existing institutions have re-branded themselves and introduced additional products to help fill the debt financing gaps. By way of example:

- the European Investment Bank introduced the Europe 2020 Project Bond Initiative;
- the UK Green Investment Group was formed, with a mandate to finance "green" projects; and
- UK Export Finance ("UKEF") launched Direct Lending and Export Refinancing Facilities.

The UK Green Investment Group was launched in October 2012 (at the time, as a non-departmental public body of the Department for Business, Energy & Industrial Strategy ("BEIS") – it was sold to Macquarie Group Limited in August 2017) and has since committed over £15 billion of financing to 100 green infrastructure projects, committing £3.4 billion to the UK's green economy. It is the first investment bank worldwide to invest solely in green infrastructure. The funds have been used to leverage private-sector capital to fund projects in priority sectors from offshore wind to waste and non-domestic energy efficiency.

UKEF has also shown a significant shift in approach and appetite for international project finance risk. UKEF has three additional funding-related facilities: the Direct Lending Scheme; the Export Refinancing Facility; and the Local Currency Finance Scheme. Under the Direct Lending Scheme, UKEF provides export credit loans up to £3 billion in aggregate to overseas buyers to finance the purchase of capital goods and/or services, from exporters carrying on business in the UK. Loans can be made in sterling, US dollars, euros or Japanese yen. The Export Refinancing Facility is available to banks funding non-sterling buyer credit loans, typically with values above £50 million that are intended to be refinanced through the debt capital markets or other commercial loans. The Export Refinancing Facility aims to boost trade by ensuring that long-term funding is available to overseas buyers of British exports supported by UKEF. UKEF has also introduced a Local Currency Finance Scheme. Under this scheme, UKEF can guarantee a credit loan given to an overseas borrower in a local currency (it supports around 40 different currencies), provided the loan is used to purchase capital goods/services from an exporter operating in the UK. Local Currency Financing is particularly useful for reducing foreign currency risk and variable debt costs where a project does not generate revenues in a foreign currency.

**The energy markets**

The UK's energy sector continues to undergo significant change. The 2009 Renewable Energy Directive set a target for the UK to achieve 15% of its energy consumption from renewable sources by 2020.

To bolster the UK's efforts in achieving this, the Energy Act 2013 implements key aspects of Electricity Market Reform ("EMR") – a policy initiative pioneered by the UK Government to mobilise £110 billion (approximately US$175 billion) of capital investment required by 2020 to ensure a reliable and diverse supply of low-carbon electricity. Such reforms are vital, as the UK has seen significant power plant closures in recent years – the Act was aimed at ensuring both investment in infrastructure, alongside decarbonisation as more power plants are decommissioned in the UK. Around a fifth of capacity that was available in 2011 will close by the end of this decade, and demand for electricity is set to increase as major sectors such as transport and heat are electrified.

The subsequent Energy Act 2016 furthers the 2013 Act's work. It focuses on the oil and gas sector and works to implement recommendations into UK offshore oil and gas recovery and its regulation. The Act formally established the Oil and Gas Authority ("OGA") as an independent regulator and enabled a more comprehensive charging of the offshore oil and gas industry for licences for environmental and decommissioning activity. This allows the government to continue to recover costs of its environmental and decommissioning activity in line with the "polluter pays" principle.

In broader terms, the UK project finance market in the oil and gas sector has not been immune to the effects of global trends. The "new normal" of low commodity prices since 2016, for example, has depressed capital investment in oil and gas projects in the UK. Contrasting to a high of fourteen (14) and then twenty-two (22) oil and gas projects gaining approval in 2011 and 2012, respectively, in 2016 only two new projects were approved (together valued at only £500 million). The first half of 2017 saw only one project gain approval (valued at £80 million).

The UK's current electricity mix has changed substantially, and rapidly, over the past couple of years. Most notable is an increase in renewable-generated electricity (a trend in line with global patterns). In 2017, for the first time Britain generated more electricity from renewable energy than from gas and coal. Renewable sources (wind, solar, hydro and biomass) together contributed just over 29% of electricity generation, up from a quarter in 2016. In comparison, only 21**%** came from nuclear power. The latest *Digest of United Kingdom Energy Statistics*, published in 2017, reported that in 2016, 8.9% of total energy consumption came from renewable sources (up 8.2% in 2015). Renewable electricity represented 24.6% of total generation, renewable heat 6.2% of overall heat, and renewables in transport, 4.5%. And, for the second year running, solar photovoltaics were the leading technology in capacity terms at 11.9GW, representing a third of total electricity capacity.

The UK Government's energy and climate change goals are to deliver secure energy and a sustainable low-carbon future. This is driven by the need, by 2050, for an 80% reduction in carbon emissions (across the economy) as against 1990 levels and, by 2020, to achieve the legally binding EU target of sourcing 15% of the UK's energy from renewable sources (not including nuclear power). To allay fears that this target would be lost on the UK's exit from the EU, in June 2016, the Conservative Government announced the ambitious (but legally binding) target of reducing carbon emissions by 57% by 2030. Such targets are informed by the UK's need of developing approximately 59GW new net capacity by 2025, with as much as 33GW coming from renewables and the remaining 26GW coming from conventional thermal power. In an effort to promote private investment in the development of large-scale infrastructure projects (and in particular, the development of low-carbon technology) in the UK, the UK Government has instituted a series of programmes that are specifically designed to stabilise the economics of financing for such projects.

The UK Government has, however, continued investment in new nuclear, and displayed a firm commitment to the role it should play in the UK's future energy mix. This is based on nuclear power being low-carbon, affordable, dependable, safe and capable of increasing the diversity of energy supply. The UK Government's support echoes similar pro-nuclear political decisions in other jurisdictions, notably the UAE and Turkey. The events at Fukushima, Japan (March 2011) did not result in a reversal of this policy, unlike the nuclear phase-out announced by Germany and the cancellation of a new-build nuclear programme in Italy. Although the UK Government emphasises that it will be for energy companies to fund, develop and build new nuclear power stations in the UK, including meeting the full costs of decommissioning and their full share of waste management and disposal costs, the Office for Nuclear Development (within the Department for Business, Energy and Industrial Strategy) is taking active steps to establish and cement the right framework and conditions in the UK for investment in new nuclear power stations, with the aim of having new nuclear projects generating electricity from around 2020.

The UK Government's strong support for nuclear power was shown in December 2017, when it announced that the UK had the potential to become a world leader in developing the next generation of nuclear technologies. The government announced that funding would be available until 2020 to support research and development into innovative advanced and small modular reactors, as well as to assess their feasibility and accelerate the development of promising designs. This follows on from its November 2015 announcement that it intended to phase out coal-fired generation without CO2 abatement by 2025, build new gas-fired plants, and place greater reliance on nuclear power and offshore wind. See the response to question 1.2 below for a summary of the nuclear power market in the UK.

**Transformation of the UK electricity market**

From a policy perspective, the Infrastructure Act 2015, the UK Government introduced the UK Guarantee Scheme, which is a liquidity enhancement mechanism that aims to enhance liquidity to ensure that investment in nationally significant and financially credible infrastructure projects does not stall due to adverse credit conditions. It works by offering a government-backed guarantee to help infrastructure projects access debt finance where they have been unable to raise finance in the markets. The UKGS can issue up to £40 billion of guarantees and is open to at least 2026. To date, it has issued nine guarantees totalling £1.8 billion of Treasury-backed infrastructure bonds and loans, supporting over $4 billion worth of investment.

In addition, the Energy Act 2013 was aimed at bringing about a "once-in-a-generation transformation" of the UK electricity market, and has had significant implications for the economics of investing in low-carbon generating technologies. EMR is the UK Government's key policy mechanism for ensuring security of energy supply through the development of low-carbon technology. The key policy measure to incentivise new low-carbon electricity generation is the provision of the contract for difference ("CfD") instrument, where a low carbon electricity generator and the Low Carbon Contracts Company ("LCCC" – a government owned limited company) enter into a contract that ultimately protects consumers from high costs and gives greater certainty of revenues to electricity generators.

The provision of CfDs is intended to stabilise revenues for investors in low-carbon electricity generation projects such as nuclear (and renewables) by helping developers secure the large upfront capital costs for low-carbon infrastructure. However, the long planning horizon for nuclear new-build projects and massive capital requirements pose substantial financial risks to nuclear power sponsors and investors. In the US, it was determined that

US Government guarantees were necessary in order for new-build nuclear projects to be commercially viable. In October 2016, the UK Government confirmed that it had provided a government guarantee to EDF (France) to assist in bringing forward their investment in Hinkley Point C, the Somerset nuclear power plant. It has provided a guarantee for up to £2 billion that will be available from 2018 to 2020, if necessary conditions are met.

The CfD is a quasi-power purchase agreement: generators with a CfD will sell their electricity into the market in the normal way, and remain active participants in the wholesale electricity market. The CfD then pays the difference between an estimate of the market price for electricity and an estimate of the long-term price needed to bring forward investment in a given technology (the strike price). This means that when a generator sells its power, if the market price is lower than needed to reward investment, the CfD pays a "top-up". However, if the market price is higher than needed to reward investment, the contract obliges the generator to pay back the difference. In this way, CfDs stabilise returns for generators at a fixed level, over the duration of the contract. This mitigates the generator's long-term exposure to electricity price volatility, substantially reducing the commercial risks faced by these projects. The Energy Act 2013 includes a provision whereby the LCCC will act as the counterparty to eligible generators under the CfD. This mechanism was in direct response to concerns about the "credit" behind the CfD economics. Although a CfD is a private law contract between a low-carbon electricity generator and the LCCC, the cost of CfDs will ultimately be met by consumers via a levy on electricity suppliers.

The first CfD auction in January 2015 was a success, with a competitive allocation process, and the cost was £105 million less than the original strike prices published for the same technologies. It was a similar story for the Capacity Market auction, where the first auction procured capacity at almost half the expected clearing price. However, following the May 2015 General Election, there has been a decrease in pace in implementing the CfD and Capacity Market measures, which, in turn, created uncertainty for EMR. In July 2015, the Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) confirmed the postponement of the next CfD auction round, and, subsequently, in November 2015, the Secretary of State for Energy and Climate Change confirmed that the delayed October 2015 CfD auction would not take place until the end of 2016. This postponement was partly caused by the UK Government's attempts to rein in the costs of supporting low-carbon electricity generation. Recently, however, the UK Government's commitment to the CfD auction programme has been renewed. There was a successful round in 2017 (where two offshore wind projects were awarded CfDs at £57.50 MWh), and a third round is planned for spring 2019, where up to £557 million will be made available for investment.

These results and plans are consistent with the UK's new "Clean Growth Strategy", announced in October 2017 and based on the Climate Change Act 2008. This strategy confirms a commitment to cut greenhouse gas emissions, achieve clean growth, but also ensure that businesses and consumers have affordable energy. Practical measures under the Strategy include providing £20 million to support a new clean technology early stage investment fund.

Amongst other EMR policies was the establishment of a carbon price floor introduced on 1 April 2013, with the aim of encouraging additional investment in low-carbon power generation by providing greater support and certainty to the carbon price. Supplies of fossil fuels used in most forms of electricity generation became subject to either the climate change levy ("CCL") or fuel duty from that date. Such supplies are charged at the relevant carbon price support rate, depending on the type of fossil fuel used, which will be determined by the average carbon content of each fossil fuel. The carbon price support rates would reflect the differential between the future market price of carbon and the floor price determined by the UK Government. Until 2020, the CPF is frozen at £18 per tonne of CO2. There have been repeated calls for longer-term clarity on carbon pricing and the CPF. In the 2017 Autumn Budget, the Government stated it was "confident" that the Total Carbon Price is set at the right level, and will continue to target a similar total carbon price until unabated coal is no longer used. The European Commission considered, but ultimately rejected, a similar system to reform the EU ETS.

In the July 2015 budget, the UK Government announced the removal of CCL exemption for electricity generated from renewable sources from 1 August 2015. The CCL was introduced in 2001 and is a tax on UK business, collected by energy suppliers, that is designed to encourage energy efficiency, reduce carbon emissions and promote energy from renewable sources. Businesses were previously able to claim an exemption if they could show a levy exemption certificate, showing that they bought energy from qualifying renewable energy sources.

In September 2015, Drax, along with one of the UK's leading generators of renewable power, Infinis, announced that they were to apply for judicial review of the UK Government's decision to remove the CCL exemption. Drax and Infinis' challenge was based on the fact that when the CCL exemption was removed from electricity generated from combined heat and power plants, there was a two-year notice period, whereas in their case the notice period was only 24 days. Judgment was issued against Drax and Infinis on 10 February 2016. The High Court recognised the merits of bringing the case but ruled against the claimants, dismissing their claim that the government had not provided enough notice of the removal of the CCL exemption.

**Regulatory framework**

The Office of Nuclear Development has focused on taking actions which are aimed at reducing regulatory and planning risks for investors. A planning regime has been proposed to aid the installation of nuclear reactors, including – following public consultation – identifying sites for new nuclear power stations to be built by the end of 2025. The UK Government legislated in the Energy Act 2008 to ensure that operators of new nuclear power stations will have secure financing arrangements in place to meet the full costs of decommissioning and their full share of waste management and disposal. The Energy Act 2013 also introduced measures to create a new independent statutory body, the Office for Nuclear Regulation ("ONR"), to regulate the nuclear power industry. The ONR and the Environment Agency are together undertaking a process of Generic Design Assessment ("GDA") of new nuclear designs, which allows the safety, security and environmental implications of new nuclear reactor designs to be assessed before an application is made for a licence and permissions are granted to a particular design of reactor on a particular site. In late December 2017, the Hitachi-GE UK Advanced Boiling Water Reactor (UK ABWR) was granted approval, and confirmed as suitable for construction in the UK. The completion of this step is a significant one in the overall process to construct a new type of reactor in the UK.

In March 2017, the ONR published design acceptance confirmation for the NuGen AP1000 technology, for use in their nuclear site at Moorside in Cumbria, marking another step forward in the development of the latest nuclear technology in the UK.

**Shale gas**

Shale gas fracking remains an area of great interest and potential within the UK – the British Geological Survey estimates that there could be up to 1,300 billion cubic feet of shale gas in the north of England (primarily in the Bowland shale beneath Manchester, Liverpool and Blackpool) – equivalent to approximately 50 years of UK gas consumption. Further reserves are likely to exist in central and southern England. In December 2013, the UK Government's

Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) reported that up to half of the UK's land area might be suitable for fracking, including as yet unexplored deposits throughout much of eastern and southern England. US energy costs (partly as a result of significant investment by oil and gas buyers in US shale gas development) are currently one-third of those of Western Europe – a major issue for European exporters.

While UK shale oil is still in the early stages of exploration in the UK, the industry won an important victory in 2016 when the government overturned local council objections to a fracking scheme in Lancashire. Reportedly, it has the capacity to support 64,000 jobs and make the UK less reliant on imports. Scientists from the British Geological Survey (BGS) have estimated that the total volume of gas in the Bowland-Hodder shale in northern England is approximately 1,300 trillion cubic feet. It is not possible to estimate how much shale gas and oil the UK can produce until more exploration and testing is undertaken.

In April 2015 and following the introduction of the Energy Act 2016, certain functions passed from the Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) to the OGA, a newly created executive agency. Following this change, the process of obtaining consent to drill a well is the same irrespective of whether the well drills for conventional or unconventional gas: operators bid for exclusive rights to an area in competitive licence rounds. The operator then needs landowner and planning permission, which may require an environmental impact assessment.

On 16 July 2015, the UK Government laid draft regulations that defined the protected areas in which hydraulic fracturing will be prohibited. The draft regulations ensure that the process of hydraulic fracturing can only take place below 1,200 metres in specified groundwater areas outside National Parks, Areas of Outstanding Natural Beauty and World Heritage Sites.

Fracking remains a controversial issue in the UK, however. Recently, in March 2018, the application by Ineos to explore for shale gas in South Yorkshire was rejected by local councillors, raising the cumulative total of planning rejections against fracking companies to seven in 2018 alone (mainly focused around the Midlands and the north of England). Interestingly, some of the rejections came from Conservative councils, despite the Conservative Government's Manifesto promise of developing a shale gas industry in the UK (the Labour Party, on the other hand, is anti-fracking).

**Brexit Negotiations and the EU Withdrawal Bill**

In June 2016, the UK voted to leave the European Union. Since then, the Conservative Government has been negotiating with the European Union, and has tabled a bill, "the EU Withdrawal Bill" that will replace the European Communities Act 1972 and make other provisions in connection with the withdrawal of the United Kingdom from the EU. It is the primary piece of legislation that will determine the UK's position *vis-à-vis* current EU legislation post-exit. It also aims to remove the jurisdiction of the European Court of Justice over UK courts. It will transfer all current EU law into UK domestic law, so that as smooth a transition as possible is achieved in the immediate aftermath of exiting the EU. It is seen as "one of the largest legislative projects ever undertaken in the UK" by the House of Commons library. It precipitates an examination of "major swathes of the statute book".

As such, it is a highly contentious piece of legislation. Debate currently revolves around the provision it will make for the devolution of certain powers to Scotland and Wales. Currently, certain powers in relation to the two nations are exercised at EU level. The Bill in its current form (early March 2018) places those powers in Whitehall. The Scottish and Welsh Parliament and National Assembly respectively dispute this, however.

Currently, the Bill is at the Committee stage in the House of Lords, with the next session due to sit on 14 March 2018. Once it passes through the Committee stage, it will enter the Report stage, and then a third reading, and then there will be time for amendments to be tabled before it finally receives Royal Assent. The Bill has been subject to rigorous debate in the House of Lords on the basis of its constitutional acceptability. It is likely that it will undergo significant change before it progresses past the Lords.

With regard to Brexit negotiations, the UK is currently in round two of negotiations with the EU. Whereas phase one focused on divorce terms, phase two phase looks ahead to issues such as the Irish border, the future relationship between the UK and the EU, and the UK's withdrawal from Euratom. Negotiations need to be completed by October 2018, to give EU Member States and the European Parliament time to ratify the agreement by 29 March 2019 – the deadline for leaving the EU. So far, fishing policy has not been decided, nor have citizens' rights, governance of security and justice measures, nor the applicability of EU law during any transition period.

Brexit's effects on the project finance market are both general and specific. In general terms, currency exchange volatility (the pound substantially weakened following the vote), and a restriction to the credit markets both negatively impacted on the UK project finance market. In particular, the vote creates uncertainty over the continued access of the UK to European Investment Bank Funding, which up to the vote had been an important source of funding for smaller-scale UK projects. During the transition period, it is likely that the UK will continue to be subject to EU procurement directives (such as the Public Contracts Regulations 2015 SI 2015/102). This means that organisations under the rules must continue advertising and awarding public contracts in accordance with the EU directives. It is unclear what the position will be regarding procurement post-exit and post-transition period, but it is likely that Parliament will not repeal the relevant legislation unless a pressing need arises. If the UK seeks to retain membership of the European Single Market, it would have to continue to apply all EU public procurement directives.

It has been suggested in the legal press that there are reasons for optimism regarding government liquidity support for projects post-Brexit such as the adoption of a looser monetary policy in the UK or potential policies to stimulate the economy via investment in infrastructure. Standard and Poors have commented that private finance initiatives should maintain their credit strength. They have also noticed that in the short term, projects have benefitted from the higher inflationary environment. On the other hand, five project financings have been downgraded from stable to negative (for example, Alpha Schools (Highland) Project, Aspire Defence Finance PLC and Consort Healthcare (Salford) PLC).

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

Notable recent project finance deals include the Hinkley Point C Project in Somerset, the £2.2 million Thames Tideway Tunnel project, the Galloper Offshore Wind Farm, the £6.5 billion Thameslink Project, the Drax Coal-Fired Power Plant refinancing, and the Intercity Express Programme Phase 1 public-private partnership ("PPP") refinancing.

Project bonds activity has increased in these financings, such as the $300 million CPI-linked bond for the London Underground Northern Line Extension 2015, and the £254 million senior secured bonds issued for the acquisition of the 389MW West of Duddon Sands wind farm offshore transmission assets.

As mentioned in the response to question 1.1 above, nuclear power has become central to the UK Government's thinking on energy policy in the UK. Aside from Hinkley Point C, there are currently two other on-going nuclear power project financings in the UK: Wylfa Newydd (Horizon); and Moorside (NuGen).

In October 2013, the UK Government announced that initial agreement had been reached with EDF to develop Hinkley Point C in Somerset – the first new nuclear power station in the UK since the start of generation at Sizewell B in 1995. The 430-acre site, reducing to 165 acres once operational, will generate enough electricity to power nearly 6 million homes, bring 900 permanent jobs to the area and create around 25,000 jobs during construction.

At the same time, the UK Government agreed EDF should receive a guaranteed strike price of £92.50 MWh from Hinkley Point C, twice the market price of electricity over a 35-year period. With construction costs estimated at £18 billion, the key commercial terms include the provision of a UK Guarantee for the debt element of the financing (which could include a bond issuance). In October 2016, the UK Government confirmed that it had provided a government guarantee to EDF (France) to assist in bringing forward their investment in Hinkley Point C, the Somerset nuclear power plant. It has provided a guarantee for up to £2 billion, which will be available from 2018 to 2020 if necessary conditions are met.

The UK Government's support for the project had been deemed compatible with the Common Market in a formal report by the European Commission, published in October 2014, which found that there was no State aid (when the UK Government first suggested they might provide a guarantee to EDF). An appeal against this decision was lodged by Austria on 6 July 2015, but the European Commission ruled that EU Member States were free to choose their mix of energy sources. The Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) said that it is confident that the European Commission's State aid decision on Hinkley Point C is legally robust, and it had no reason to believe that Austria would submit a challenge of any merit. On 15 July 2015, a second challenge was lodged with the European Court of Justice by Greenpeace Energy and nine German and Austrian green energy suppliers. The claimants accused the European Commission of legal and procedural error. They feared that a comprehensive subsidies package would create distortions in the European energy market and create competitive advantages for nuclear power. Final contracts for Hinkley Point C were signed in September 2016.

Additionally, Sellafield, a nuclear fuel reprocessing and nuclear decommissioning site, announced the winning consortia for a £500 million 10-year agreement to support the organisation's staff on the decommissioning of Europe's most complex nuclear site. New deals were framed to bring big benefits to the community, with all firms committed to training and spending at least 20% of their subcontracting budget with small to medium-sized firms.

The three main investors who have announced plans to build up to an aggregate of 16GW of new nuclear power generation in the UK by 2025 are:

**EDF Energy (NNB GenCo)**

In January 2009, EDF purchased British Energy and all of its assets for £12.5 billion, including 10 sites in the UK. In addition to running the existing fleet of ex-British Energy nuclear power stations, EDF has publicly made clear its intention to build four new European Pressurized Reactors (EPRs) (amounting to 6.4GW) at Hinkley Point C and Sizewell.

Centrica's withdrawal from British Energy will mean that there is no British involvement left in the three consortiums established to build new nuclear plants in the UK. Construction came underway at Hinkley Point C in March 2017, after substantial delays, and in December 2017 the seawater cooling pipes were installed. First power was scheduled for 2025. It will provide 7% of the UK's energy over the next 60 years and is scheduled to begin operating in 2025. China General Nuclear Power Corporation ("CGN") owns the remaining 33.5% stake in the project (EDF owns the controlling share of 66.5%). As part of the deal (CGN will contribute one third of the Plant's cost), CGN will take a 20% stake in developing Sizewell, and will try to develop its own reactor with EDF's backing at Bradwell in Essex.

**Horizon Nuclear Power**

Horizon Nuclear Power is a UK energy company which was established with the objective of developing a new generation of nuclear power stations. Horizon Nuclear Power was a joint venture between E.ON UK and RWE npower; however, in March 2012, E.ON UK and RWE npower announced that they were withdrawing from the joint venture to build new nuclear plants in the UK due to, among other factors, pressure from Germany's decision to phase out all nuclear power. The sale of Horizon Nuclear Power to Hitachi Limited of Japan was announced in November 2012. The Hitachi Horizon programme involves building two to three 1,300 MW plants at each of Horizon's sites at Wylfa, Anglesey, and Oldbury, Gloucestershire, with the first unit becoming operational in the first half of the 2020s and employing its Advanced Boiling Water Reactor (ABWR) technology.

In November 2015, it was announced that Wylfa and Oldbury had moved a step closer to going ahead after the ONR said it had completed three GDAs for ultimate client Hitachi-GE's ABWR, which will be used in both plants. The ONR said it has concluded that sufficient progress has been made by Hitachi-GE to move into the final assessment stage, which Hitachi-GE expects to complete in December 2017. Hitachi and Horizon expect to have the full range of licences and permissions in place by 2018 for a new nuclear power plant at Wylfa. External finance will be required to fund construction, from both debt and equity sources.

**NuGeneration Ltd (NuGen)**

NuGen is a joint venture between GDF Suez and Iberdrola, created to develop new-build nuclear opportunities in the UK. Scottish and Southern Energy plc had been part of the original joint venture but sold its 25% stake to the existing parties in 2011. Further to this, NuGen has acquired option rights over 100 hectares of land adjacent to the existing nuclear facilities at Sellafield in West Cumbria. It was announced in December 2014 that NuGen had signed a cooperation agreement with HM Treasury to promote financing for a new nuclear power station at Moorside. In December 2015, NuGen was awarded a £20 million contract to assess the site of the potential new nuclear reactors. The contract is the Moorside project's largest so far and will support licensing, planning application and other consents required to build the new nuclear power station near Sellafield.

In December 2017, South Korean State utility Korea Electric Power Corporation (Kepco) won the preferred bidder status for the project. This finally brings a degree of certainty to what is set to be the biggest nuclear plant in Western Europe. The parties, depending on negotiations, hope to sign a deal in the first half of 2018.

It was also announced in December 2015 that Toshiba was looking for outside help to fund its £8 billion nuclear programme after a collapse in its share price. The Japanese group is in talks with local financial institutions to support the construction of an atomic plant near the Sellafield facility in Cumbria, after running up losses following an accounting scandal. The Japanese financial regulator recommended that Toshiba be fined 7.37 billion yen (£40 million) for overstating profits and the share price of the company was down 40% since the start of the year in 2017, but has grown in strength since, reaching highs in March 2018.

## 2 Security

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

In domestic UK project financings, the intention of the parties (and the usual requirement of all types of lenders) is to create security over all, or substantially all, a project company's assets. Project finance borrowing vehicles are normally special purpose vehicles or "SPVs" with no pre-existing businesses, rights or liabilities beyond those associated with the project.

Security is normally granted by way of a general security agreement, such as a debenture, which covers all the SPV's rights and assets (both pre-existing and after-acquired) or (less commonly) by way of separate security agreements for each type of asset.

More often than not, lenders will look to achieve "going concern" security on a UK-based project or asset. This is aimed at putting them in a position of default, stepping in if necessary and operating (or selling) the relevant asset as a going concern. Basic legal security is normally insufficient to achieve this type of outcome; conventional legal security is often supplemented by bespoke contractual arrangements providing lenders with specific notice, "cure" and "step-in" rights.

Where (as is very often the case) the viability of a project as a going concern is dependent upon the continuing availability to an operator or owner of permits and licences, special attention will need to be paid to the consequences of default in the wider sense – by way of example, breach of licence conditions or change of control can result in permits and licences being breached and/or becoming terminable. Certain types of licences and permits are, in effect, personal to the initial licence-holder; contractual rights can be expressed to be non-assignable in the absence of consents. A careful analysis of the regulatory and practical conditions applicable to the application for, and maintenance of, permits, licences and key contracts is necessary and will differ on a case-by-case basis.

The main types of securities under English law are mortgages (equitable and legal), charges (fixed and floating), assignments (broadly equivalent to charges), pledges and liens. Mortgages, charges and assignments are the most frequently used forms of security. Assignments may be legal or equitable; the process for enforcement of the two types of security differs. A debenture will include a range of mortgages, charges and assignments depending on the nature of the security assets.

English law differentiates between legal and equitable interests in assets (including security interests) and, in particular, as regards land and shares.

It is possible, in theory, to create security orally (unless it relates to land) but, in practice, security is always documented. There is no prescribed procedure or form of document required to create security (but see question 2.2 below regarding registration).

A legal assignment of an asset must comply with section 136 of the Law of Property Act 1925. If the secured lender wishes to implement a legal assignment of rights by way of security, then section 136 sets out the procedure. A legal assignment must be in writing and signed by the assignor, be absolute (meaning that the assignee has the entire right to the benefit in the action) and not be set out to be by way of charge only, and any third parties against whom the assignor could enforce the assigned rights need to be notified in writing. If the assignment has been perfected, the assignee has the right to sue the third party in its own name. It is often not possible in project financing to comply with section 136; the vast majority of assignments of receivables, accounts and contracts used for the purposes of project financing are equitable assignments. If the requirements under section 136 are not met, the assignee has an equitable assignment, which does not grant the right to sue the third party in its own name. Assignments of future contracts can only be by way of equitable assignment.

Other securities, such as a charge and a mortgage, require evidence in writing, which can be effected by means of a debenture. Debentures can create legal mortgages and fixed and floating charges over all the borrower's assets, if agreed, and as set out in the debenture. The debenture is executed as a deed.

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

Security is usually taken over real estate by way of a legal mortgage over (ideally) a freehold title, or by the creation (or assignment) of a leasehold interest. Security over moveables is normally effected by way of a fixed charge over plant, machinery and equipment. Plant and machinery which is fixed to land is normally deemed to be part of that land; pipes and cables can in certain circumstances also constitute fixtures. The depreciation position differs between "fixtures" (which effectively become part of the land or property to which they are affixed) and moveables or "chattels" – so fully analysing the legal standing of an asset is important. Complications arise over the creation of security over assets located on the foreshore or in international waters.

The following are the main types of security which require registration:

- company charges;
- mortgages and charges over interests in land;
- security over certain IP rights; and
- security over ships and aircraft.

Registration is important for the chargee to secure its priority rights and ranking in case of the chargor's insolvency.

The procedure is the same as set out above, namely by agreeing the terms and conditions and setting these out in a debenture. In order to perfect a legal mortgage and a fixed charge following the execution of the debenture, the security has to be registered.

Under the Companies Act 2006, a company must register details of any security it grants (subject to some exceptions) at Companies House within 21 days of the date of creation of the security. Failure to register will result in the security becoming void against an insolvency officer, appointed in respect of the chargor and against any creditor. Separate registrations regarding security over land and real estate interests will be required at the Land Registry or at the Land Charges Department. Note that security over intellectual property may also be subject to separate registration procedures (for example, at the Trade Marks Registry).

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

Security over receivables is normally taken by way of assignment. Fixed charges over receivables or bank accounts require the secured lender to control both the receivables and the account into which they are paid when collected; this is almost always impossible as a practical matter in the context of a typical project. Security over receivables can also be taken by way of a floating charge, but the practical value of a floating charge (which "fixes" on the assets it covers only on the occurrence of a crystallisation event) to a lender in terms of asset security may be limited. If the benefit of the receivables is assigned to the lender, then, in order to achieve a legal assignment under section 136 of the Law of Property Act 1925, notice in writing of the assignment must be served on the account debtors – often impracticable where there are a wide range of debtors.

As it may be impractical to serve notice or to impose a high degree of control on this asset class, an equitable assignment or floating charge is often used as an alternative form of security. This form of security enables the chargee to take security without unduly restricting or affecting the chargor's ability to carry on its business, by dealing pre-default with its receivables as if no security had been created. The formalities for this form of security are fewer but floating charges rank behind fixed charges in terms of priority, and the proceeds of floating charge enforcement are subject to certain other prior ranking claims.

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

Project financings will invariably establish a strict regime in relation to the project's cash flows – this will require revenues to be paid into dedicated accounts held by pre-agreed account banks and will set out clear rules on the priority of application of available cash (the Cash Flow Waterfall). A typical project account or account bank agreement will establish strict rules as to permitted withdrawals from those accounts.

Withdrawals will cease to be permitted upon the occurrence of an actual or potential Event of Default. Any withdrawal which is not permitted under the relevant accounts or account bank agreement will trigger default; default will permit the lenders to enforce security. In the context of receivables and bank accounts, this will include transferring to the lenders full control over receivables and accounts.

As it may be impractical to serve notice or to impose a high degree of control on this asset class, an equitable assignment or floating charge is often used as an alternative form of security. This form of security enables the chargee to take security without unduly restricting or affecting the chargor's ability to carry on its business by dealing pre-default with its receivables as if no security had been created. The formalities for this form of security are fewer but floating charges rank behind fixed charges in terms of priority, and the proceeds of floating charge enforcement are subject to certain other prior ranking claims.

The new law, the Business Contract Terms (Assignment of Receivables) Regulations 2017, applies to contracts governed by English law and invalidates a clause which purports to prohibit the assignment of a receivable.

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

Security over shares in companies incorporated in England and Wales can either be taken by way of legal mortgage, or by way of charge over the shares (an equitable mortgage or charge). The governing law of the mortgage should always be English law. The convention in English law financings for security over shares in the context of projects is for security to be effected by way of equitable charge; lenders will always (subject to very limited exceptions) resist becoming shareholders of record in an SPV or project vehicle for a wide range of reasons, including incurring shareholder liabilities and reputational risk. Equitable share charges are normally protected by means of a power of attorney in favour of an agent or trustee for the lenders, enabling the lenders to take a legal transfer of shares if default occurs, where absolutely necessary.

In the ordinary course of events, secured lenders will normally be happy for the sponsors/relevant chargors to retain legal title to shares until an Event of Default and/or enforcement event occurs.

A legal mortgage of shares involves the transfer of the relevant shares in the company to the lender from the outset, subject to an agreement for their re-transfer once the secured debt is repaid. The lender will be registered in the company's register of members as a fully entitled shareholder of the company, and not just as a mortgagee. As a result, the transfer will operate so as to give the lender all the rights of a shareholder. While the lender is registered as a shareholder, it will receive all dividends and any other money or assets paid in relation to the shares, and will be entitled to vote as a shareholder.

With an equitable mortgage or charge of shares, the chargor remains as a registered shareholder and retains legal title to the shares, transferring only its beneficial interest to the lender. The chargor will normally be required to lodge its share certificates and stock transfer forms with the lender, on the basis that the stock transfer forms can be completed by the lender (in favour of itself or a nominee) if an Event of Default or enforcement event occurs. Voting rights and the right to receive dividends will normally remain with the chargor until an Event of Default occurs.

The CREST system allows CREST members to grant legal and equitable mortgages over their shares held in CREST.

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

A nominal fee is payable to Companies House on registration of security by a company. The fee does not vary according to the class of asset or type of security. Separate registration is required for each security document. The fee is currently £23 for registering a security document using the paper filing process, and £15 for using the electronic filing process.

Additional fees are also payable for registration to the Land Registry or Land Charges Department as regards security over land. These fees are registration fees and will not usually be significant in the context of the overall transaction. No stamp duty is payable on the registration of security.

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

Registration with Companies House requires the completion of a specified form and must be undertaken within 21 days of the creation of the security, or it will be void on insolvency and against other creditors.

Companies House is not responsible for inaccuracies in the registered particulars (acceptance of the particulars does not guarantee their accuracy). Inaccuracies in the registered particulars can have serious consequences as regards priority and effective registration. Responsibility for ensuring the accuracy of the registered particulars lies with the presenter (in practice, the chargee or its advisors). The 21-day period includes bank holidays and weekends and does not stop running if the Companies House registrar identifies a defect and returns the registration form for correction. As a result, in the context of complicated security documents, it is essential to draft and agree the registration particulars in advance of financial close. If necessary, these particulars can be pre-agreed with Companies House to reduce the risk of rejection and the loss of time (and priority).

Charges over certain assets, such as land, intellectual property rights, ships and aircraft, need to be registered at other specialist registries related to the asset in question, as well as at Companies House.

On 6 April 2013, a new regime for the registration of security came into force via the Companies Act (Amendment of Part 25) Regulations 2013 No. 600. This regime is intended to streamline existing procedures and to reduce uncertainty over registration.

Principal features of the new registration regime include:

- **Scope of charges covered**: All charges created by a company are registrable except for a narrow range of excluded items. The company and any person "with an interest in the charge" is entitled to register the charge.
- **"Voluntary" registration**: Failure to register security is no longer a criminal offence. However, commercial sanctions for non-registration (whereby non-registered security becomes void against a liquidator, administrator or creditor and any secured debt becomes immediately re-payable) continue to apply. Security should still be registered within the 21-day window.
- **Filing, e-filing and statements of particulars**: Persons wishing to register security have the option of registering via an electronic filing system. Under this system, a statement of particulars must be filed online together with a certified copy of the charging document. The entire charging document is available to view online, although certain personal information (such as bank account details) can be redacted. There is no longer any need to send an original charging document to Companies House.

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

Subject to limited exceptions in relation to certain types of UK Government-owned, strategic and regulated assets, no regulatory or similar consents are required in relation to most land and real estate rights or in relation to most types of privately held assets. Specific legal regimes apply, however, to different types of regulated assets – for example, certain types of governmental assets (in particular, those associated with defence), nuclear generation, nuclear fuel production and reprocessing plants and related sites and certain assets vested in specific types of privatised businesses (for example, water and transmission businesses). In addition, licences granted by Ofgem (the gas and electricity regulator in England and Wales), regulatory authorities in relation to exploration for and development of hydrocarbon assets or the Financial Conduct Authority, may affect the granting of any mortgage, charge or other form of security over an asset. The consent of Ofwat (the regulator of the water and sewage industry in England and Wales) may also be required under the instruments of appointment by the Secretary of State for the Environment for water and sewerage, undertaken under the Water Act 1989.

## 3 Security Trustee

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

England and Wales fully recognise the concept of trusts. Trusts are normally used to create beneficial interests in assets which may differ from the strict legal ownership of those assets. Trust deeds are often used alongside debentures in England and Wales to create and regulate the holding of security over assets.

The creation of a trust by a borrower will normally involve the conveyance by the borrower to a trustee (usually a trust corporation – either an eligible financial institution or a specialist trust company such as any Law Debenture or Banker's Trust) who may hold the security for the benefit of itself, the other secured lenders in the transaction and (on a residual basis) for the borrower itself. English law trusts are normally long-term arrangements; beneficial ownership remains with the secured party so the trust assets do not fall within the trustee's estate if the trustee becomes insolvent.

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

This is not applicable in our jurisdiction. See question 3.1 above.

## 4 Enforcement of Security

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

In general, no. In relation to unregulated assets, there is no requirement for a public auction following enforcement of security. It is impossible to exclude the possibility of third parties seeking injunctive relief to prevent enforcement of security or the sale of secured assets following enforcement, but generally English courts will oppose any such proceedings where security was validly given and (where required) properly registered.

The Financial Collateral Arrangements (No. 2) Regulations ("FCA") came into force in England and Wales in December 2003 in order to implement the Financial Collateral Directive (2002/47/EC), with the aim of simplifying the enforcement of security over cash, financial instruments (including shares, bonds and warrants) and credit claims.

The FCA Regulations 2003 were amended by the Financial Collateral Arrangements (No 2) Regulations 2003 (Amendment) Regulations 2009 (SI 2009/2462) which came into force in October 2009. These amendments provided for changes in the Companies Act.

The FCA Regulations 2003 were further amended by the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993) (FCA Amendment Regulations 2010). These came into force on 6 April 2011 and included credit claims as financial collateral.

Following the FCA, paragraph 43(2) of Schedule B1 to the Insolvency Act 1986 will not apply to any security interest created or otherwise arising under a financial collateral arrangement. This means that neither the consent of the administrator, nor the permission of the court, is required to enforce such a security interest, which would otherwise be applicable when a company is in administration or the subject of a company voluntary arrangement.

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

"Foreclosure" has a narrower meaning under English law than it does in the US.

Foreclosure in the context of security over an asset is the process by which the mortgagor's rights in the secured asset are extinguished (the mortgagor's equity of redemption is extinguished), and that asset becomes bested in the mortgagee.

The mortgagee could obtain a court order under which it becomes the owner of the property. A mortgagee's right to foreclose arises once the liabilities secured by the mortgage have become repayable.

Even in these circumstances, a mortgagee normally has certain obligations to the mortgagor – including an obligation to obtain a reasonable price on sale of a mortgaged asset, and (pursuant to the "equity of redemption") to return any excess proceeds over the secured debt finalised by it to the mortgagor. In general, under English law, foreign investors are treated differently from businesses established in England and Wales in relation to the enforcement of security.

## 5 Bankruptcy and Restructuring Proceedings

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

There are different types of insolvency proceedings under English law:

- administration;
- receivership/administrative receivership;
- compulsory liquidation;
- company voluntary arrangements (CVAs); and
- schemes of arrangement.

From a lender's perspective, administration and administrative receivership are the most important regimes.

Lenders to a project normally insist on taking security over all, or substantially all, the Project SPV's rights and assets. Special rules apply to security created by "Project Companies" (prior to the Enterprise Act 2002, these rules were capable of applying to all businesses). An administrative receiver is generally appointed over the whole of the company's assets by, or on behalf of, the holders of any of the company's charges which, as created, were floating charges. Since the coming into force of the Enterprise Act 2002, only lenders holding security created before 15 September 2003 are able to appoint an administrative receiver, subject to certain exceptions. The key exception in the case of project finance is that set out under section 72E of the Insolvency Act 1986. Section 72E states that the appointment of an administrative receiver by a project company is not prevented if the project is a "financed" project and is subject to step-in rights. A project is "financed" if, under an agreement relating to the project, a project company incurs (or, when the agreement is entered into, is expected to incur) a debt of at least £50 million for the purposes of carrying out the project. The administrative receiver's primary duty is to the secured lender who appointed him, but he is also an agent of the company. If the secured lender has the highest-priority fixed charge over the company's assets, the lender may appoint one or more fixed-charge receivers over the secured assets. Appointing its own receiver offers the lender more control over the realisation of the assets.

Out of court, an administrator can be appointed by the holder of a "qualifying" floating charge, provided that the charge relates to the whole or substantially the whole of the company's assets, and the company has triggered an Event of Default under the financing documentation. A company need not be insolvent in order for administration to occur. Once appointed, the administrator owes his duties to all creditors, not only to the project lenders. His primary objective is to rescue the company as a going concern. If a lender has the right to appoint an administrative receiver (as described above), that lender may veto the appointment of the administrator.

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

Following the formal insolvency of a company, an administrator or liquidator may challenge transactions entered into by the company before the start of the relevant insolvency procedure. The period when such transactions are vulnerable to being challenged is known as a "hardening period". Such transactions include transactions at an undervalue, preferences, extortionate credit transactions, avoidance of floating charges and transactions defrauding creditors. The hardening period ranges from two years (transactions at an undervalue) to six months (preferences).

A creditor with a claim that ranks in priority to other unsecured creditors and (in corporate insolvencies) to floating charge holders and the prescribed part (Schedule 6 and sections 175, 176, 328, 347 and 386, Insolvency Act 1986) is a preferential creditor. Employees are usually the only preferential creditors following the introduction of the Enterprise Act 2002 (they will receive wages, holiday pay and contributions to pensions). In order of priority, a party secured by way of mortgage or fixed charge will rank ahead of any preferential creditors. Preferential creditors are paid from the proceeds of floating charges, which are ranked below the fixed-charge creditors but above all other unsecured creditors.

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

Private-sector entities incorporated in England and Wales are generally not excluded from bankruptcy proceedings in England and Wales.

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

Injunctive relief may be available from the English courts in unusual and/or extreme circumstances. As described in the responses to questions 2.1 to 2.5 above, typical project security arrangements will include:

- detailed contractual controls over project receivables, cash and bank accounts; and
- "step-in" and related contractual arrangements with counterparties to key project documents providing protection against borrower non-performance, insolvency and other matters.

There are specific insolvency regimes relating to the insolvency of PPP and public finance initiative ("PFI") projects and in relation to the preservation of certain types of strategically important assets (for example, certain pipelines and transmission assets).

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

Part 26 of the Companies Act 2006 provides a procedure for companies to make a compromise or arrangement with its creditors (or any class of them), which will be binding on all creditors in the relevant class(es) if the requisite majorities vote to approve the scheme. A scheme requires the approval of a majority in number of creditors holding 75% in value of each affected class, and the sanction of the High Court of England and Wales. The court will consider any objections from creditors, which commonly relate to the provision of insufficient information or notice of the scheme and/or the fairness of class composition. There is no statutory moratorium attached to the scheme, although lock-up agreements, whereby creditors commit in advance to vote in favour of the scheme and agree not to take enforcement action, are common in practice. Since the legislation does not prescribe the subject matter of a scheme, it is a highly flexible device and is available to any company which can be wound up under the Insolvency Act 1986. This includes UK-registered companies, unregistered companies and foreign companies, provided a sufficient connection with England is established. This is a determination on the facts, but the presence of English law governed debt, often together with English creditors or bank accounts, will typically be considered sufficient.

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

Under English law, a director will potentially be liable for wrongful trading if "at some time before the commencement of the winding up of the company, that [director] knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent liquidation" (section 214(2), Insolvency Act 1986). A director will have a defence if, after that director knew or should have concluded that there was no reasonable prospect of avoiding an insolvent winding-up or entering insolvent administration, the director took every step with a view to minimising the potential loss to the company's creditors which he ought to have taken (section 214(3), Insolvency Act 1986). This will generally give conscientious directors facing financial difficulties sufficient time to organise a restructuring while continuing to trade, provided there continues to be a reasonable prospect that restructuring negotiations will successfully conclude (even if in fact they do not). Liability for fraudulent trading (that is, knowingly carrying on the business of the company with the intent to defraud creditors) can also extend to directors, who may be personally liable in an action brought by a liquidator. Directors could also face criminal liability for fraud, misconduct, falsification of the company's books, material omissions from statements and false representations under sections 206 to 211, Insolvency Act 1986 and are liable to disqualification from being a director of any company for up to 15 years under the Company Directors Disqualification Act 1986.

## 6 Foreign Investment and Ownership Restrictions

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

There are no restrictions on foreign investors investing in UK companies as a general rule under English law, but there are specific statutory regimes in place for certain industries. Authorisation is required for investment in specific regulated areas including the nuclear industry, banking, media, financial services and defence.

UK and EU competition rules may impact ownership by companies with UK, EU or global business turnovers exceeding specific thresholds.

Compliance with EU directives may impact an entity's ability to invest in or own certain assets.

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

The UK has signed bilateral investment treaties, protecting investor rights, with around 120 countries.

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

Expropriation of assets or companies is generally rare in the UK in the absence of hostilities, breach of international sanctions or financial market turmoil. Certain public-private assets are subject to compulsory purchase powers; compulsory purchase is also possible (subject to public processes and appeal rights, and to the payment of "market value" compensation) for the development of infrastructure and other assets (such as new railway lines). Subject to limited exceptions (for example, the State's ability to acquire shareholdings in financial institutions in certain circumstances), the State has no special legal right to expropriate private-sector assets.

## 7 Government Approvals/Restrictions

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

The exact nature of the project will determine which regulatory bodies and/or UK Government agencies will have authority over the project. However, there are a number of bodies which have an overarching function in respect of development related to the typical project sectors.

**Local Authorities**

The majority of onshore projects will require planning permission, and the identity of the body granting planning permission depends on the nature of the project. Planning permissions are usually granted by the local authority of the relevant area. Local authorities are also responsible for granting consent for the storage of large quantities of hazardous substances, such as natural gas and chemicals. Local authorities, and the London Mayor, introduced the Community Infrastructure Levy in April 2010, which is a charge attached to development once it has been granted planning permission, to fund and pay for the maintenance of local infrastructure.

**National Infrastructure Planning**

Where a proposed development in England is classed as a Nationally Significant Infrastructure Project (e.g. power plants, airports and major road schemes), planning permission/development consent for these will be dealt with by the Planning Inspectorate (specifically the Major Infrastructure Planning Unit). The ultimate decision-maker for such projects will be the relevant Secretary of State, e.g.

the Secretary of State for Energy and Climate Change in the case of energy projects.

**Welsh Assembly Government**

Planning decisions which would be taken by the relevant Secretary of State in England will be made by the Welsh Ministers when these projects are in Wales.

**Environment Agency ("EA")**

The EA is the main environmental regulator in England and is responsible for the environmental permitting regime, which covers a variety of areas including waste management, water pollution and air pollution. There is a separate Welsh Environment Agency which, on 1 April 2013, was merged into a new environmental body for Wales alongside the Countryside Council for Wales and Forestry Commission Wales.

**Health and Safety Executive ("HSE")**

The HSE is the principal regulator for all health and safety issues in Great Britain.

**Marine Management Organisation ("MMO")**

The MMO implements and regulates the UK's marine planning and licensing system in respect of all offshore construction works.

A number of other public, private or semi-public regulators may also have authority over projects, depending on their exact nature. These may include Natural England, the Crown Estate, the Office of Gas and Electricity Markets (Ofgem), the Water Services Regulation Authority (Ofwat) and the Office of Communications (Ofcom).

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

In general, no. Registration of prescribed particulars at Companies House and/or other applicable registrars must, however, comply with the relevant registration requirements.

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

**Land**

To own land in England and Wales there is no requirement for a licence, nor is there any general bar on foreign ownership of private-sector land.

**Water**

In order to impound or abstract groundwater and surface water, a licence must be obtained from the Environment Agency.

**Wind, wave, tidal and solar energy**

No licences are required to use any renewable energy resources, although the usual planning permissions and consents required to carry out construction and engineering works will be required. A licence to generate electricity (or an exemption from obtaining such a licence) must also be obtained from the Department for Business, Energy and Industrial Strategy.

**Minerals (other than oil and gas, coal, gold and silver)**

Ownership rights of minerals located in privately owned land (except oil and gas, coal, gold and silver) will generally reside in the owner of the surface land, although these rights may be retained by a previous landowner.

The Crown Estate generally holds the right to exploit all minerals on the UK foreshore and continental shelf, with the exception of gas, oil and coal.

**Oil and gas**

Ownership of all onshore and offshore oil and gas in Great Britain (to the limits of the continental shelf) is vested in the Crown. The OGA grants exclusive rights to "search and bore for and get" petroleum within Great Britain. The rights granted by onshore licences do not include any rights of access, which must be obtained from the relevant landowner, and the licensees must also obtain any consents required under other legislation, such as planning permissions and environmental permits. Licensees wishing to enter or drill through coal seams for coal-bed methane and coal mine gas must also seek the permission of the Coal Authority (see below). Within UK territorial waters, consent for placing installations and laying pipelines on the seabed must be obtained from the Crown Estate.

**Coal**

Following the privatisation of the coal industry in 1994, the ownership of almost all coal now resides with the Coal Authority, which grants licences for coal exploration and extraction.

**Gold and silver**

Rights to gold and silver in most of England and Wales are owned by the Crown, and a licence for the exploration and development of these metals must be obtained from the Crown Estate Commissioners through the Crown Mineral Agent.

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

Owners of minerals may receive royalties in relation to the extraction of minerals. Such royalties would be subject to UK tax. From April 2013, all mineral royalties are taxed 100% to income tax rather than 50/50 to income and capital gains tax, as before. There may be restrictions in place in relation to the extraction and exploitation of natural resources. For example, the Environment Agency has discretion to refuse to grant water abstraction licences if it believes there will be a detrimental environmental effect.

Customs procedures and/or duties may apply on certain exports.

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

There are no general restrictions on foreign currency exchange.

The Money Laundering Regulations could be relevant, and apply to all categories of businesses, including those active in the UK financial sector.

Fees may be imposed by banks in the UK when dealing in foreign currencies. Corporation taxes may arise on exchange gains and losses, depending on the asset or liability in question.

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

The UK is business-friendly (gateway to the European Union, and relatively low levels of bureaucracy). There is no exchange control regulation, which means that repatriation of funds is straightforward subject to international sanctions that may be in place (for example, against North Korea). There is no discrimination in favour of local companies and there is no requirement to reinvest profits in the UK.

Remittance applies on an individual basis when a non-UK domiciled UK resident can choose to pay tax on the "arising basis" or on the "remittance basis". The latter is when the individual pays tax on UK income and gains and on any foreign income or gains that are brought into (remitted) into the UK.

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

Subject to UK and EU sanctions and the Money Laundering Regulations, project companies in England and Wales can establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions.

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

No; only as agreed contractually amongst the shareholders of a project company, its lenders and the parent. There are UK- and EU-specific tax implications, however.

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

Legislation and regulations, in addition to the permits and licences already mentioned above, that may affect a project include:

**Environmental impact assessment**

Where a development may have adverse impacts on the environment, the developer will be required to submit an environmental impact assessment to the relevant planning authority when applying for planning permission/development consent.

**Contaminated land regime**

The contaminated land regime contained in Part 2A of the Environmental Protection Act 1990 may apply to any project that either pollutes land and/or water or is located on previously contaminated land. Under the regime, liability for the clean-up of contaminated land falls on any person who causes or knowingly permits contamination in, on or under land. If such people cannot be found, then liability passes to the current owners and/or occupiers, regardless of their awareness of the contamination. However, if a project involves redevelopment of a site, then it is likely that the planning regime will govern clean-up rather than the contaminated land regime.

**Common law**

A person (including a company) who has suffered loss as a result of environmental or health and safety issues such as noise, odour or other pollution, may in some cases be entitled to bring a civil claim under the common law of nuisance, negligence, or trespass and/or the rule in *Rylands v Fletcher* against those who have caused the loss.

**Statutory nuisance**

Certain nuisances such as noise and dust are regulated by local authorities as "statutory nuisances".

**EU Industrial Emissions Directive (2010/75/EU)**

The Industrial Emissions Directive is the main EU instrument, aiming to prevent or reduce emissions to air, land and water from industrial installations. The Directive requires installations within its scope to operate under a permit and streamlines permitting, reporting and monitoring requirements to simplify and reduce the administrative burden on operators.

Most installations will have to comply with the Industrial Emissions Directive from 7 January 2014, but this depends on the type of installation.

**Environmental Permitting regime**

The Environmental Permitting regime is an integrated permitting regime which regulates a range of activities which may give rise to pollution, including those covered by the EU Industrial Emissions Directive, such as waste management, air pollution and water pollution.

**Climate change**

The Climate Change Act 2008 established a framework to develop an economically credible emissions reduction path. The Department for Business, Energy and Industrial Strategy focuses on climate change and energy supply.

**Environmental Damage (Prevention and Remediation) (England) Regulations 2015**

These Regulations implement the EU Environmental Liability Directive (2004/35/EC) in England. There are equivalent regulations in Wales. They apply to damages to species, habitats or water, or risks to human health from contamination of land, and require those responsible to take immediate action to prevent damage occurring or remediate damage where it does occur.

**Nature conservation legislation**

The Environment Agency and Natural England are responsible for enforcing laws implementing the EU Wild Birds Directive (2009/147/EC) and the EU Habitats Directive (92/43/EC), which protect certain species and habitats.

**Health and safety legislation**

The Health and Safety at Work etc. Act 1974 provides the framework for health and safety regulation in England and Wales. The Act is enforced by the Health and Safety Executive and local authorities, although in general the HSE will be the regulator for major projects. Other legislation such as the Control of Major Accident Hazards Regulations 2015/483 may also apply to major projects.

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

The EU procurement laws (as implemented in England and Wales) are applicable to project companies developing public-sector projects, if the public contracts fall within the scope of the rules and exceed certain financial values. The rules ensure that the award process is transparent, non-discriminatory and respects the principles of equal treatment.

EU procurement laws apply to contracts awarded by central governments, local authorities or other public-sector bodies.

## 8 Foreign Insurance

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

There are no restrictions on insurance policies over project assets provided by foreign insurance companies, unless the foreign insurance company is carrying out and effecting the insurance in the UK.

If the foreign insurance company is carrying out and effecting the insurance in the UK, it may require authorisation by the Prudential Regulation Authority ("PRA"), and may therefore have to comply with the PRA rules, unless it can rely on European Economic Area ("EEA") "passporting" rights or other exclusions. The PRA was created by the Financial Services Act 2012 and is part of the Bank of England.

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

Foreign banks, and other foreign creditors, can be co-insured by the insurance company over the project assets.

## 9 Foreign Employee Restrictions

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

The general position is that EEA nationals have the automatic right to work in the UK by virtue of being an EU citizen. In addition, Swiss citizens and Commonwealth nationals who have a grandparent born in the UK or the British Islands have been granted permission to work in the UK. Unless an individual falls into one of these categories, they must obtain immigration permission to work in the UK under the Points-Based System ("PBS") by falling into one of the new tiers (employers must be aware there are five distinct tiers) of the PBS or be a dependant of a migrant coming to the UK under one of the tiers. With the exception of Tier 1, migrants must be "sponsored" before they can apply to enter or remain in the UK. UK employers need to obtain a sponsor licence from UK Visas and Immigration (UKVI) before they can employ migrants under Tiers 2–5. Tier 1 categories require migrants to make their own applications to enter and stay in the UK to work.

## 10 Equipment Import Restrictions

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

As the EU is a customs union, UK companies can buy most goods from other member countries without restrictions – although VAT and excise duty will normally still apply. If a UK company imports from outside the EU, it may have to comply with import licensing requirements and with common customs tariffs that apply across the EU. Apart from the general restrictions concerning materials that are deleterious to health and safety and the environment, there are no legal restrictions or controls which apply exclusively to importing construction equipment.

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

This is not applicable. Please see the response to question 10.1.

## 11 *Force Majeure*

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

*Force majeure* provisions and exclusions are set out in virtually all project documents, and although the term "*force majeure*" is derived from French law with no recognised meaning under English law, such provisions and exclusions are enforceable under English law provided that they are properly defined in the agreement. Normally *force majeure* exclusions do not apply to payment obligations.

## 12 Corrupt Practices

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

The Bribery Act 2010 received Royal Assent in April 2010 and came into force on 1 July 2011. It repeals previous statutes in relation to bribery, including the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (the "Bribery Act" or the "Act"). The legislation arms prosecutors with a range of criminal offences which will cover a wide range of conduct that they may employ to prosecute any potentially corrupt activity. The Bribery Act's arrival coincides with a significant shift in the UK's approach to fighting corruption which has seen prosecutors bring companies into the criminal courts for corruption on numerous occasions in recent years. The Act reflects a general tightening of anti-bribery laws globally in line with the OECD Convention on the Combating of Bribery, as well as an increased level of international cooperation to enforce such legislation; however, the Act raises the bar even higher than equivalent legislation in other jurisdictions, such as the US Foreign Corrupt Practices Act.

The Act affects all UK businesses and those incorporated abroad who do business in the UK, and creates four new offences related to bribery (the offering or receipt of financial or other advantages) of a person with the intent of bringing about improper performance of that person's duties. These are:

(1) Offering (or promising or giving) a bribe, intending that another person perform their duties improperly (or rewarding them for having done so).

(2) Accepting (or requesting or agreeing to accept) a bribe, intending that duties will be performed improperly.

(3) Bribing a foreign public official in order to retain business or to gain an advantage in the conduct of business.

(4) Failure of commercial organisations to prevent bribery on behalf of the organisation. If any person associated with an organisation is found guilty of bribery, then the organisation is deemed guilty of an offence, unless it can show it had adequate procedures in place to prevent those people from committing bribery.

Individuals found guilty of certain of these offences can be imprisoned for up to 10 years and/or receive an uncapped fine. Commercial organisations found guilty of any of the above offences can receive an uncapped fine. Directors and senior officers of commercial organisations may also be convicted if they are deemed to have given their consent or connivance to the offence.

For natural resources companies operating in countries where government offices are seen by some in positions of influence as an opportunity to accumulate personal wealth and as involving tasks which justify small additional financial incentives, the Bribery Act presents a significant compliance challenge, not least because the list of those who can expose the company and risk a criminal conviction extends well beyond its employees.

The corporate offence of failing to prevent bribery means that senior management may be held accountable for the actions of persons associated with the organisation. A company's only defence is to show that it had adequate bribery prevention procedures in place. These would include establishing policies which define acceptable behavioural limits, procedures to record all related events with a means of seeking approval in uncertain cases, and training and briefing for all staff likely to be affected by the provisions of the Act.

The Act has forced natural resources companies which do business in the UK, and UK companies which do business overseas, to re-examine their approach to assessing and managing bribery risk throughout their operations in the UK and abroad to ensure that adequate anti-corruption procedures are in place internally. Such procedures also need to address the risk that third-party service providers will expose the company to criminal liability by bribing in connection with the company's business.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements relating to projects located in England and Wales are generally governed by the laws of England and Wales. Scottish law is substantially different to English law and normally applies to some or all project documents relating to projects located in Scotland. Northern Irish law is broadly similar to English law, subject to a number of qualifications.

### 13.2 What law typically governs financing agreements?

Financing agreements for English projects are generally governed by English law. Financing agreements for a broad range of projects located throughout the world are often subject to English law.

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

Land-related agreements, concessions and the like, and permits and consents, are normally governed by the law of the location of the project.

## 14 Jurisdiction and Waiver of Immunity

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

Judgments obtained through a party's submission to a foreign jurisdiction may be legally binding and enforceable, provided the conditions for recognition and enforcement of those judgments are fulfilled. Judgments, relating to civil and commercial matters, of EU Member State courts (except Denmark), dated from 10 January 2015 onwards, will be enforceable in England and Wales pursuant to the Recast Brussels Regulation (EU 1215/2012). Similar rules apply to Iceland, Norway and Switzerland pursuant to the 2007 Lugano Convention. Judgments of courts of some non-EU States (mainly Commonwealth members) with which reciprocal conventions exist will be enforced by a different process of registration under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Judgments of courts of all other States will usually be enforced through new English proceedings and the English courts must recognise the basis on which jurisdiction was accepted by the ruling court; namely, territorial or submission. Typical exceptions to these regimes include: judgments obtained following fundamental procedural irregularities; proceedings brought in breach of statutory or international convention obligations; or where the judgment is based upon fraud, is contrary to English public policy or natural justice, or is contrary to the Protection of Trading Interests Act 1980 (e.g. for multiple damages).

Sovereign immunity is governed by the State Immunity Act 1978. The starting point is that a State or State entity will enjoy sovereign immunity from both suit and attachment. However, the Act contains several ways in which a court can disregard this immunity, such as a consensual waiver. If the usual conditions for recognition and enforcement of a judgment are fulfilled, a State will not benefit from immunity if it would not have been able to claim immunity had the proceedings been brought in the UK. Ordinarily, where a sovereign entity is acting in a private or commercial capacity, it will not be entitled to claim sovereign immunity from suit or attachment.

## 15 International Arbitration

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

Contractual provisions in project documents governed by the laws of England and Wales requiring submission of disputes to international arbitration are generally recognised, and supported by the courts of England and Wales. Provided the arbitration agreement is in writing, the English courts will stay any proceedings brought in breach of that agreement unless the court is satisfied that the arbitration agreement itself is null and void (Arbitration Act 1996). The UK is a signatory to the New York Convention, under which arbitral awards may be recognised and enforced.

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

The UK has been a Contracting State to the New York Convention since December 1975.

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

Whether or not a matter can be subject to arbitration is determined on a case-by-case basis, although arbitration is, in general, limited to civil proceedings. Criminal or family law matters, or matters relating to status, are not capable of being submitted to arbitration. Disputes in which the UK Government has a direct interest, such as criminality, cannot be submitted to arbitration. However, a claim for compensation arising out of a criminal act may well be arbitrated (for example, in respect of a claim for trespass to the person or property, as these would be civil actions). Divorce also cannot be arbitrated and can only be granted by the courts in England and Wales, though the division of property might be subject to arbitration proceedings, provided that the arbitrator was not involved in the initial divorce proceedings. Similarly, succession issues do not lend themselves to arbitration and wills are usually only contested in court, though certain matters involving trusts might well be arbitrated. Again, the beneficiaries of a will can agree to a different method of sharing out the estate and could enlist the help of an arbitrator in reaching a settlement. Arbitration of issues involving minors and the insane is sometimes possible, but enforcement will be subject to the same constraints as apply to the courts in respect of enforcement of claims against minors and the insane for public policy reasons.

In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal. However, the validity of a patent would not ordinarily be arbitrated, as patents are subject to a system of public registration. Therefore, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination. It is relevant to note that, although the English courts at one point suggested that an arbitration agreement would be considered "null, void and inoperative" insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law (see *Accentuate Ltd v ASIGRA Inc.* [*2009*] *EWHC 2655*), this approach has not been followed in subsequent cases (see *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [*2014*] *EWHC 2908* (*Ch*)). This case has subsequently received positive judicial treatment. However, there has not yet been any ruling by an appellate court in relation to this issue and, therefore, some ambiguity remains.

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

As a general principle, arbitration is consensual rather than mandatory. If a matter is arbitrable pursuant to agreement by the parties, then it is subject to the relevant dispute resolution and jurisdiction clause in a contract.

## 16 Change of Law / Political Risk

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

There have not been any calls for political risk guarantees in England and Wales in recent years. Lenders will typically require direct agreements with governmental authorities if the project is a PPP or PFI project. Direct agreements are commonly entered into by lenders with key project contract counterparties in all types of UK-based projects. Following retroactive changes to regulatory support regimes for renewable energy projects in countries such as Spain, Greece, Bulgaria and the Czech Republic, investors in renewable energy are understandably wary of "change in law" risk in the renewables sector and the damaging effect that such retroactive changes can have on a project's economics. For this reason, both the CfD and IUK Guarantee contain provisions safeguarding the generator/guaranteed beneficiary against UK "change in law" risk.

## 17 Tax

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

The UK imposes a withholding tax at the basic rate of income tax (currently 20%) on any payment of yearly interest arising in the UK. Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20% of such interest payment and account for this withheld amount to the UK tax authorities. Double tax treaties exist with many other jurisdictions, which in many cases will reduce withholding tax.

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

There are no UK tax incentives provided preferentially or specifically to foreign investors or creditors. Specific incentives are afforded to foreign investors in relation to the construction and operation of projects and businesses in specified locations.

## 18 Other Matters

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

Currency exchange risk will always be a consideration for foreign investors in UK-based projects, where revenues are almost always sterling-based.

Change of law remains (as in all other jurisdictions) a risk for investors in the UK (albeit a risk of very low magnitude, but examples include the early closure of the Renewable Obligation regime in the UK), given the inability of any administration to tie the legislative hands of its successors.

EU, US, UK and UN sanctions can be an issue if a project or business might involve dealing with sanctioned persons, entities or assets.

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

There are no legal requirements that apply exclusively to project companies seeking to issue bonds or similar capital markets instruments.

Any project company seeking to issue debt instruments (securities) on the London Stock Exchange ("LSE") must comply with the UK Listing Authority ("UKLA")'s Listing Rules (the "Listing Rules"). The UKLA, a division of the Financial Conduct Authority, is the body responsible for regulating all securities listed on the LSE. The

Listing Rules contain (i) the rules and regulations for listing debt securities, and (ii) the continuing obligations that apply to issuers and bondholders for the duration of the listing. The Listing Rules cover principles ranging from corporate governance and executive remuneration to accounting standards and full disclosure of information to prospective investors.

Debt securities admitted to the Main Market of the LSE must be listed in accordance with Chapters 2 and 17 of the Listing Rules. Debt securities admitted to the Professional Securities Market must be listed in accordance with Chapter 4. All debt securities admitted to trading must comply with the LSE's Admission and Disclosure Standards and the relevant Disclosure and Transparency Rules.

Rules may differ according to the issuer's market sector. For example, mineral, oil and natural gas companies are subject to the additional disclosure requirements set out in Chapter 6 of the Listing Rules. Rules may also differ according to the issuer's investor base. For example, an issuer will be subject to more stringent obligations if marketing its securities to retail investors as opposed to solely professional investors.

## 19 Islamic Finance

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

Although these instruments have been used in other financing contexts in England and Wales (such as acquisition finance, corporate finance and capital markets), they have not yet been used in the project financing context in England and Wales. Were they to be employed, then it would be likely that an *Istina'a* or *Wakala* arrangement would be used for the purposes of financing the construction of the assets during the pre-completion period, and such assets would then be leased by the financier (as direct or indirect owner of the assets) to the project company, pursuant to the *Ijarah*. The *Ijarah* is the mechanism by which the principal and the profit margin are returned to the financier during the post-construction period of a project financing as rental consideration comprising the purchase price of the asset as well as a fixed and/or floating profit margin calculated by reference to LIBOR. A *Murabaha* instrument could be used to make available either a working capital facility to the project company or equity bridge loans to the project company, with full recourse to the sponsors.

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

*Shari'ah* is not applied in the UK, and English law does not recognise *Shari'ah* as a system of law capable of governing a contract, on the basis that English law does not provide for the choice or application of a system of law other than a system of national law. This is based on the Convention on the Law Applicable to Contractual Obligations 1980 (the Rome Convention), which requires that a governing law of an agreement must belong to a country, and *Shari'ah* does not belong to a particular country (albeit that *Shari'ah* has been adopted, through legislation, by countries such as Saudi Arabia).

The approach of the English courts, in the main, has been to distinguish between the *Shari'ah* and the contractual governing law of an Islamic finance agreement by ruling that *Shari'ah* issues are not justiciable in the English courts. That element of the agreement is deemed as forming part of the commercial agreement (which English courts will rarely interfere with) and not the legal agreement. Instead the dispute will be dealt with by applying the ordinary principles of English law, and an English court will avoid ruling or commenting on the compliance of the agreement with *Shari'ah* (see *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [*2003*] *2 All ER* (*Comm*) *84*). This approach was reaffirmed in a recent English High Court case, *Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2017] EWHC 2928*, where Dana Gas (an issuer based in the UAE) was attempting to render its *mudarabah sukuk* unenforceable on a number of grounds, one of which was that its *sukuk* was not *Shari'ah*-compliant.

Parties may still elect to have a dispute in relation to a contract determined and resolved in accordance with *Shari'ah* principles by submitting to arbitration. Under section 46 of the Arbitration Act 1996, arbitral tribunals are obliged to decide disputes with reference to either the national law chosen by the parties or any other agreed considerations (including *Shari'ah* considerations).

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

Generally, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability in England and Wales, unless that interest payment obligation is deemed a penalty offending the rules laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garages & Motor Co Ltd* [*1915*] *AC 79* and *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis* [*2015*] *UKSC 67* (*Cavendish*). Note that a contractual provision for payment of a higher rate of interest after a default in payment by a borrower could be deemed to be a penalty; however, this will be difficult to establish in view of the new test set out in *Cavendish* which requires that the clause in question impose a detriment on the contract breaker "*out of all proportion to any legitimate interest of the innocent party*". In determining this, an English court will now consider the wider commercial context of a transaction and, where the parties have negotiated a contract, on a level playing field and with the assistance of professional advisors, it will now be much harder for the party paying the higher rate of interest to challenge the validity of such a provision on the basis that it is a penalty. Furthermore, a provision that provides for interest to increase on default is not likely to be held to give rise to a penalty if: (i) the increase is levied only from the date of default (and not before); (ii) the main purpose of the clause is not to deter default; and (iii) the increase is modest and commercially justifiable by reason of the increased credit risk represented by a debtor in default.

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Milbank

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# Finland

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## 1 Overview

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

In Finland, project financing has been typically used in large infrastructure projects, such as motorways and energy projects, in the fields of nuclear power and renewable energy. Over the recent years, public sector construction projects have been of major significance. During the last few years, there have also been some significant real estate development projects in Finland, such as large shopping malls and sports arenas.

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

The most significant project financings in recent years include, for example, the construction of the Metsä Group's new bioproduct mill in Äänekoski as well as the construction of several LNG terminals and the new Redi and Tripla shopping centres in Helsinki.

## 2 Security

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

In Finland, it is possible and common market practice to give security over assets with a general security agreement covering different types of assets and securities. However, each asset type must be specified in the security agreement, and granting security interest may be difficult or virtually impossible for certain asset types.

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

In general, any right, property or asset can be used as a security under Finnish law, provided that the asset is transferable, sufficiently specified and that it has economic value. However, certain types of assets have additional requirements, such as registration requirements, for them to be used as security, and the perfection of the security may require different procedures. In Finland, security over real property is taken in the form of a mortgage. Registered leaseholds and other rights of use that meet certain criteria can also be mortgaged. The creation of the security interest over real property requires the mortgage to be registered, and the registered mortgage is then evidenced by a mortgage note. The perfection of the mortgage over real property depends on the type of mortgage note, whether a physical or an electronic promissory note. In the case of a physical promissory note, the promissory note must be handed over to the creditor, whereas electronic promissory notes must be registered in the name of the creditor. As of June 2017, new mortgage notes are issued in electronic form only.

Security over machinery and equipment can be created in a number of ways. First, they can be regarded as components (such as buildings on the property) or accessories (such as equipment that is permanently located on the property) of the property if they are sufficiently integrated into the real estate. In that case, the assets form part of the real property, and thus the security over the real estate covers the machinery and equipment. Further, if the machinery or equipment does not meet the above-mentioned criteria, the machinery and equipment will be considered tangible movable property, whereupon the security over them could basically be created by way of a pledge. The perfection of the pledge requires delivery of the underlying asset to the possession of the pledgee. However, this is not widely used and, in practice, often not even possible. The most common way of creating security over machinery and equipment (if they are considered as movable property) is a floating charge. The floating charge covers the movable assets of a company, such as machinery, cash and receivables. However, a floating charge may not cover assets over which a mortgage can be granted under any other act, such as vessels or aircrafts. The floating charge is created through the registration of the relevant floating charge and perfected upon the delivery of the floating charge promissory note evidencing the floating charge to the creditor.

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

In Finland, security over receivables can be created with a pledge agreement between the pledgor (i.e. the creditor of the pledged receivable) and the pledgee. The perfection of the pledge concerning receivables requires for the debtor to be notified of the pledge. There are no specific requirements as to the form of this notification. However, the notification should identify the debt and the creditor-borrower relationship to a sufficient degree. In addition, after the debtor has received the notification concerning the pledge and unless otherwise agreed, the debtor may no longer pay the debt to the original creditor. In practice, it is commonly agreed that the pledger is free to collect the receivables in the absence of default, but in such case, the security is not duly perfected until the underlying debtor is instructed not to make payments to the original creditor. If these instructions are given at a later stage, the security may become subject to clawback in insolvency proceedings.

If the pledged receivable is evidenced by a negotiable promissory note, a different perfection method applies to the pledge. In this case, perfection is achieved by handing over physical possession of the negotiable promissory note to the pledgee.

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

A bank account can be pledged in a similar way as described above in the case of receivables. The notification of the pledge in the case of bank accounts is directed to the relevant account bank. After the account bank has received a notification of a pledge, the pledgor may not make any withdrawals form the pledged bank account unless otherwise agreed. However, it is common market practice to allow the use of the pledged bank account until an event of default occurs. Consequently, this means that, for as long as the pledgor is free to use the bank account, the pledge is not duly perfected and thereby ineffective against third-party creditors.

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

Under Finnish law, a security can be taken over the shares in a company. The method of perfection of the pledge depends on whether share certificates have been issued or not. If share certificates have been issued, the perfection of the pledge is achieved through a transfer of the share certificates to the pledgee, whereas in the case that there are no share certificates, the perfection of the pledge requires for the company whose shares have been pledged to be notified thereof. In addition, the company must register the pledge in the shareholder's register if no share certificates have been issued. If the shares are included in the book-entry system, the pledge is perfected by registering the pledge in the book-entry securities account of the pledgor.

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

In general, there are no notarisation, registration, stamp duty or other fees apart from the minor customary filing charges of the relevant authority in relation to, e.g., real estate mortgages and floating charges as well as the pledging of IP rights and book-entry securities.

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

The amount of time or expense involved in filing, notification or registration in order to create a valid security interest is limited, usually a few days or at most a couple of weeks.

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

In general, no regulatory or similar consents are needed in order to create a security interest over real property in Finland.

## 3 Security Trustee

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

Finnish law does not recognise the concept of a trust. However, the role of a security agent is recognised under Finnish law, and a foreign security trustee would most likely be granted the same powers with respect to Finnish property as a security agent. The security agent can act as a representative and enforce the security on behalf of the secured creditors if so agreed in the relevant documentation (though the security agent will not have all the same powers as, e.g., a trustee would under English law).

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

See question 3.1 above. No parallel debt or joint and several creditor mechanisms are required in Finland (though the concept of a trust is not recognised).

## 4 Enforcement of Security

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

The enforcement procedure depends on the type of security that has been granted. In respect of certain types of assets, such as shares, the parties may generally agree upon the method of enforcement, whereas the enforcement of a security created by way of a mortgage must be carried out through official enforcement proceedings. Typically, the enforcement of mortgages requires an enforceable enforcement order (i.e. a court order or arbitral award), after which the actual enforcement is performed by a bailiff in an execution procedure regulated by law, usually through a public auction or a private sale.

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

There are no specific restrictions on foreign investors or creditors in Finland. In general, the same restrictions apply to foreign investors and creditors as they do to domestic ones.

## 5 Bankruptcy and Restructuring Proceedings

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

In general, the secured parties can enforce the security, whether movable or immovable, independently from the bankruptcy estate. However, the secured creditors must notify the bankruptcy administrator of the claim and the security as well as of any enforcement actions prior to the actual enforcement. Further, the creditor must provide the bankruptcy estate with any proceeds that exceed the amount of the creditor's claim secured by the sold asset. In certain circumstances, the bankruptcy estate may prohibit the sale of a specific asset for a certain period of time or take actions to realise the asset.

The commencement of restructuring proceedings under the Finnish Act on the Restructuring of Enterprises (47/1993) (the "**Restructuring Act**") prevents the secured creditors from enforcing their claims in relation to the restructuring debt. Any enforcement proceedings that have been initiated must be suspended.

In addition, creditors whose claims are secured by a floating charge are in a different position than other secured creditors. Floating charge creditors do not have any right to separate enforcement unlike the other secured creditors. Instead, their claims are enforced only as part of the general bankruptcy enforcement proceedings, although with better priority. However, floating charge creditors enjoy priority over unsecured claims only up to 50% of the value of the company's assets covered by the floating charge.

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

In bankruptcy or corporate restructuring, a clawback is possible under the Finnish Act on the Recovery of Assets to the Bankruptcy Estate (758/1991) (the "**Recovery Act**"). Pursuant to the Recovery Act, certain transactions undertaken by the debtor prior to filing for insolvency proceedings may be revoked if those transactions violate the rights of the creditors. In general, recovery is possible with regard to all transactions that have favoured a specific creditor at the expense of other creditors and, further, provided that the debtor, at the time of the transaction, was insolvent or became insolvent partly due to the transaction. In addition, these general grounds for recovery are only applicable if the counterparty to the transaction knew or should have known that the debtor is insolvent or of the impact of the transaction on the debtor's financial status.

In addition, the payment of any debt may be recoverable if it was made three months prior to bankruptcy or to the commencement of restructuring proceedings by means of an unusual method, or amount, of payment than before and the amount of payment is considered significant in relation to the estate's assets. If the payment was made to a person affiliated with the debtor, the payment may be recoverable if it was made two years prior to filing for insolvency proceedings.

In addition, in accordance with the Recovery Act, a security granted three months (two years if the beneficiary is a person affiliated with the debtor) before bankruptcy or restructuring is filed for may be recovered if the parties had not agreed upon the security while the underlying credit was granted or if the security had not been perfected without undue delay after the credit was granted.

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

Apart from the exceptions set out in the Finnish Bankruptcy Act (120/2004), any private individual or legal entity may be declared bankrupt under the Bankruptcy Act. The entities excluded from the bankruptcy regime include, among others, the State of Finland, Finnish municipalities, the autonomous Åland Islands, a State enterprise (in Finnish: *valtion liikelaitos*), the Evangelical Lutheran Church and the Orthodox Church.

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

Subject to certain limitations, the enforcement procedure concerning movable property, save for floating charges, is typically carried out by way of a private sale or any other lawful method agreed upon in the security agreement. In such case, no official proceedings are required. However, the enforcement of mortgages and floating charges must always be carried out by official enforcement proceedings. See question 4.1 above.

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

Under Finnish law, a company may be subject to two different formal insolvency proceedings, namely i) bankruptcy pursuant to the Bankruptcy Act, and ii) company reorganisation pursuant to the Restructuring Act. In addition to these two formal proceedings, a company may choose to restructure its debts with voluntary agreements and arrangements with its creditors outside of formal insolvency proceedings. These arrangements are entered into and enforced in accordance with normal contractual principles.

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

Under the Finnish Limited Liability Companies Act (624/2006) (the "**Companies Act**"), the liabilities of directors fall under the general duty of care of the directors. The general duty of care imposes an obligation for the management of the company to act with due care and to promote the interests of the company. The failure to act in the company's interests may constitute a violation of the general duty of care and result in liability to pay damages to the company, its shareholders or third parties. However, it should also be noted that Finnish law does not specifically require directors to file for bankruptcy or to apply for restructuring if the company faces financial difficulties.

## 6 Foreign Investment and Ownership Restrictions

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

In Finland, there are no general restrictions, controls, fees or taxes on foreign ownership or investments in project companies. In general, foreign companies or companies with foreign ownership are treated the same as domestic companies. However, in some cases, it is easier for investors from within the EEA than from elsewhere in the world to operate in Finland, especially in the fields of banking, insurance and asset management where the EU's single passport regime applies.

The Finnish Act on the Monitoring of Foreigners' Corporate Acquisitions in Finland (172/2012) (the "**Monitoring Act**") may, in some limited circumstances, affect foreign investments. Under the Monitoring Act, it is possible for the government to reject acquisitions of defence-related companies.

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

Finland has entered into several bilateral investment treaties. However, the Lisbon Treaty transferred responsibility over international treaties, such as investment treaties, to the EU. All existing agreements in EU Member States will remain in force until they are replaced by EU treaties.

The investment treaties' aim is to ensure that foreign investors are treated equally and reasonably. In addition, the treaties set out the procedure for possible expropriation and regulate how investors will be compensated in case of such event.

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

The protection of private property is secured by the Finnish Constitution. The expropriation of property is only possible if it is for the public interest and against full compensation. Further, expropriation is not allowed if the purpose of the expropriation can be achieved in some other, less intervening, way. The Finnish Act on the Redemption of Immoveable Property and Special Rights (603/1977) sets out the conditions for the expropriation of immoveable property, such as real estate, and of special rights, such as the right of use or easement, and determines the relevant compensation. In addition, expropriation may be allowed under the Finnish Act on Expropriation for Defence Purposes.

## 7 Government Approvals/Restrictions

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

The relevant government agency or department is dependent on the type of project. In general, municipal authorities are the primary government agencies with authority over projects.

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

In general, no documentation in relation to financing need be registered or filed with any government authority, save for the applicable registration procedures and filings required to create a valid security interest; namely, in the case of mortgages.

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

Generally speaking, the ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets does not require a licence. However, some activities may require a permit, such as a mining permit, and other environmental permits and building permits.

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

The extraction of natural resources may be subject to the relevant permit, such as a mining permit or environmental permits, but no general restrictions are in place in Finland.

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

In Finland, there are no restrictions on foreign currency exchange. Funds can be freely transferred to or from Finland. Some restrictions are, however, in place to prevent money laundering and the financing of terrorism. In addition, the potential exchange rate profits are considered as taxable income.

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

Yes, the remittance of investment returns in the form of dividends from a Finnish project company to an investor outside of Finland is generally subject to a 20% withholding tax, unless the dividends qualify as an exemption under the EU Parent-Subsidiary Directive or the rate is reduced by an applicable tax treaty.

The repatriation of the principal amount of a loan or interest is not subject to a withholding tax. However, interest may be subject to a corporate income tax of 20% if the interest is connected to a permanent establishment located in Finland.

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

In Finland, there are no restrictions on establishing or maintaining onshore foreign currency accounts or offshore accounts in other jurisdictions.

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

There are certain restrictions on the payment of dividends under Finnish law. The Companies Act provides, for example, that the distribution of corporate assets, such as dividends, is prohibited if the company is insolvent at the time of the distribution or if the distribution would lead the company to insolvency. The above-mentioned restriction applies regardless of where the parent is domiciled.

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

In general, there are no material environmental, health or safety laws that would impact specifically upon the financing of a project. However, there are several environmental and safety related laws in place, which must be followed by the project company. Compliance with these laws is often included as an undertaking in the finance documents.

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

There is no specific legal framework for procurement by privately held project companies. Procurement by public purchasers is regulated by the Finnish Act on Public Procurement and Concession Contracts (1397/2016), which sets out the legal framework for the procurement procedure and procurement threshold values.

## 8 Foreign Insurance

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

There are no restrictions or controls on insurance policies over project assets provided by foreign insurance companies. However, insurance companies domiciled outside of the EEA have to obtain a licence in order to provide insurance policies in Finland.

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

The insurance policies are payable to foreign (or domestic) creditors if so agreed in the relevant documentation.

## 9 Foreign Employee Restrictions

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

EU citizens as well as the citizens of Norway, Iceland, Liechtenstein and Switzerland may work in Finland without a residence permit. However, the worker's right of residence must be registered if they intend to stay in Finland for more than three months. Citizens coming from outside the EU or the EEA must have a worker's residence permit.

## 10 Equipment Import Restrictions

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

In general, there are no specific restrictions on importing project equipment to Finland. However, the import of certain goods, such as dual-use goods, or goods originating from certain countries is restricted. As an EU Member State, Finland complies with EU rules on import regulations, import quotas and other trade regulations.

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

Importing outside of the EU may be subject to import duties and value-added tax.

## 11 *Force Majeure*

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

*Force majeure* exclusions are generally available and enforceable in Finland, depending, however, on the relevant contractual documentation.

## 12 Corrupt Practices

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

Under the Finnish Criminal Code (39/1889), bribery is penalised and the applicable penalty is a fine or imprisonment for up to six months. The aggravated acceptance of a bribe is punishable by imprisonment for at least four months and at most four years. In addition, damages must usually be paid for corrupt business practices.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Typically, Finnish law or, in some large projects involving foreign suppliers, English law.

### 13.2 What law typically governs financing agreements?

Typically, Finnish law or, mainly if there are lenders domiciled outside the Nordic region, English law.

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

The parties may choose the applicable law rather freely. However, it should be noted that security agreements that cover assets located in Finland are usually governed by Finnish law as Finnish law would govern perfection in any case.

## 14 Jurisdiction and Waiver of Immunity

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

In general, the relevant party's submission to a foreign jurisdiction is binding and enforceable in Finland and, although the waiver of immunity is not specifically recognised in Finnish law, certain Supreme Court cases suggest that the waiver can be legally binding and enforceable. In addition, certain regulations, such as Brussels I, may lay down specific rules on the jurisdiction of courts.

## 15 International Arbitration

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

Yes; generally, the parties may freely agree upon the arbitral tribunal and the applicable arbitration rules. Also, arbitration agreements and arbitral awards are generally recognised by the local courts.

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

Finland has ratified the New York Convention without any reservations. Finland has also ratified, among others, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

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

Any dispute that can be settled by an agreement between the parties may be referred to arbitration for a final decision. Consequently, certain disputes that cannot be settled between the parties are not arbitrable, such as criminal cases and cases relating to family law.

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

Under Finnish law, certain types of disputes are subject to mandatory arbitration. For example, the Companies Act provides that disputes concerning a squeeze-out and a redemption price must be settled through arbitration.

## 16 Change of Law / Political Risk

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

To the extent of our knowledge, there has not been any call for political risk protection or political risk guarantees.

## 17 Tax

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

In general, there is no obligation to deduct or withhold tax from interest paid to foreign lenders except where the loan is deemed comparable to an equity investment. The same applies to the proceeds of a claim under a guarantee or to the proceeds of enforcing a security. Interest paid to domestic individuals is generally subject to a final withholding tax of 30%.

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

There are no specific tax incentives provided to foreign lenders in Finland. In general, no taxes apply to foreign lenders with respect to investments, loans, mortgages or other security documents for the purposes of effectiveness or registration. Please see question 7.6 above.

## 18 Other Matters

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

The relevant issues have been covered in other sections.

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

A company seeking to issue capital market instruments, such as bonds or other debt securities, on a regulated market is required to publish a prospectus. The prospectus must be approved by the competent authority, i.e. the Finnish Financial Supervisory Authority. Depending on the amount of the offering, the issuer must publish a prospectus prepared according to the Prospectus Directive or according to national requirements. The national requirements are stipulated in the Finnish Securities Markets Act (746/2012). In some limited circumstances, the issuer has no obligation to publish a prospectus. However, a prospectus must be published if the intention is to seek admission for the securities to be traded on the stock exchange. Even if the securities are not to be traded in any regulated market, the issuer must provide correct and sufficient information on the underlying security, usually in the form of an information memorandum resembling a prospectus. The prospectus regime within the EU will be fully harmonised with the new Prospectus Regulation, which will become fully applicable in the summer of 2019.

## 19 Islamic Finance

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

*Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments are not specifically recognised by Finnish law. However, there are no restrictions on using instruments recognised by Finnish law that are similar to these Islamic instruments, but we are not aware of any cases where such instruments have been used.

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

In general, Finnish law does not recognise *Shari'ah* law, and it is unlikely that Finnish courts would allow its application.

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

No, they cannot.

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# France


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## 1 Overview

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

After the closing of many large-scale greenfield projects under the form of public-private partnerships ("PPP") (notably to boost France's railway network infrastructure and football stadiums to prepare for the 2016 European Football Championships), the main trends of the last few years mainly focus on (i) the refinancing of existing projects, involving, notably, insurance companies, and on (ii) brownfield projects, such as the privatisation of regional airports.

As regards more specifically the role of the State, the State acts now more as a lender to special purpose vehicles ("SPV") in the field of innovative projects rather than as a client of a PPP. For instance, the State has launched the *programmes d'investissement d'avenir* and grants, through the *Agence de l'Environnement et de la Maîtrise de l'Energie* ("ADEME"), subsidies and loans to SPVs set up by the sponsors of the most innovative projects in energy fields such as floating wind farms, hydroelectric technology and natural gas vehicle stations.

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

The most significant project financings which were successfully closed in the last few years mainly relate to infrastructure projects and football stadiums under the form of PPPs:

- A high-speed train link between Paris and Britanny (*LGV Bretagne Pays de Loire*), which amounts to €3.3 bn (closed in 2011).
- A high-speed train link between Paris and the South-West of France (*LGV Sud Europe Atlantique*), which amounts to close to €8 bn (closed in 2011).
- The Marseille ring road (L2), which amounts to more than €0.6 bn (closed in 2013).
- The Paris law courts, which amounts to close to €0.7 bn (closed in 2012).
- The Marseille Velodrome Stadium, Bordeaux Stadium and Nice Stadium, which amount to €0.3 bn each (closed in 2010 and 2011).

## 2 Security

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

Under French law, each type of asset is required to be assigned or pledged through a dedicated type of security agreement. In France, the security package in a project finance transaction usually provides for:

(i) a pledge over the shares of the project company;

(ii) one or more pledge(s) over a bank account (*nantissement de solde de compte*) and/or a pledge over receivables and/or delegation of cash flows arising from project agreements (EPCs, operation and maintenance agreements, hedging agreements, insurance policies, etc.); and

(iii) actual or contingent security over the project's physical assets (whether by means of an assignment, a pledge, a mortgage (*hypothèque*), or a lender's privilege (*privilège du prêteur de deniers*) in relation to real estate, depending on the type of assets.

As a general principle, security interests created under French law security documents do not require notarisation, save for those granted in relation to real estate.

Under French law, the concept of "floating" or "adjustable" lien or encumbrance is not recognised, save for certain assignments such as an assignment of receivables (*nantissement de créances*) by way of security (*cession (Dailly) de créances professionnelles à titre de garantie*) or pledges such as a pledge over a bank account (*nantissement de solde de compte*), which can be considered as "quasi-floating" charges.

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

In France, security over real estate can be granted through (i) a mortgage (*hypothèque*), or (ii) a lender's privilege (*privilège du prêteur de deniers*), which are required to be executed before a notary and registered.

Mortgages (*hypothèques*) are to be drafted and registered by a notary and cover the plot of land and the buildings built on it, as well as the improvement works carried out on the property.

For the lender's privilege (*privilège du prêteur de deniers*) to be effective, the following four conditions should be met:

(i) the purchase agreement and the facility agreement must be drafted and registered by a notary;

(ii) the facility agreement shall provide that the sum borrowed is intended for the acquisition of the asset;

(iii) the purchase agreement shall provide that the payment is made using the facility; and

(iv) the building should already exist.

The choice between a mortgage (*hypothèque*) or a lender's privilege (*privilège du prêteur de deniers*) will be made on the basis of the above conditions, considering also that the registration of a lender's privilege (*privilège du prêteur de deniers*) is less expensive (see question 2.6).

It is now generally accepted that wind turbines can be mortgaged to secure financings. On the contrary, the type of security interest granted over a pipeline, whether underground or above ground, is not completely certain since there is no certainty as to its nature (movable or immovable property). The most prudent route is to consider this type of equipment as a movable asset; this analysis being followed for both legal and tax approaches by major French companies involved in this field. The asset can be pledged through a pledge over a movable asset (*contrat de gage d'équipement*) which can be executed under a private signature, without the intervention of a notary.

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

Under French law, security interests over receivables where (i) the chargor is free to collect the receivables in the absence of a default, and (ii) the debtors are not notified of the security, may be taken in two different ways:

(i) by way of an assignment of receivables (*nantissement de créances*) – it is necessary to correctly identify the underlying contractual right as a condition of validity of the assignment. The assignment of future rights is possible, but only "future rights" which can be clearly identified by reference to specific agreements or arrangements which have been or are to be entered into should be assigned (even if the amounts or dates of payment of such rights cannot be determined at the time of assignment).

After notification to the debtor, the beneficiary alone may receive payment of the debt, which is the subject matter of the security, and keep it as security on a bank account subject to returning these amounts to the assignor if the secured obligation is performed. The prudent approach would be to implement this payment structure. However, the assignor may need to receive the payment of the assigned receivables in order to ensure expenditure arising in the ordinary course of its business may be met. In this case, it may be agreed that the assignor will keep the collections so long as no default has occurred and, possibly, that the collections are credited on a dedicated account, the balance of which is pledged in its favour; or

(ii) by way of an assignment of receivables (*nantissement de créances*) by way of security (*cession (Dailly) de créances professionnelles à titre de garantie*) – such assignment is usually made through a framework agreement under which a borrower or other beneficiary of credit agrees to assign commercial receivables on a periodic basis as security for such credit, replacing receivables which have matured by assigning fresh receivables as they come into existence by delivering new transfer instruments (*bordereaux*) on a periodic basis.

The relevant statutory provisions permit only the assignment of "professional" receivables, i.e. receivables owed to the assignor by a legal entity or an individual in the exercise of a professional activity. Consumer receivables cannot be the subject of such an assignment.

It shall also be considered that assignments of receivables by way of security (*cessions (Dailly) de créances professionnelles à titre de garantie*) may only secure credit made available directly to the assignor. Such security is therefore not available to secure guarantees granted by the assignor of the debt of other companies, even companies in the same group of companies as the assignor. Such type of security interest should not include amounts owed to hedging banks under swap agreements or to agents or security agents acting in such capacity, etc.

The relevant statutory provisions state that the actual creation of the security occurs on delivery of a *bordereau* containing the relevant information relating to the assigned receivables. It is therefore necessary, in a framework security assignment agreement, to specify the frequency with which new *bordereaux* enumerating receivables which have come into existence will be delivered by the assignor. While this will depend on the average life of the receivables of the assignor, the general "market practice" is to require monthly deliveries of *bordereaux*.

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

Under French law, the pledge over a bank account (*nantissement de solde de compte*) shall be considered as a pledge over the credit rights of the pledgor of the account *vis-à-vis* the account holder, i.e. the account balance. The account holder may not be a party to the pledge agreement but shall then be notified of the pledge. Acceleration of the security interest granted over the account balance shall be made through the service of an enforcement notice, the form of which shall preferably be agreed with the account holder.

The details of the flow of earnings to be credited to the pledged bank account can be documented either in the pledge agreement or in the underlying facility agreement. However, where such facility agreement is governed by a law other than French law, it will generally be worthwhile to provide the detail in the pledge agreement so that in the event of litigation the French court will have the entire picture before it.

The pledge agreement may allow the pledgor free access to money on the account unless and until the pledge is enforced (this will usually be the case where the account being pledged is the ordinary revenue account of the pledgor). Nonetheless, it is also possible to provide for money on the account to be blocked prior to enforcement.

In transactions where the account being pledged is an account opened (usually by a special purpose company created for the transaction) especially for the purpose of receiving revenues generated by use of an asset and from which the security agent is instructed to pay amounts to other accounts or other parties in the transaction or to be held as cash retention to build up certain ratios, additional restrictions on transfer of funds out of the pledged account may be necessary.

The granting of cash collateral agreements (*contrats de gage-espèces*), which constitute a delivery of the full title to the cash by way of security (*remise d'espèces en pleine propriété et à titre de garantie*), has been developed by practitioners and is supported by several decisions of the French Supreme Court (*Cour de Cassation*), although never confirmed nor invalidated by any French law or regulation. The pledgee acquires the title to the pledged assets subject only to an obligation to restitute equivalent assets upon payment of the secured obligation.

This type of security interest should only be used for cash collateral granted in favour of a single beneficiary. The use of cash collateral for a syndicated financing raises delicate issues with respect to property of the cash; in particular, in the context of an insolvency of the beneficiary.

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

Security interests over shares held in French companies can be granted under French law and differ according to the type of company.

Pledges over shares held in French companies are very different depending on the form of companies:

(i) pledges of a securities account (*nantissements de compte-titres*), i.e. pledges of shares in companies issuing "securities" (*valeurs mobilières*) such as public limited companies (*sociétés anonymes*) or private limited company (*sociétés par actions simplifiées*) are effected by pledging the securities account (*nantissements de compte-titres*) in which such pledges are registered; and

(ii) share pledge agreements (*nantissements de parts sociales*), i.e. pledges of shares in companies' ownership interests which are represented by non-negotiable fractional interests (*parts sociales*) such as limited liability companies (*sociétés à responsabilité limitée*) or partnerships (*sociétés en nom collectif*) are effected using different forms of pledge.

Regarding the pledges of a securities account (*nantissements de compte-titres*):

(i) unlike the case of a share pledge agreement (*nantissement de parts sociales*), there is no legal requirement that pledges of securities account (*nantissements de compte-titres*) be executed in French;

(ii) no filing is required to be made with the Clerk (*greffier*) of the Commercial Court (*Tribunal de Commerce*);

(iii) all dividends and other proceeds related to the shares must be be credited on a special account registered in the books of a credit institution, as long as the account holder of the securities account (*nantissements de compte-titres*) is the issuer of the relevant securities and is not authorised to receive funds from the public (i.e. is not an authorised credit institution);

(iv) pledged shares must be transferred to a separate account which shall be recorded as being pledged. In practice, shares registered on the books of the company in Account No. "X" will be moved to an account numbered "X *bis*"; and

(v) there is no legal requirement that transfers of shares be approved; however, the articles of association may provide for a *clause d'agrément* – the relevant statutory provisions state that approval of a draft of the pledge agreement is deemed to constitute approval of the subsequent transfer of shares resulting from enforcement of the pledge unless the company prefers to buy the shares back and reduce its share capital.

Share pledge agreements (*nantissements de parts sociales*) are perfected against third parties by way of filing with the registry (*greffe*) of the relevant Commercial Court (*Tribunal de Commerce*) of the place of registration of the companies whose shares are being pledged. The filing must include an original copy of the pledge agreement and a summary table (*bordereau*) describing the pledge. As it is extremely unlikely that the court bailiff will accept a document that is not in the French language (except, perhaps, if the document is accompanied by a translation prepared by a court-approved certified translator), it is strongly recommended that an agreement for the pledge of shares should be signed in French.

There is no requirement that either the pledgor or the pledgee be domiciled in France.

Due to the manner in which the pledge over financial securities is created and perfected, it is generally – although not unanimously – felt that it is not prudent to attempt to create pledges of varying ranks over the same shares. In a transaction in which there are lenders of varying ranks, the preferred practice is to conclude a single share pledge agreement (*nantissements de parts sociales*) in favour of one beneficiary acting on behalf of all of the lenders and to deal with issues of priority in a separate intercreditor agreement.

Share certifications are not issued by French companies.

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

The notarisation, registration, stamp duty and other fees vary with the type of security interest which is granted:

(i) with respect to security interest granted on real estate, the registration cost for a mortgage (*hypothèque*) is about 0.7% of the guaranteed amount and for the lender's privilege (*privilège du prêteur de deniers*), 0.05% of the guaranteed amount. Please note that these registration costs are added to the notary's fees;

(ii) there are no costs, fees or other duties for the following instruments, in the absence of registration (neither by way of notary nor with the registry (*greffe*) of the relevant Commercial Court (*Tribunal de Commerce*)): pledges of a securities account (*nantissements de compte-titres*); pledge over a bank account (*nantissement de solde de compte*); cash collateral agreement (*contrat de gage-espèces*); assignment of receivables (*nantissement de créances*); and assignment of receivables by way of security (*cession (Dailly) de créances professionnelles à titre de garantie*); and

(iii) with regards to the going-concern pledge agreements (*nantissements de fonds de commerce*), pledge of equipment agreements (*nantissements de l'outillage et du matériel d'équipement*), pledge of inventory agreements (*gages des stocks*) and share pledge agreements (n*antissements de parts sociales*), costs for registration with the registry (*greffe*) of the relevant Commercial Court (*Tribunal de Commerce*) vary from €11.87 to €144.05.

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

The filing, notification or registration requirements before a public registry and in relation to the relevant instruments usually take between one and three weeks, assuming the relevant security document was correctly drafted and no errors were found by the registry. As to registration fees, see question 2.6.

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

The creation of security interest over real estate, plant, machinery and/or equipment differ according to the location of the contemplated asset, its type and the parties involved in the transaction (see question 2.2).

## 3 Security Trustee

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

New article 2488-6 of the French Civil Code (*Code civil*) clarifies and broadens the role of the security agent which would hold the French security interests granted in the context of the transaction in its own name and on behalf of the other financial institutions involved.

In the event of the intervention of several creditors in a financing transaction, the use of a security agent is permitted to take, register, manage and realise the securities guaranteeing this transaction.

The mechanism is extended to all collateral and guarantees, and is no longer limited to actual collateral. In addition to "personal" security interests, the security agent may also, where applicable, register, manage and fulfil promissory security interests and security interests under foreign law. It may also be the assignee of trade receivables assigned as security or delegated claims securing the secured obligation.

The security agent has the same powers as a trustee, and as such, will be the direct holder of the security interests and guarantees provided to the creditors of the secured obligation.

The security interests and guarantees will be transferred to a patrimony with a use distinct from the patrimony of the security agent. This legal recognition will make it possible not to have to modify the security interests and guarantees in the frequent hypothesis of a change of beneficiary creditors, and thus be able to intervene on behalf of any subsequent assignee of the secured obligation and any product received by the collateral agent for the management and/or realisation of the collateral, and guarantees will be part of this assignment patrimony.

The agreement by which the creditors appoint the security agent must be established in writing, on pain of nullity. The creditors must expressly mention the quality of security agent of their co-contractor in order to avoid confusion with other contracts (mandate or common law trust). They must also specify the purpose of the security agent's mission, its duration and the extent of its powers.

The security agent may exercise, within the limits of the powers conferred by the creditors in the contract of appointment, all rights, sue for the benefit of the creditors of the secured obligation, and may in the event of the opening of collective proceedings, proceed to the declaration of the receivables without having to obtain a special mandate of the creditors' beneficiaries.

In the event of the opening of a collective proceeding against him, only the personal assets of the security agent may be liable for his outstanding debts. The assets and rights appearing in the assets assigned cannot therefore be apprehended by the creditors registered in a collective proceeding of the security agent.

The security agent is responsible for the mistakes committed in the performance of his mission. Except for any gross or fraudulent negligence, and provided that the breach concerned does not deprive of its substance the essential obligations of the security agent, the contractual liability of the latter may nonetheless be limited by a limitation of liability clause. The security agent will also incur his own assets for any breach of his obligations and/or mistakes committed in the performance of his mission.

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

As referred to above, under French law, the security agent is now able to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately. It seems, therefore, that there is no need to enter into specific mechanics such as parallel debt or joint and several creditor status. Notwithstanding this, please note that as this legal framework is very new, there are clearly insufficient judicial precedents to assess which are the strict limits to this new concept under French law.

## 4 Enforcement of Security

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

The timing and value of enforcement depends on the type of security enforced and the enforcement proceedings chosen by the lenders. The enforcement of security interest carried out through a public auction or in the context of judicial or notarial proceedings is not necessarily immediate. For notarial enforcements, see question 5.4.

The commissory pact (*pacte commissoire*) is authorised:

(i) for all pledges (security relating to tangible personal property): it may be agreed, when pledging or subsequently, that in the absence of the performance of the secured obligation, the creditor will become the owner of the pledged property;

(ii) in the case of collateral (security interest in intangible personal property): in case of default of its debtor, the creditor may be attributed, by the judge or in the conditions provided by the agreement, the pledged claim and all the rights attached thereto; and

(iii) with respect to the pledges of inventory, the stipulation of a commissory pact (*pacte commissoire*) was previously prohibited; however, since 2016, the former provision has been repealed. Therefore, from now on, it is possible to include a commissory pact (*pacte commissoire*) in a pledge of inventory.

The commissory pact (*pacte commissoire*) is nonetheless prohibited in the case of any reorganisation, judicial restructuring or judicial liquidation.

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

In France, as a general principle, there are no distinctions between domestic and foreign entities in the context of foreclosing a French security interest granted on the project and/or related companies.

## 5 Bankruptcy and Restructuring Proceedings

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

As a general rule, as from the declaration of the project company for the opening of safeguard (*sauvegarde*) or rehabilitation (*redressement*) proceedings, secured lenders will be prevented from enforcing their security during a standstill period for defaults arisen prior to the court decision opening the insolvency proceedings, since the project company is prohibited from paying debts outstanding prior to this court decision. All creditors must file a claim with the creditor's representative within two months of the publication of the court decision. This period is extended to four months for creditors domiciled outside France.

There are limited exceptions to this prohibition of payment, as, for example, the authorisation given to the judge to pay the creditor in order to release the pledge on the secured asset.

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

In case of rehabilitation or liquidation, transactions entered into during the hardening period (*période suspecte*) can be subject to clawback rights at the initiative of the administrator, the liquidator or the prosecutor. This period can be backdated by the court up to 18 months before the judgment opening the insolvency proceedings. For some of the transactions performed during the hardening period (*période suspecte*), the court must declare their nullity. This will apply, for instance, to contracts in which the debtor's obligations significantly exceed those of the other party, payments made for debts that have not fallen due on the date of payment, payments made by means not commonly used in business transactions, or a mortgage (*hypothèque*) or pledge granted to secure a pre-existing debt. Some other transactions performed during the hardening period (*période suspecte*) are subject to optional voidance if it appears that at the time of the transaction, the contracting party was informed of the situation regarding the company's insolvency.

As a general rule, secured creditors will be qualified as "privileged creditors" up to the value of the asset secured and will be paid by preference to the other creditors on the value of the secured assets. Exceptionally, employees' claims are preferred to secured creditors on the distribution of the sale price of the secured assets.

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

In accordance with the provisions of the French *Code de commerce*, insolvency proceedings only apply to "private law" entities. Public entities (e.g. State services and local administrative authorities) are excluded from insolvency proceedings, but "private law" entities, even directly or indirectly controlled by public entities, are subject to these proceedings.

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

Direct enforcement of secured credits is possible in some specific cases by way of a commissary pact (*pacte commissoire*), empowering secured creditors to take ownership of assets pledged to them. For instance, a commissory pact (*pacte commissoire*) clause is legally authorised on bank accounts when a pledge is granted on the sums of the account holder which is party to the lending and pledge agreement. The use of a commissory pact (*pacte commissoire*) is also possible, in favour of the secured creditor, on a mortgage (*hypothèque*) in real estate, for shares, machinery and IP elements. Nevertheless, the commissory pact (*pacte commissoire*) practice is prohibited during insolvency proceedings.

For some securities, a loan agreement can be drafted by a notary and then be vested with the authority (*force exécutoire*) to seize the assets of the debtor without having to initiate court proceedings.

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

In order to anticipate and avoid insolvency, other upstream legal processes are available to achieve a restructuring of the distressed company's debts through cramdowns of creditors.

(i) **Grace periods**. Pursuant to article 1244-1 of the French Civil Code (*Code civil*), the judge can take into account the debtor's financial position to allocate a grace period in order either to defer or reschedule the debtor's debt payment due date for a maximum duration of two years. A court order based on article 1244-1 entails suspension of any pending enforcement measures, contractual interests and penalties for late payment.

(ii) **Special mediation** (*mandat ad hoc*). The special mediation is a pre-insolvency and confidential procedure that applies only to solvent companies encountering financial difficulties, with the objective of reaching an agreement between the company and its main creditors.

(iii) **Conciliation**. In a situation where a company faces financial difficulty but, contrary to the special mediation, remains in an insolvency state for less than 45 days, it may be eligible on a voluntary basis to the opening of conciliation proceedings. Following the commencing order, a court-appointed conciliator (*conciliateur*) works together with the creditors of the company to find an agreement reducing and/or rescheduling its indebtedness. The agreement may be either acknowledged by the president of the court or approved by the court.

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

When the company is under liquidation and its assets do not cover its debts, an action for mismanagement can lead to its directors being liable for all or part of its debts. This liability action may be brought against the appointed directors with representation powers, and any individual or entity that is not officially a director but has acted as a *de facto* director. Such an action can be initiated by the liquidator, the prosecutor or the supervising creditors appointed by the court if the liquidator after having been summoned by the supervising directors. The time limit for this action is three years starting from the date of the judgment opening the liquidation.

In addition, directors or *de facto* directors found liable for certain specific breaches as, for instance, continuing the activity of the company despite its situation of insolvency can be prohibited by the court from managing any business for up to 15 years and holding any public office for up to five years.

## 6 Foreign Investment and Ownership Restrictions

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

The government is empowered by law to ensure the defence of the national interests and may as such, for instance, regulate capital movements between France and other countries (article L.151-2 of the French Monetary and Financial Code (*Code Monétaire et Financier*)).

Moreover, foreign investments in an activity are subject to prior authorisation of the Minister of Economy if: such activity participates, even occasionally, in the public authority; falls into a list of activities such as research, production and sale of weapons and ammunition; or the nature of which has an impact on public order, public safety or national defence interests (article L.151-3 of the French Monetary and Financial Code (*Code Monétaire et Financier*)).

The list of the latter activities is defined by decree, the foreign investments that are referred to in this regulation are:

- the change of control within the meaning of the French Commercial Code, the acquisition of all or part of a branch, or of ⅓ of the capital or voting rights of a company having its registered office in France; and
- the acquisition of a branch by a French company controlled by a foreign individual or company.

Thus, these regulations cover brownfield projects.

If a foreign investment is implemented in one of the abovementioned activities without prior authorisation, an administrative fine up to twice the invested amount may be imposed on the investor by the Minister of Economy. Criminal sanctions may also be imposed. Moreover, any contract forming part of the transaction will be considered as null and void (article L.151-4 of the French Monetary and Financial Code (*Code Monétaire et Financier*)).

Nevertheless, foreign investors have the means to maximise the chances of having their investment authorised since the content of the application files is regulated and a benchmark of satisfactory investments already exists.

These cases can therefore be used as precedents.

In addition, the Minister of the Economy may not discretionarily refuse such investments and refusal decisions may be challenged before the administrative courts (*cf.* Jérémie Boublil, Jacques Goyet, Sébastien Pinot, Neil Robertson, "France", in Dennis Unkovic Ed(s), *Foreign Direct Investment, A view from the Inside*, London, Global City Media, 2016, p. 75–88).

Finally, it should be noted that, currently, the abovementioned regulations do not apply in case of creation of an SPV in the field of a greenfield project finance scheme.

Nevertheless, foreign investments in such greenfield projects could still be monitored, just like domestic investments, through the granting by the administrative authorities of the necessary authorisations and/or contracts necessary to set up the project.

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

The abovementioned provisions of the French Monetary and Financial Code (*Code Monétaire et Financier*) make a distinction between investments made by residents of States of the European Union ("EU") and European Economic Area ("EEA") which have signed a convention to fight against tax fraud and evasion and residents of other States. The list of investments subject to prior authorisation is more restricted for the first category.

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

The French Code of Expropriation (*Code de l'expropriation*) regulates the expropriation of unmovable assets. Expropriations, which are implemented if land is necessary to projects ordered or managed by administrative authorities, must meet public necessity and general interest criteria, assessed through a public enquiry and a cost/benefit study. Expropriated persons and entities must receive a "fair indemnity", calculated according to real estate market benchmarks.

In addition, the legislator may, under article 34 of the Constitution, enact laws deciding on the nationalisation of companies.

There is no specific form of investment which would be legally specifically protected from expropriation/nationalisation risk. However, the Constitutional Court, which is in charge of assessing the grounds justifying the nationalisation laws, confirmed in a decision of 16 January 1982 (81-132 DC), in the field of one of the last important nationalisation laws, enacted until now, that the legislator can freely proceed to nationalisation as such nationalisation is founded on public necessity and is subject to a fair indemnification pursuant to the Declaration of Human Rights of 1789.

## 7 Government Approvals/Restrictions

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

The main government agency with authority over projects, which is attached to the Ministry of Economy and Finance, is Fin Infra, an expert body dedicated to the financing of complex public investment projects and whose clients are the State and local administrative authorities (Decree 2016-522 dated 27 April 2016).

Fin Infra is notably in charge of conducting a reinforced prior assessment in order to determine whether the project is justified.

Moreover, the Ministry in charge of the budget must grant advice on a budgetary sustainability study which has to be made by the State or the administrative authority in order for it to conduct certain types of projects.

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

Financing documents, unless they are built according to a capital markets scheme, such as a Euro Medium Term Notes Programme, which must be approved by the French Financial Markets Authority (*Autorité des marchés financiers*), do not require specific registration/filing formalities *per se*.

However, certain security packages, such as debt assignments (*cessions de créance*), must follow a specific notification process under the French Monetary and Financial Code (*Code Monétaire et Financier*) in order to be opposable to the debtor, and certain securities, such as mortgages over unmovable assets, must be registered with the land registry.

In certain public investment sectors, project documents must be approved by decree to be valid and enforceable. This is, for instance, the case of PPPs passed in motorway infrastructure projects (Article 2122-4 of the *Code de la Voirie Routière*).

Moreover, award notifications of project agreements entered into with the State and local administrative authorities (such as a concession contract) must be published on publicly available official material in order for limited duration challenge periods to start running against the agreements (like for any administrative contracts put into tender). This is, however, not a condition of the validity and enforceability of the project documents but a condition to enable challenge periods, and usually lapse after a two-month term.

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

No licence is required *per se* in order to own land, natural resources, a pipeline or a business.

However, large-scale projects such as infrastructure projects usually require the occupation of the public domain of the State or of a local authority, on which all or part of the infrastructure or the assets will be built. Thus, the authority must grant its authorisation to occupy its domain.

Occupation of the public domain must be authorised in compliance with rules applicable to State and local authorities property, set forth mainly in the General Code of Public Entities Property (*Code général de la propriété des personnes publiques*).

Moreover, certain activities, depending on their impact on the environment, must be authorised by the State under the rules of the Environmental Code (*Code de l'environnement*); more specifically, if they meet the criteria of a classified installation for environmental protection.

In addition, the activities of certain regulated sectors require a specific professional licence which must be granted to the operator and/or to the physical persons running the entity. This is the case, for instance, for railway operators, real estate assets operators who contract leases on behalf of third parties and banking sector operators.

Both French and foreign entities can hold such authorisations and licences, provided they meet the criteria to obtain such authorisations and licences.

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

A general tax on polluting activities is levied on the storage and elimination of waste, the emission of polluting substances, the use or delivery of lubricating oils and the extraction of materials. An annual form must be submitted in May following the year for which the tax is due.

The rate and basis of the tax vary depending on the category of pollutants. For the extraction of natural resources, the rate is €0.20 per ton.

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

There are no restrictions, controls, fees or taxes on foreign currency exchanges.

France has not implemented foreign exchange control restrictions on companies or individuals. French banks may lend freely in both Euros and foreign currencies. Reporting requirements apply to some transactions to detect money laundering and tax evasion, and to comply with rules on data collection for balance-of-payments statistics.

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

Generally speaking, there are no restriction, fees or taxes on the remittance and repatriation of investment returns or loan payments to non-resident parties. For the withholding taxes on income, see question 7.8 and section 17.

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

Under French law, project companies, as any company, can establish and maintain foreign currency accounts and/or offshore accounts in other jurisdictions, subject to (i) the legality of such account with respect to the relevant offshore laws and regulations, (ii) applicable sanctions, anti-bribery, anti-money-laundering and anti-terrorism French, European and/or US regulations, and (iii) the relevant KYC from the contemplated financial institution where such account would be opened and maintained.

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

Dividends received by a French company are, in principle, taxed at normal corporate income tax rate. However, some exceptions are applicable.

**Scenario 1**

The French project company pays dividends to its parent company established in France.

A company is qualified as a parent company if it owns at least 5% of the share capital of the project company.

If the parent company holds the shares for at least two years, a participation exemption regime applies. According to this regime, the dividends are taxed on a portion of 5% (exemption on 95%). The effective tax rate is about 1.6%.

If the companies are members of a tax consolidation group, dividends distributed are subject to taxation on 1% of their amount (exemption on 99%).

**Scenario 2**

The French project company pays dividends to its parent company established in the EU.

A participation exemption applies to dividends paid to EU parent companies. No withholding tax is levied on such distribution since the parent company holds at least 5% of the share capital of the project company for a minimum of two years.

**Scenario 3**

The French project company pays dividends to its parent company established outside the EU.

In principle, dividends paid by a French company to a non-EU company are subject to a withholding tax of 30%.

This withholding tax is, generally, reduced or eliminated by application of one of the many double tax treaties signed by France.

However, the withholding tax rate is increased to 75% if the parent company is located in a Non-Cooperative State and Territory ("NCST"; black-listed jurisdiction).

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

As indicated above, the assets which are held and/or managed by the SPV can meet the criteria of a classified installation for the protection of the environment, in which case a declaration/registration/authorisation process must be complied with pursuant to the Code of Environment.

In such a case, the installations and activities are regularly controlled and monitored by the State services in charge of the protection of environment (*Directions régionales de l'environnement, de l'aménagement et du logement*). Such services may impose additional prescriptions to be followed, apply financial penalties and modify/withdraw authorisations granted.

Moreover, in order to be granted a project agreement by the State or an administrative authority (e.g. under the form of a concession), the successful tenderer must prove its compliance with tax and labour law regulations, and must prove such compliance every six months after the award of the contract.

More generally, under the French Labour Code (*Code du Travail*), every company signing a contract above a certain threshold must regularly check that its contractor meets certain labour law obligations such as the prohibition of illicit employment.

Finally, construction sites are carefully monitored by inspectors attached to the Ministry of Labour pursuant to the French Labour Code (*Code du Travail*) and the Code of Construction and Housing (*Code de la Construction et de l'Habitation*) in order to check the measure taken by the construction companies regarding health, employees' and subcontractors' safety, and in order to check that the construction companies meet all their health, safety and labour law obligations with their employees or their subcontractors.

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

If the project companies, whether owned by the State, local authorities or by private entities, meet the criteria in order to be considered as adjudicating powers or adjudicating authorities under EC Directives 2014/24, 2014/25, 2014/26 and to national regulations such as Ordinance No. 2015-899 dated 23 June 2015, they must select their contractors following the tender process set out by such regulations.

This could be the case, for instance, if the project companies are, under certain circumstances, considered as network operators under article 12 of the abovementioned ordinance (e.g. in gas, electricity, water, transportation networks and petroleum extraction).

Moreover, specific tender regulations apply in certain specific sectors. For instance, highway network operators must apply tender rules in order to select service providers (gas distribution, restaurants, etc.) to end-users on the highway networks (contained in article L.122-12 of the *Code de la voirie routière*).

## 8 Foreign Insurance

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

There are no specific restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies, provided that the foreign insurance company is authorised to operate in France by the French prudential authority ("ACPR") or through a European Passport (for insurance companies based in a Member State of the EU).

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

There is no restriction on this aspect under French law.

## 9 Foreign Employee Restrictions

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

Most citizens of countries that are not part of the EU/EEA need both a work permit and a resident permit to work in the French territory (irrespective of their professional level – worker, technician, engineer or executive). The permit type depends on the planned activity and whether the individual in question asks for a temporary or long-term work permit.

There are mainly two kinds of work permits: residence visa (automatically allows the holder to work in France); and the temporary working authorisation (which requires the prior authorisation of the Labour Inspectorate (*Direccte*)).

A number of categories of employees are exempt from obtaining a work permit. This exemption mainly regards nationals of countries from the EU/EEA.

In principle, the social security system of France is applicable. However, due to the coordination of the social security systems within the EU and certain bilateral agreements France signed with countries outside the EU, the social security system of the home country can remain applicable if certain conditions are met (this is mainly the case when an employee is seconded within a French company for a limited period of time). The employer should request a certificate of coverage from the social security authority in their home country to prove that social security contributions are being paid in the employee's home country. Then the employer will be exempt to pay social security contributions in France.

## 10 Equipment Import Restrictions

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

Customs duty is levied on the value of goods imported into France from outside the EU. The duty is determined with the common customs tariff applicable in all EU Member States.

There is no customs duty on equipment delivered within the EU.

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

The common customs tariff provides for import duties depending on the nature of the imported equipment and its country of origin. It derives from EU regulation and treaties signed by the EU with other countries.

## 11 *Force Majeure*

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

*Force majeure* exclusions are defined in a similar way by case law as regards administrative law contracts (e.g. project agreements executed with the State such as public service concessions) and by the French Civil Code (*Code civil*) as regards private law contracts.

Article 1218 of the French Civil Code (*Code civil*) provides that: "*there is force majeure in a contract when an event out of control of the debtor, which could not reasonably be predicted at the time of the signature of the contract and the effects of which cannot be avoided by appropriate measures, impede the performance by the debtor of its obligation*" (our translation).

In case of *force majeure*, the parties are released from performing their obligations.

Such rule is of public order and may not be overridden by the parties to the contract in administrative law contracts.

In any case, the parties may agree on the effects of *force majeure* in terms of risk sharing and may provide for rules of allocation of insurance indemnities.

## 12 Corrupt Practices

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

Corruption and bribery practices are historically governed by the French Criminal Code. Since 2017, specific rules preventing corruption practices are applicable.

**(1) French Criminal Code**

Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate, (i) to carry out or abstain from carrying out an act pertaining to his office, duty, or mandate, or facilitated by his office, duty or mandate, or (ii) to abuse his real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government is punished by up to 10 years' imprisonment and a fine of €150,000 for natural persons (i.e. generally, directors of the company) and/or a fine of €450,000 for legal persons.

The same penalties apply to yielding before any person holding public authority, discharging a public service mission, or vested with a public electoral mandate who, unlawfully, at any time, directly or indirectly solicits offers, promises, donations, gifts or rewards with the same abovementioned aim.

Moreover, a new offence of traffic of influence, introduced in 2013, involving foreign public agents, which is subject to French law irrespective of whether the offences are committed by a French citizen abroad or by a foreign citizen ordinarily resident in France or exercising his/her activity in France, is punished by up to 10 years' imprisonment and a fine of €1 mn for natural persons (i.e. generally, directors of the company) and/or a fine of €5 mn for legal persons.

**(2) Specific Rules Preventing Corruption Practices**

The French anti-corruption arsenal has been reinforced by adopting Law No. 2016-1691 on 9 December 2016 on transparency, fight against corruption and modernisation of business practices.

The directors (including chairmen, chief executives and managers) of large companies or French groups with over 500 employees and a turnover of more than €100 mn are required to implement a mechanism to prevent corruption in France and abroad.

The eight following measures need to be taken: (i) introduce a code of conduct; (ii) introduce a whistleblowing mechanism to collect reports; (iii) define a risk mapping document; (iv) implement a commercial partner assessment procedure; (v) implement an accounting control procedure; (vi) introduce a training programme for managers or staff that are at risk of corruption; (vii) introduce a disciplinary sanction procedure for employees who breach the code of conduct; and (viii) establish internal controls and assessments of the implemented measures.

Failure to implement the abovementioned measures is punished by a fine of up to €200,000 for natural persons (i.e. generally, directors of the company) and/or by a fine of €1 mn for legal persons.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements are typically governed by French law.

In purely private projects involving only private entities, the parties may, however, agree to apply a foreign law, which will apply subject to the compliance of the international private law rules of the countries to which each of the private entities belong.

As regards project agreements entered into with the State, State-owned entities or local administrative authorities, such agreements usually meet the criteria of an administrative law contract (e.g. public service concessions). In such a case, the application of French law is mandatory.

### 13.2 What law typically governs financing agreements?

Finance documentation is generally governed by French law. However, English or New York law may be other options when the pool of lenders is not familiar with French law. In accordance with the provisions of Regulation (EC) No. 593/2008 of the Parliament and the Council on the Law Applicable to Contractual Obligations

(Rome I). The selection of a foreign law will be valid and legally binding in France, and French courts would apply such law provided that the contents of the relevant provisions of the chosen laws do not contravene with the principles of French public policy.

Security documents shall, however, comply with the "*lex rei sitae*" principle, according to which the governing law of a security document shall be the law of the jurisdiction where the asset is located.

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

As indicated above, project agreements which take the form of administrative law contracts are governed by French law in all of their aspects.

Moreover, as regards project and financing agreements which take the form of private law contracts, French law will apply in any case for French public policy matters such as property registration, securities, mortgages and bankruptcy.

## 14 Jurisdiction and Waiver of Immunity

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

As regards project and financing agreements which take the form of private law contracts, a party's submission to foreign jurisdiction and waiver of immunity will usually be legally binding and enforceable, as confirmed by the French Supreme Court (*Cour de Cassation*). Nevertheless, under French private international law principles, French public policy rules will continue to apply notwithstanding any party's waiver.

As regards project agreements which take the form of administrative law contracts, a State-owned entity or local administrative authority's clause of submission to a foreign jurisdiction and waiver of immunity will, in most circumstances, be declared null and void by French courts and will thus not be binding and enforceable in France.

## 15 International Arbitration

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

The Code of Civil Procedure (*Code de Procédure Civile*) provides for rules applicable to international arbitration (article 1504 *et seq.*).

Thus, contractual provisions requiring submission of disputes to international arbitration and arbitral awards will be recognised by local courts, provided that the abovementioned provisions of the Code of Civil Procedure (*Code de Procédure Civile*) are complied with.

In a nutshell, international arbitration may only apply to situations in which international commerce interests are at stake (this criterion is, however, usually met if the contractual situation involves several States; *Cass.civ.1ère 26 January, 2011, No. 09-10.198*) and arbitral awards will be recognised if they are not contrary to international policy (article 1514 of the Code of Civil Procedure (*Code de Procédure Civile*)).

Under the same conditions, they are declared enforceable in France in the course of an *exequatur* procedure.

However, the possibilities for the State, State-owned entities and local administrative authorities to be subject to arbitration are very restricted (see article 2060 of the French Civil Code (*Code civil*)). Nevertheless, a law enacted in 1986, notably in the context of the negotiations relating to the setting up in France of Eurodisney, provides for an exception to article 2060 of the French Civil Code (*Code civil*), under which "*the State, the local administrative authorities and entities owned by the State or local administrative authorities [i.e. "établissements publics"] are authorised, in the contracts that they sign with foreign companies for the performance of operations of national interest, to provide for arbitration in the contract in order to settle, as the case may be in a definitive manner, litigations relating to the performance and the interpretation of such contracts*" (our translation of article 9 of Law No. 86-972 dated 19 August 1986).

Thus, under certain circumstances, project agreements to which the abovementioned entities are parties may be subject to international arbitration.

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

France applies the New York Convention only to the recognition and enforcement of awards rendered on the territory of another Contracting State. France is also a Contracting State of the European Convention on International Commercial Arbitration of Geneva dated 21 April 1961 including the Agreement relating to Application of the European Convention on International Commercial Arbitration of Paris dated 17 December 1962.

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

Domestic disputes with non-professional parties are not arbitrable. Furthermore, the arbitration agreement is void if it entrusts the arbitrators with a mission that infringes French public order policy. Moreover, as indicated above, public bodies and institutions may be subject to arbitration only in very restricted cases. However, some categories of public institutions, whether industrial or commercial, may be authorised by decree to enter into compromise agreements.

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

There are no types of disputes subject to mandatory domestic arbitration proceedings.

## 16 Change of Law / Political Risk

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

In purely private project financings, where public authorities do not intervene as contracting parties, there is, generally speaking, to our knowledge, no call for political risk protections in France. We were, however, involved a few years ago in a tax stability agreement between the sponsors of a project and the local authorities in a French overseas territory, the details of which may not be disclosed.

In project finance schemes under the form of PPPs, the lenders always request the signature of a direct agreement with the public client, which will contain rules applicable in case the main project agreement (e.g. a public service concession) is declared null and void by a jurisdiction.

Indeed, in such a situation, and notwithstanding the fact that the public authority is not bound anymore by the project agreement which has been declared null and void, the lenders will benefit from the guarantee from the public authority, contained in the direct agreement, under which the public authority undertakes to pay any outstanding debt to the lenders in case of default of the SPV (which will inevitably arise as a result of the cancellation of the project agreement).

In addition, under French administrative law, which governs project agreements entered into with public authorities, the latter are not allowed to make compromises on their regulatory powers and thus undertake to avoid modifying the regulations which they are in charge of enacting.

Nevertheless, under the theory of the "*fait du prince*", in case the contracting public authority imposes new obligations to its contracting party by way of a unilateral modification to the contract, or as a result of new regulations having a specific impact on an essential element of the contract, such contracting party is entitled to indemnification, under certain circumstances. Such indemnification will repair any direct damage suffered.

In addition, the State may be held liable for the consequences of the enactment of a new law in case such consequences over the contracts are considered as "very serious and special" (e.g. CE, 1 February 2012, No. 347205).

In any case, the SPV and the public contracting authority can negotiate specific clauses in the project agreements governing indemnification relating to regulation modifications.

## 17 Tax

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

Interest payments made by a French company to a non-tax resident are, in principle, exempt from any withholding tax in France. By exception, if the payment is made to an entity established in a NCST, a 75% withholding tax applies.

Rates of interest paid by French corporate taxpayers to related companies are deemed to be at arm's length if they do not exceed a maximum rate published by the French Tax Authorities corresponding to the average of annual floating rates applied by banks. If the interest rate exceeds the said maximum rate, the borrower will have to demonstrate that the rate applied is in line with the rate that would have been applied if the lender had been a third party.

Tax deduction of interest may be limited under French tax law. The main limitations are the following:

a) French tax law provides for thin capitalisation rules and disallows interest deduction if the paying company is thin capitalised. Such situation is met if the following thresholds are simultaneously overstepped:
   1. The amount of the related parties' debt exceeds 1.5 times the amount of equity or share capital of the company.
   2. Interest paid to related parties exceeds 25% of the current result before tax; increased mainly by this interest being payable to related parties and amortisation.
   3. Interest paid to related parties exceeds the amount of interest income received by the company from related parties.

   If at least one of these ratios is not met, the interest is fully tax-deductible. Otherwise, interest is deductible up to the amount corresponding to the highest of the above ratios/ thresholds.

b) General limitation. A 75% general limitation applies to both related party financing and bank debt where the net annual interest expenses exceed €3 mn regardless of the purpose of the financing. It means that if a company bears an annual interest exceeding €3 mn, 25% of this interest is not tax-deductible.

Other specific regimes may limit the tax deductibility of interest in France under certain circumstances, please seek assistance for more details.

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

Corporate income tax is payable annually on all profits generated in France by legal entities. Residents and non-residents are taxable in France on profits allocable to a French business. France has a broad range of tax treaties signed with more than 110 countries. Tax treaties prevent double taxation on all types of income and provide for a reduction or a cancellation of the withholding taxes levied on dividends, interest and royalties.

The main French tax incentives are the following:

a) Corporate income tax rate decrease

The corporate income tax rate has recently been reduced from 33⅓% to 28% for the portion of the tax profit which does not exceed €500,000. This reduction will continue progressively until 2022 to reach a general rate of 25% for all companies, without any limitation regarding the amount of profit.

b) Amortisation

French tax law provides for different methods of depreciation of assets (straight-line depreciation and accelerated depreciation). Straight-line depreciation is normally used. In principle, there is no specific restriction to the deduction of amortisation under French rules.

c) Tax losses

Ordinary tax losses are offsetable against tax profits, with a limit of €1 mn plus 50% of the portion of profits exceeding €1 mn. The exceeding tax losses may be carried forward indefinitely.

d) Capital gain taxation on shares

For corporate income tax purposes, capital gains realised on the sale of shares are only taxed on a portion of 12% of their amount (88% exemption). The shares have to represent at least 5% of the share capital of the sold company and have to be held for a minimum of two years.

The taxable portion is subject to corporate income tax at the standard rate.

## 18 Other Matters

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

The above answers cover most of the relevant issues raised in project financings governed by French law.

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

Under French law, provisions relating to the issuance of bonds or similar capital market instruments differ according to the legal form of the private company; a private limited company (*sociétés par actions simplifiées*) may not be legally entitled to issue, guarantee or secure bonds and other debt securities, while public limited companies (*sociétés anonymes*) are subject to certain quantitative limitations in the amount of unsecured bonds outstanding at any one time, as compared to their level of equity and reserves.

These limitations should not apply to financial institutions and insurance companies, and there are other more minor exceptions.

In any case, in the context of certain PPP projects, the issue of bonds may be subject to prior consent by the relevant governmental authority.

Depending on the type of investors addressed, the number of retail investors addressed, the total issue amount, the minimum amount of securities to be acquired per investor, and the minimum unit per value of the securities, capital market instruments may be structured as:

(i) public placements; or

(ii) private placements, with no or limited disclosure or supervision requirements with the competent French regulation entities, but with the intervention of an authorised financial entity in order promote the allocation of securities.

## 19 Islamic Finance

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

French law does not expressly recognise the concepts of *Istina'a*, *Ijarah*, *Sukuk*, *Wakala* and *Murabaha*; however, French tax law has consequently evolved in the last few years to align these concepts to similar French law instruments.

It is mainly considered that the structuration of project finance under French law may comply with *Shari'ah* law when using French law instruments which are similar in nature, such as:

(i) an investment title for *Sukuk*, according to which principal and remuneration are indexed on the performance of the assets owned by an issuer;

(ii) an EPC agreement for *Istina'a*, which is believed to be the most popular structure in Islamic project financing;

(iii) an operating lease for *Ijarah*;

(iv) a mandate for *Wakala*, where the borrower is employed as the lenders' agent per an agency (*Wakala*) agreement; and

(v) the purchase of chattel property with deferred payment (including a positive margin) for *Murabaha*, which is probably the least popular structure in Islamic project financing.

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

There is no relevant case law in France regarding the application of *Shari'ah* law as regards the governing law of a contract or dispute.

It remains also very unlikely that French courts would accept its application, unless (i) the governing law of the relevant agreement is set as the law of a country with legislation based on *Shari'ah* law, and (ii) such legislation does not contradict with French public policies.

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

Under French law, the inclusion of an interest payment obligation in a loan agreement does not affect its validity and/or enforceability.

However, please note that:

(i) in accordance with article 1343-2 of the French Civil Code (*Code civil*), the capitalisation of interest payable pursuant to a contract (including "default interest") is permitted only where the said interest has accrued for at least one year.

(ii) the French Consumer Code (*Code de la Consommation*) provides for mandatory requirements regarding the all-in interest rate (*taux effectif global*), according to which where the all-in interest rate is calculated, if it is wrong or inaccurate for any reason, or in the event that it is not set out either in the relevant agreement or in a separate letter, the contractual interest rate would not be applicable and the legal interest rate would be applicable as from the date of the contemplated loan agreement, and the bank may be held criminally liable.

Nonetheless, and concerning loans bearing interest at a floating rate, the bank is not under any obligation to give notice to the borrower of the actual all-in interest rate resulting from the variation of the applicable interest rate when the applicable interest rate is based on an objective index (*indice objectif*).

## Acknowledgment

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The firm advises particularly on corporate law, mergers & acquisitions, private equity, tax law, employment & social security tax, banking, project finance & capital markets, competition & distribution law, property law & property management, public & environmental law, intellectual property & technology law, transport law, and litigation & arbitration.

The firm has offices in Paris, Lille, Lyon, Aix-Marseille, Shanghai and Beijing.

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# Germany

PrimePartners Wirtschaftskanzlei

Adi Seffer

## 1 Overview

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

The Eurozone experienced stable growth in 2017, although it suffered from certain political and geopolitical uncertainties. Great Britain's vote to leave the European Union will lead to a disruption of the seamless relations between Great Britain and the European Union. However, both sides intend to reduce the economic consequences to a minimum. Several major terrorist attacks in 2017, e.g., in Belgium, France, Great Britain and Germany, reminded communities of the unresolved matter of the influence of the Arabic revolutions in the Middle East and North Africa, and the massive number of refugees still arriving in Europe with unclear status. The European Central Bank continued to stimulate the capital market and provides significant Euro liquidity. Europe's economy is in a good condition. In Germany, at least in certain regions, most inhabitants have the status of full employment, with an unemployment rate below 2 per cent, tax payments are at an all-time high and nationally there is a surplus in the public sector. Mergers and acquisitions (M&A) and private equity (PE) activities are close to the peak of 2017. The trend for 2018 remains strong. Although the overall amount of transactions in 2017 was lower than 2016, due to several high-value deals, the total value of the transactions doubled in 2017. The German Mittelstand maintains the acquisition target of foreign investors, although some larger targets came into the focus of investors. Restructuring transactions of all kinds as well as heavy industries, the health care sector, and the transportation and energy market (including wind parks and solar) are strong.

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

In Germany, numerous transportation and alternative energy projects also represent significant project financing:

- "Siemens" and "Alstom" intend to merge their train development divisions;
- the financing of the offshore wind parks "Nordsee One", "Nordergründe" and "Butendiek";
- the redevelopment of the campus of the Schleswig-Holstein university hospital;
- the development of the autobahn A7; and
- the purchase of the natural gas supply company, Thüringen-Sachsen, including the respective gas distribution systems.

## 2 Security

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

The establishment of securities and their priority depend on the type of asset and the type of the security requested. A general security agreement is achievable for assets of the same type and/or securities of the same type.

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

German law differentiates between security over real estate and security over movables and other equipment. Security over real estate can be established by land charge (sec. 1191 German Civil Code (*BGB*)) or mortgage (sec. 1113 *BGB*). Land charges and mortgages extend to accessories which are to be considered an economic unity with the real property according to secs. 97 and 98 *BGB*. Security over other equipment can be established by a security transfer or a pledge agreement.

**Land charge**

The creation of a land charge requires a notarised agreement by a German notary public between the owner of the land and the secured party about the encumbrance on the real estate and registration with the land registry. Perfection of a land charge is effected by registration with the land registry or, if a land charge certificate has been issued, by transfer of the land charge certificate. Under German law, the first-to-file rule applies, thus the chronological order of land charges – pursuant to the filing date – over the same real property determines their priority; namely, if an earlier land charge is already registered with the land registry, such land charge takes precedence over subsequent land charges. With regard to the security agreement by which the owner of the real estate and the creditor agree that the land charge shall secure a certain claim of the creditor, no formal requirements apply; however, for verification purposes, written agreements are recommended.

**Mortgage**

Like a land charge, a mortgage is perfected by notarised agreement by a German notary public between the owner of the real estate and the creditor, stipulating the encumbrance of the land and registration of all essential circumstances (e.g., underlying claim, interest and creditor) with the land registry. Its priority is established according to the first-to-file rule.

**Security transfer**

It is characteristic of a security transfer that the party granting security usually remains in possession of the transferred assets and is therefore still in a position to use the assets economically, even though it is no longer the legal owner of the asset because of the transfer of ownership. Because of the tax on the transfer of real estate, in practice this security is executed in relation to movable assets only.

A security transfer of movables requires an agreement on the transfer of ownership of the asset for a certain period of time, usually until the secured claim is completely satisfied. With respect to such transfers, the principle of certainty has to be observed; namely, a third party must be able to determine which specific assets are transferred as security. Transfer of ownership usually requires transfer of possession, to make it possible for the debtor to keep using the assets; however, this transfer of possession is often replaced by a separate agreement by which the debtor is entitled to hold possession on behalf of the secured party. Further, the debtor and the creditor have to agree on what claims of the creditor shall be secured and the process of foreclosure, if the creditor's claim is not satisfied. There are no formal requirements for security transfer agreements, but for certainty and verification reasons a written agreement is highly recommended.

Regarding priority, the security right that was perfected first – i.e., at an earlier date – has prior ranking. A security transfer of movables requires no registration; therefore, no fees or taxes are incurred. Real estate may also be transferred as security; however, the transfer of real estate incurs real estate transfer taxes of approximately 3 per cent of the land's value, and is therefore very seldom used as security.

**Pledge**

In order to perfect a pledge on movable assets, transfer of possession is required. The pledge of rights requires the notification of the relevant third party (e.g., bank, customer) of such pledge. Priority is established according to the date of the pledge; namely, a pledge of an earlier date has prior ranking.

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

Rights, for example, receivables, are usually assigned by global assignment agreements pursuant to which the debtor assigns all existing and future claims in connection with customer relations or other claims to the creditor for security purposes. With regard to the assigned claims, the principle of certainty applies; namely, if the claims assigned are not determinable, the assignment is invalid and unenforceable. Further, claims already assigned to third parties are not assignable, as the priority principle on the date of assignment applies.

In general, no formal requirements exist to perfect such global assignments, but to avoid any uncertainty about which claims are assigned and for verification reasons, written agreements are common.

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

The pledge of rights requires a notification of the relevant third party (e.g., bank, customer) of such pledge. Priority is established according to the date of the pledge; namely, a pledge of an earlier date has prior ranking.

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

In the case of pledging shares in a German limited liability company (*GmbH*), a notarised pledge agreement is required by law; namely, it must be signed in front of a German notary public after having been read aloud and in its entirety to the parties. Priority is established according to the date of the pledge; namely, a pledge of an earlier date has prior ranking.

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

The fees of the notary public depend on the value of the land or shares and vary from 1 per cent to less than 0.3 per cent.

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

In case of land charges, mortgages and pledging shares in a *GmbH*, the respective agreements need to be notarised by a German notary public. This leads to notary fees, consisting of fees for registration and issuance of a land charge certificate, if applied for, as mentioned under questions 2.2 and 2.6 above. The creation of land charges and mortgages needs to be registered with the land registry.

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

Usually, under German law, government approvals are not required for project finance transactions. However, for project implementation, different types of approval exist (e.g., building permits, permissions under the Water Resources Act, Water Waste Act, Federal Mining Act, etc.). As the requirements for each permission vary, before the implementation of the project there should be a careful review of whether all necessary permissions already exist or may be obtained. A foreign investor would not be treated more strictly in obtaining a required permission, but the German Federal Ministry of Economics and Technology (*BMWi*) may restrict a foreign investment if public security is threatened.

## 3 Security Trustee

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

Under German law, a corporate entity, in the capacity of an agent or trustee, may hold collateral on behalf of the project lenders as the secured party. To perfect such an arrangement, it needs to be established whether the security is non-accessory or accessory. In the case of non-accessory securities, the security may be granted directly to the agent or trustee. In the case of accessory securities, the security is granted to all project lenders and the security trustee or agent as their representative.

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

The security agent is a common position in project finance agreements in Germany.

## 4 Enforcement of Security

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

The enforcement of security interests depends on the type of collateral granted. The following list briefly outlines the enforcement of the different securities:

**Land charge, mortgage**

A security enforcement of land charges and mortgages is usually realised through public auction or sequestration. The process of public auction and sequestration is governed by the German Act on Enforcement. Any foreclosure action has to be ordered by the court.

**Security transfer**

In the case of a security transfer, the process of realisation is usually agreed by the parties within the security agreement. As the debtor usually remains in possession of the transferred assets, the creditor often empowers the debtor to sell the assets and in return the debtor assigns the proceeds to the creditor.

**Assignment of rights**

The realisation of an assignment of rights is usually conducted through forfeiture of the assigned claim. The creditor may also decide to sell the assigned claim or rights if such sale is not disadvantageous. However, a sale of claims is usually inappropriate as the purchaser will probably not pay the nominal value of such claims.

**Pledge**

A pledge is realised through the sale of the assets or public auction, whichever is more profitable. As the cost of a sale is usually lower than the cost of a public auction, a sale is more common. If the proceeds of such sale exceed the security, the debtor is entitled to claim the excess amount.

**Guarantee, surety**

If the debtor is in default, the creditor is entitled to demand payment from the guarantor.

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

Under German law, no restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies.

## 5 Bankruptcy and Restructuring Proceedings

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

Pursuant to the German Insolvency Code, insolvency proceedings may be opened over the assets of individuals and legal entities. Insolvency proceedings over the assets of a company are opened in the case of over-indebtedness or illiquidity, if insolvency proceedings are initiated either by the company itself or one of its debtors. Insolvency proceedings are opened by court order and an insolvency administrator is appointed, who then is the only one who has the power of disposal over the company's assets. Often a preliminary administrator is appointed who has limited power and operates the company and its assets jointly with the company's management. The insolvency administrator is in charge of seizing the business assets and has to enforce clawback rights. After insolvency proceedings are opened, the creditors have to file their claims with the insolvency court.

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

Under German law, different clawback rights exist if the debtor has transferred assets within three months preceding the opening of insolvency proceedings, provided that such transfer was intended to harm its creditors. In the case of fraudulent transfer (transfer with the intention to harm the creditors), all transfers in the 10 years preceding the opening of insolvency proceedings may be challenged.

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

Public agencies may not be the subject of insolvency proceedings.

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

German law provides fast-track procedures and injunctions to seize assets in cases of urgency.

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

German law provides the possibility for insolvency protection proceedings under a company's own administration (slightly similar to the "chapter 11 proceedings" used in the US) if it is threatened with insolvency or over-indebtedness. The court appoints a trustee for the company's assets while the company and its board of creditors are granted three months to implement an insolvency plan. The court may only deviate from unanimous decisions of the board of creditors if the insolvency plan is obviously futile. Dissenting creditors trying to fight the implementation of the insolvency plan have to show credibly that they are subject to worse conditions under the plan. The insolvency plan may contain a debt-for-equity swap by way of remedial action. Such debt-for-equity swap provides certain advantages for the acquirer, in the form of limited liabilities compared to the regular acquisition of shares.

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

In the case of insolvency or over-indebtedness, directors are obligated to apply for insolvency proceedings instantly, or in any case, no later than within three weeks. Failure to do so is a criminal offence, and directors are personally liable for any damages caused by the delayed application. In cases of obvious infringement of such obligation, e.g., obvious over indebtedness or manoeuvres intended to cause damage to certain creditors or to benefit other creditors, such action may not be insured by directors' and officers' liability (D&O) insurance.

## 6 Foreign Investment and Ownership Restrictions

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

Under German law, there are no general restrictions on foreign investment in, or ownership of, project and related companies. However, it should be noted that in 2009, the German Foreign Trade and Payments Act and the Foreign Trade and Payments Regulations were amended. The law enables the German Federal Ministry of Economics and Technology (*BMWi*) to examine and possibly prohibit acquisitions by foreign investors (from outside the European Union), who wish to acquire directly or indirectly 25 per cent or more of the voting rights in a German company, if this is essential to safeguard the public policy or public security of the Federal Republic of Germany. The law is not limited to specific sectors and enterprises; its aim is not to abandon the country's open investment strategy but to ensure that, in individual cases, the *BMWi* has measures at its own disposal to examine foreign investments.

The law does not provide for the registration of foreign investments. Thus, a foreign investor would not be obliged to register the envisaged investment. However, in order to verify if an acquisition would be deemed to be against public policy or public security, the investor may request a legally binding certificate of non-objection prior to the envisaged acquisition. Such application needs only to outline the basic elements of the acquisition, the investor and its field of business. If the *BMWi* does not start an investigation of the acquisition within one month of receipt of the investor's written request for a certificate of non-objection, it will be deemed to have been issued. For tax reasons, there are no disadvantages in foreign investments, as they trigger the same taxes as domestic investments.

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

The prohibition or restriction is only possible in exceptional cases, because it may only be restricted or prohibited if it is a threat to public policy or public security, as established by articles 52 and 65 of the Treaty on the Functioning of the European Union and according to case law of the European Court of Justice. Therefore, the existence of a concrete and serious threat to the fundamental interests of society is required. Within three months of the signature of a purchase agreement, the *BMWi* may initiate the examination of foreign investments. In this case, the investor would be obliged to submit all necessary information in connection with the acquisition. After the receipt of the information, the *BMWi* has to decide within two months whether the examined acquisition should be subject to certain conditions or prohibited. If the *BMWi* takes no action within this period, the acquisition may no longer be prohibited or made subject to any conditions.

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

Article 14 of the German Constitution guarantees property rights. However, it also obliges the use of such property for the public good. Otherwise, expropriation is permitted, constitutional and lawful provided that reasonable compensation is paid. Specific German laws allowing expropriation are:

- the Federal Building Code;
- the Federal Highway Act;
- the Regional Highway Act;
- the Air Traffic Act;
- the Energy Act;
- the General Railway Act; and
- the Regional Water Act.

However, expropriation under the above-mentioned laws is only permitted if it is necessary for the public good.

## 7 Government Approvals/Restrictions

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

Generally, regional authorities are in charge of approvals and supervision, although in a few cases federal agencies are the responsible authorities.

**Transport**

Air traffic that is regulated by the Federal Air Traffic Act is supervised by the Federal Air Traffic Agency. Railways are mainly governed by the Federal Railway Act and supervised by the Federal Railway Authority. Public transport is regulated by the Federal Public Transportation Act and supervised by regional authorities. Shipping transport and ports are supervised by the Federal Water and Shipping Act.

**Water treatment**

The commercial use of water is mainly governed by the Water Resources Act, Waste Water Levy Act and the State Water Acts.

**Chemicals**

Pursuant to the Federal Chemicals Act, the registration of chemicals is handled by the Federal Environment Agency.

**Energy**

The energy market is regulated by the Federal Energy Act and supervised by the Federal Network Agency for electricity, gas, telecommunications, postal services and railways.

**Minerals, oil and gas**

The extraction of minerals is mainly governed by the Federal

Mining Act, pursuant to which regional authorities are usually in charge of the administrative procedures thereunder.

**Finance**

To conduct business in the banking sector, permission under the Federal Banking Act is required. The supervision of the banking and finance sector is carried out by the Federal Financial Supervisory Authority (*BaFin*).

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

Under German law, no substantial documentation formalities exist regarding finance or project agreements. In some cases formal requirements, such as a written form (e.g., surety, lease agreements), need to be observed in order to execute legally binding and enforceable agreements. For verification reasons, written agreements are highly recommended even if a written form is not required by law. If foreign investors are party to the agreement, bilingual documentation is recommended; namely, German and English. If the project company is a *GmbH*, please note that its incorporation, any transfer of shares, and any share pledge, need to be notarised, as mentioned above.

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

In general, under German law, the owner of land is also the owner of the natural resources therein. However, according to the Federal Mining Act, the resources listed therein do not belong to the landowner. Therefore, the right to extract these natural resources, for example, oil and gas, is assigned by the state. With respect to the commercial use of water, a permit pursuant to the Water Resources Act is required.

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

The royalties to be paid for the extraction of natural resources are governed by the Federal Mining Act and are assessed by the regional authorities. In general, no restrictions with respect to the export of natural resources exist. Export permissions are required only for goods listed in the Foreign Trade Act: specifically, dual-use goods; namely, goods that may be used for civil and military purposes.

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

In Germany, no significant controls, taxes or other charges exist with respect to foreign currency exchange. However, the rules regarding the prevention of money laundering need to be observed with respect to currency exchange transactions. Concerning fees in relation to foreign currency exchange, it should be noted that banks usually charge exchange or transaction fees.

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

Except for double taxation agreements, no specific regulations exist regarding remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loan payments to parties from foreign jurisdictions. There are no restrictions on the distribution of profits of a German project company to shareholders in other jurisdictions. There are no legal obligations for German project companies to repatriate foreign earnings. Nor is there any restriction on their use. However, there might be contractual obligations on the project companies to do so.

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

Yes, foreign currency accounts may be established by German project companies abroad and in Germany as well. There are no legal restrictions. However, such accounts have to comply with German tax and money laundering rules.

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

Except for double taxation agreements, no specific regulations exist regarding remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loan payments to parties from foreign jurisdictions. There are no restrictions on the distribution of profits of a German project company to shareholders in other jurisdictions.

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

Different laws apply depending on the relevant project sector. There are various laws that govern the environmental aspects of a project; for example, the Water Resources Act, the Waste Act, the Federal Pollution Act, and so on. As regards health and safety, there exist numerous sector-specific laws. Basically, the employer is obliged to safeguard its employees from injury and to take all reasonable measures, taking into account the nature of the business.

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

A *GmbH* is the most favoured structure for project companies in Germany. To set up a *GmbH*, a notarised deed of incorporation is required. Further, under German law, the purchase of a shelf company is possible, which also needs to be notarised. The principal financing sources for German project companies are the facilities provided by banks. Other possible legal structures for project companies are limited partnerships and stock corporations.

## 8 Foreign Insurance

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

Foreign insurers not registered in an EU or EEA Member State may also carry out insurance business in Germany. However, they have to be admitted in Germany. The authority for the issuance of such admission is the Federal Financial Supervisory Authority (*BaFin*). Insurers registered in an EU or EEA Member State and having a valid licence within an EU or EEA Member State, in contrast, may conduct their insurance business in Germany without further permission. This is known as the European passport or single-licence principle.

In order to be able to operate in Germany, however, the insurer has to go through a notification procedure with the *BaFin*.

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

Insurance policies over project assets can be payable to foreign (secured) creditors.

## 9 Foreign Employee Restrictions

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

There is a distinction between EU citizens and citizens of other countries. As EU citizens have the right of free movement and labour, they may establish themselves independently in Germany and work without a visa or permit. Non-EU citizens need to obtain a residence permit for work in order to start working in Germany. Specific transition rules may apply to certain countries which joined the European Union recently.

## 10 Equipment Import Restrictions

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

Under German law, no specific restrictions regarding the importation of project equipment exist. An import permit is required only for products in specific categories, from certain countries or certain goods listed in the import list of the Foreign Trade and Payments Act. Under the law against terrorism, further arrangements with certain individuals, groups and organisations are prohibited.

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

Customs duties (especially importation VAT, currently at 19 per cent) are only payable for goods imported from outside the European Union which are not just temporarily imported and re-exported after a few months.

## 11 *Force Majeure*

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

*Force majeure* exclusions are generally available according to law. In some cases (e.g., the German Liability Act (*HaftPflG*)), liability for *force majeure* is already explicitly excluded by law. Thus, it should be checked in each case whether such *force majeure* exclusion is applicable for the intended project.

## 12 Corrupt Practices

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

Corrupt business practices and bribery are criminal offences according to sec. 299 *ff.* of the German Criminal Code (*StGB*), and are punishable by penalty, or imprisonment for up to five years in particularly serious cases. Corrupt business practices are prohibited under sec. 3 of the German Act Against Unfair Practices (*UWG*) and subject to damages according to sec. 9 *UWG*.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Typically, German law applies; see question 13.3 below for details.

### 13.2 What law typically governs financing agreements?

Typically, German law applies; see question 13.3 below for details.

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

The parties may freely choose the applicable law, provided that such choice is not intended to circumvent public order and is not in conflict with mandatory law. A choice of law will usually be accepted by a German court. In practice, usually the jurisdiction of the main centre of interest of the project will be agreed on; e.g., if the financing is provided by German banks, the facility agreements will be governed by German law. In the case of international projects, the facility agreements are often governed by English law. However, it needs to be pointed out that the security documentation regarding assets located in Germany has to be governed by German law.

## 14 Jurisdiction and Waiver of Immunity

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

Yes, submission to a foreign jurisdiction would be effective under German law. With regard to enforceability, a distinction needs to be made between orders from courts within the European Union and those from courts in other foreign countries. Orders from EU courts are directly enforceable in Germany. In other cases, enforceability depends on bilateral treaties.

## 15 International Arbitration

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

Germany is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, foreign arbitration agreements and arbitration awards are recognised by German courts. However, the vast majority of commercial disputes are dealt with by national courts.

For the enforcement of such arbitration awards, a declaration of enforceability by a regional court is required.

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

Germany is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

Matters of public interest, such as the granting of permits by public authorities or criminal law matters, are not arbitrable.

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

Any type of arbitrable disputes may also be subject to foreign arbitration. However, certain types of disputes, in particular where public parties are involved, are not subject to arbitration but to ordinary court jurisdiction only.

## 16 Change of Law / Political Risk

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

Germany remains one of the most stable economies in the world. Because of its convenient statute-based system and the convenient enforceability of German law-based judgments worldwide, German law is therefore often chosen by parties to avoid uncertainties due to political risks and/or corruption in other jurisdictions.

## 17 Tax

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

In general, there are no obligations to deduct or withhold tax from: (i) interest payments under a fixed interest-bearing loan, which is not secured by German real estate or by ships entered into the ship register; (ii) proceeds of a claim under a guarantee; or (iii) the proceeds of enforcing security.

However, if there is a profit from a loan, there is an obligation to withhold 26.375 per cent tax on these payments, provided the borrower does not qualify for benefits under an applicable tax treaty.

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

Foreign investors are treated like domestic investors, so that from a tax point of view, no disadvantages result from investment. Depending on the type of investment, certain tax advantages may be applicable, as double taxation agreements exist with certain countries. Thus, it should be checked whether such agreements are applicable for the intended project.

## 18 Other Matters

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

There are no specific public bodies that regulate the project finance industry in Germany, and mandatory law is very limited in this regard. All relevant public law aspects of the project (permits, concessions, approvals, supervision, etc.) are handled by the public authorities competent for the applicable subject matter (e.g., renewable energy sector). Accordingly, a variety of laws and authorities may have to be considered/dealt with, and any kind of collateral can be limited by mandatory law (for instance, subsidiaries are limited in granting collateral for their parent companies).

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

A public placement of capital market instruments and/or admission to trading in a regulated marked requires a prospectus based on the EU prospectus regime. There are a couple of market segments for bonds, and not all of them accept project companies. Further, if the parent company provides any kind of guarantee, it needs to fulfil certain disclosure requirements as well. If the bond comprises an equity kicker or similar instrument, it may require a resolution by the issuer's shareholders and, if there is a broad shareholder basis, shareholders' subscription rights are to be granted.

## 19 Islamic Finance

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

*Istina'a*, *Ijarah*, *Wakala* and *Murabaha* each have similar or corresponding legal institutions available under German law. Details of structuring may be different depending on the asset(s) involved:

***Istina'a***

*Istina'a* may be used for any manufacturing or processing projects, where the asset or project structure is manufactured/implemented over different stages/milestones. For each stage/milestone, a down-payment is agreed in advance. This provides ongoing liquidity to the manufacturer paid for the actual work finalised. It is similar to a service contract with down payments.

***Ijarah***

*Ijarah* is a leasing concept that can be used for assets and equipment, similar to regular leasing contracts. The bank/lease provider purchases the asset/piece of equipment and leases it to the user. The leasing fee/rent is usually paid for management and maintenance over a fixed period of time.

***Wakala***

Powers of attorney may be given according to German law. Some powers may require a specific form under German law; for example, a notarial deed.

***Murabaha***

*Murabaha* is a fixed-income loan for the purchase of goods (real assets). The creditor purchases the goods and then sells them to the beneficiary for the purchase price plus an additional profit margin. Payment for the loan is not provided by interest (over time). The creditor is compensated by the profit margin paid by the beneficiary.

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

*Shari'ah* may be agreed by the parties as the governing law in an arbitration clause or arbitration agreement. We doubt that ordinary courts may acknowledge *Shari'ah* as governing law. No precedents have been seen so far.

As only very few cases of Islamic law-based financial products have been issued in Germany, we may not state any notable case of dispute or jurisdiction so far. Also, currently we do not see a trend in favour of Islamic financing in Germany.

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

The inclusion of an interest payment in a loan agreement is not permitted by Islamic law (*Shari'ah*). Under German law, such provision does not cause any issues. No case has been reported to date in which such provision has resulted in a validity issue or hindered its enforceability if Islamic law applies to the contract and the intention is to execute such provision in Germany.

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At PrimePartners, Adi Seffer brings more than 20 years of experience in corporate & IT transactions and financings with national and international reach. He has advised his clients as lead counsel in more than 70 buy-outs, private, public or restructuring transactions and outsourcings. Trained in international law at the universities of Frankfurt, Munich and the London School of Economics and Barcelona, he started his career as a lawyer in 1990, becoming a partner in 1993 at a major national firm. From 2001 to 2005 he served as Head of Business & Finance and Technology at an international US firm. Since then he has continued his legal transactional advisory services with his entrepreneurial spirit and enthusiasm. Adi is one of the foremost certified specialists in International Business Law in Germany, a lecturer for acquisition finance and restructuring at the Frankfurt School of Banking & Finance, and an author and speaker on M&A, Finance and Restructuring topics.

Adi Seffer is ranked nationally and internationally; in particular, he was selected as one of the Best Lawyers in Germany by Handelsblatt, for his IT expertise (*Juve*), Outsourcing (*Euromoney*) and in the field of Corporate/Mid-Cap Markets (*Chambers Europe*) as "the leading transaction manager" (*Best of the Best – Europe*).

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Chapter 16

# Ghana

NanaAma Botchway

N. Dowuona & Company

Akosua Achiaa Akobour Debrah

## 1 Overview

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

The Ghanaian project finance market has recorded an interesting mix of projects in the power, energy, maritime, aviation and rail sectors. These projects have involved both private and public actors. In recent times, project financing in Ghana has seen an increased use in alternative credit enhancement facilities due to the non-availability of government guarantees as a result of public debt limitations placed on the government by the International Monetary Fund ("IMF") as part of an extended credit facility programme being supervised by the IMF. In response, and as a means of reducing the risk to their investments, lenders have resorted to the use of partial risk guarantees obtained from mainly World Bank Group institutions, which invariably affects the cost profile of these projects.

With regards to the outlook, recent banking reforms are expected to influence the Ghanaian project finance market as a result of an increment in the capitalisation requirements of banks. In previous years, Ghanaian banks have been limited in their ability to finance large projects because they have not been sufficiently capitalised to lend significantly large sums of money. The increment in the minimum capital and liquidity requirements for banks, however, is expected to provide local banks with the capacity to participate in large project finance transactions.

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

| Project Name/Description | Project Cost |
|---|---|
| Atuabo Freeport | $700 million |
| GACL Regional Airports Expansion Project (incl. Kotoka International Airport Expansion) | $400 million |
| Tema Port Expansion | $1.5 billion |
| Takoradi Port Expansion – Phase 1 | $350 million |
| Accra-Takoradi Highway Construction | $600 million |
| 225MW Ayitepa Wind Farm | $525 million |
| 60MW Aboadze Jacobson Jelco Gas Fired Plant | $528 million |
| Ghana 1000 | $1 billion |
| Cenpower Kpone Independent Power Plant | $650 million |

## 2 Security

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

Borrowers are permitted to give asset security by means of a general security agreement. There is no requirement for a separate agreement to be executed for each type of asset used as security; however, each security is assessable to stamp duty separately as though each were set out in a separate agreement. Security is normally created by written agreement, containing charging clauses. After execution, the agreement must be stamped and depending on the type of asset and whether the borrower is a company, it may require registration with the Collateral Registry, Deeds/Land Title Registry and/or the Registrar of Companies in order to be enforceable.

Under the Borrowers and Lenders Act, 2008 (Act 773) charges created by borrowers to secure credit facilities granted by lenders must be registered with the Collateral Registry within 28 days of the creation of the charge. If the security affects land or a company's assets, it must additionally be registered with the Deeds/Land Title Registry and/or the Registrar of Companies. Under the Companies Act 1963 (Act 179), any security created over a company's assets shall be void unless registered with the Registrar of Companies within 28 days of the creation of the charge – however, an extension of time to register a charge may be granted by a court. Similarly, any security affecting land, unless registered at the Deeds/Land Title Registry, is ineffective in creating any interest in the chargee in respect of the land.

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

Security can be taken over real property, plant, machinery and equipment. This is typically done through the creation of a fixed charge over movable assets or a mortgage over real property. Under Ghanaian law, a mortgage only operates as a fixed charge on real property and does not automatically convey ownership or possession in the asset to the mortgagee. A mortgage is required to be in writing, unless excluded from such requirement by operation of law or by a specific statute. Mortgages and fixed charges are subject to the perfection requirements set out above.

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

Security may be taken over receivables, with the chargor being permitted to freely collect the receivables in the absence of a default. Security over receivables are usually created through an assignment of the receivables to the lender. The security agreement must be stamped, and if the assignor is a company, it must be registered with the Registrar of Companies. Debtors need not be notified of the creation of the security in order for it to be valid; however, an assignment of a debt shall not prejudice a debtor who has not been notified of it in writing. Further, where a debtor is not notified of the assignment of a debt and the same debt is subsequently assigned to another person, the later assignee shall take priority over the earlier assignee.

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

Cash deposited in bank accounts may be used as security for a transaction. This is normally done through the creation of a fixed charge over the account in favour of the lender. A notice of the charge is usually sent to the bank with which the account is held. The charge will specify what transactions can be made, and limits to withdrawals from the account will be specified. A charge that is created over cash in a bank account is subject to the perfection requirements set out in the answer to question 2.1.

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

Security can be taken over shares in Ghanaian companies. Shares are in certificated form, and a share charge created over the shares of a company usually requires the certificates to be deposited with the lender. Upon the creation of a share charge, the lender may file a stop notice at the high court requiring the company secretary or any other person to be notified of the lender's interest in the charged shares. Where a stop notice is filed, the company secretary cannot register any transfer of the charged shares without serving a notice on the lender regarding the request for registration of the transfer. The lender must then take the necessary steps within eight days of the notification to obtain a court order, directed at the company secretary, blocking the registration of the transfer of the charged shares.

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

Once executed, mortgages are required to be proved to have been duly signed by the mortgagor by the oath of the mortgagor, the mortgagee or any attesting witness. The oath of proof must be certified by the registrar of lands (or by a notary public, if executed outside Ghana). Stamp duty is required to be paid on all security documents. Where more than one security is created in respect of the same financing transaction, a rate of 0.5% of the secured facility must be paid on the principal or primary security as stamp duty. Auxiliary, collateral, substituted or additional securities are charged with stamp duty at a rate of 0.25% each. Nominal registration fees are payable for registration with the Collateral Registry, Registrar of Companies and Deeds/Land Title Registry.

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

Registration of security affecting real property at the Land Title Registry may involve a significant amount of time. It usually takes between three to six months after stamping to register a mortgage with the Land Title Registry. On the other hand, registering a security interest at the Collateral Registry can be done within a day, and registration with the Registrar of Companies typically takes between two to three weeks to complete. Other than stamp duty, there are not any significant filing/registration expenses.

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

Other than the consent of the Lands Commission which is required for the mortgaging of state land and stool/skin land (lands collectively owned by communities which are held in trust by chiefs of such communities on their behalf), no regulatory or similar consents are required with respect to the creation of security over real property, plant, machinery or equipment.

## 3 Security Trustee

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

The concept of a trust is recognised in Ghana and the role of the security trustee or agent is also recognised. The security trustee is permitted to enforce security on behalf of the lenders and apply the proceeds from the security to each of their claims.

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

This is not applicable; security trusts are recognised.

## 4 Enforcement of Security

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

Upon the occurrence of an enforcement event, a lender is permitted to take possession of a charged asset registered with the Collateral Registry, if this can be done peaceably, or institute a court action to enforce the security. Before attempting to take possession, the lender must give 30 days' notice to the borrower and a further 30 days' notice to the Collateral Registry.

Where a lender is unable to peaceably take possession of a charged asset (which, in practice, is often the case), an action must be instituted in court to enforce the security. The court may order for a sale of the asset or the appointment of a receiver/manager upon the hearing of the application. A court-ordered sale of an asset used as security shall be by public auction, unless the court orders otherwise.

Generally, there are no regulatory consents required for the enforcement of security.

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

There are no restrictions specially applicable to foreign investors or creditors.

## 5 Bankruptcy and Restructuring Proceedings

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

Upon the commencement of bankruptcy proceedings and on application to the court by a creditor or the liquidator, the company may be prevented from disposing of any of its property prior to the commencement of the liquidation process. A secured lender may, however, institute proceedings in court to realise its security.

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

The Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) permits a liquidator, during the winding-up of an insolvent company, to give notice to a person or company to return property that the insolvent company transferred to the said person or company to settle a debt, 21 days before the petition for winding-up was filed. The company would, upon receiving such notice, be required to return the property or its value to the liquidator. Additionally, where a liquidator determines that the insolvent company disposed of any of its property for less than its full value, two years prior to the making of the order to wind up the company, or more than two years but less than 10 years prior to the making of the winding-up order and at a time that the company was insolvent, the liquidator shall give notice to the person or company to whom the property was disposed of or who benefitted from its disposal, to return the property or the excess value to the liquidator. Further, in terms of ranking of debts for payment during the liquidation of an insolvent company, debts comprising the unpaid remuneration (not exceeding GHS 6,000) of employees for the four months preceding the liquidation and unpaid taxes owed to the Republic or a local authority as at the date of the liquidation, have priority over debts secured by a floating charge that are owed to creditors.

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

No entities are excluded from bankruptcy proceedings.

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

The Borrowers and Lenders Act provides that, upon the occurrence of an enforcement event, a lender need not institute proceedings in court to enforce any security that has been registered with the Collateral Registry. Where possible, the lender may peaceably take possession of the secured assets upon 30 days' notice to the borrower and a further 30 days' notice to the Collateral Registry. In practice, however, securities are seldom realised without a court order.

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

Besides insolvency proceedings, there are no formal restructuring processes that may be used to restructure the debts of the project company and/or cram down on dissenting creditors.

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

Under the Bodies Corporate (Official Liquidations) Act, whenever the business of a company is carried on at a time when, to the knowledge of the directors of the company, the company had no reasonable prospect of paying its debts as and when they fall due, any such business shall be deemed to have been carried on with intent to defraud the creditors of the company, and the directors or any persons who were knowingly parties to the carrying on of such business shall be held personally liable, without any limitation, for all or any of the debts or other liabilities of the company as a court, on the application of the liquidator or of any creditor, member or contributory of the company, may direct.

## 6 Foreign Investment and Ownership Restrictions

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

The Ghana Investment Promotion Centre Act, 2013 (Act 865) provides a limited number of activities in which foreigners cannot engage in. With respect to businesses in which foreign participation is allowed, the foreign shareholder of the company has to satisfy the following minimum capital requirements:

a. minimum of $200,000 for a joint venture between a foreign and Ghanaian shareholder;

b. minimum of $500,000 for a wholly foreign-owned enterprise; and

c. minimum of $1 million for a trading company.

Based on the Supreme Court's decision in *Attorney General v. Balkan Energy Ghana Limited* [2012 ] 2 SCGLR 998, and other cases on the interpretation of Article 181(5) of the 1992 Constitution, a foreign company or a Ghanaian company with foreign shareholders may be required to obtain Parliamentary approval for a contract with the Government of Ghana.

The Petroleum Local Content & Local Participation Regulations, 2013 (LI 2204) require any contractor, subcontractor, licensee or allied entity engaged in petroleum activities to have a local content plan and comply with the relevant local content regulation. Local content refers to the quantum of locally produced materials, personnel, financing, goods and services rendered.

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

We are not aware of any bilateral investment treaties that provide protection from such restrictions.

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

The Ghana Investment Promotion Centre (GIPC) Act protects companies from nationalisation or expropriation, subject to the 1992 Constitution. Under the GIPC Act, a foreigner would not be forced to cede its shares to another person. Further, in the event that the government has to acquire a project company for national interest or public purpose, just compensation would be paid.

## 7 Government Approvals/Restrictions

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

The relevant government agencies or departments are: Cabinet; Parliament; Ministry of Finance; Ministry of Energy and Petroleum; National Petroleum Agency; Petroleum Commission; Ministry for Roads and Highways; Ministry of Railways Development; Ministry of Food and Agriculture; Ghana Ports and Harbours Authority; Ministry of Lands and Natural Resources; Lands Commission; Minerals Commission; Registrar General's Department; Ghana Investment Promotion Centre; and Public Procurement Authority.

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

Under the Stamp Duty Act, 2005 (Act 689), all agreements must be stamped by the Land Valuation Division of the Lands Commission. In the event that the agreement involves an interest in land, it must also be registered with the Deeds Registry and/or Land Title Registry.

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

Land is conveyed by a lease for a leasehold interest or by a conveyance for a freehold interest. A foreign entity does not require a special licence to own land in Ghana. Article 267 of the 1992 Constitution, however, precludes a foreigner from owning an interest in land for more than 50 years. Some industries have specific requirements. For example, the Energy Commission Act, 1997 (Act 541) requires a foreigner to incorporate in Ghana to obtain a licence to transmit, wholesale supply, distribute, or sell electricity or natural gas.

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

A company must obtain a concession or right from the regulatory body in the relevant industry. Article 268 requires any contract or undertaking that grants a right or concession for the exploitation of any natural resource to be ratified by Parliament, unless expressly exempted. There are royalties for the extraction of natural resources. For example, a mining lease is subject to a royalty (differs based on the mineral being mined) of between 3% to 6% of the total revenue.

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

Under the Foreign Exchange Act, 2006 (Act 723), Ghana Cedi is the legal tender in Ghana, thus residents of Ghana cannot price, advertise, receive or make payments in foreign currency for goods and/or services. Further, the Bank of Ghana rules provide rules for Foreign Exchange Accounts and Foreign Currency Accounts such as: (a) a bank may only make foreign currency transfers if substantiated by proper documentation; and (b) transfers abroad without initial documentation of up to $50,000 is permitted; however, any amounts above must be substantiated by proper documentation.

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

The Ghana Investment Promotion Centre Act, 2013 (Act 865) allows transfer of funds in convertible currency for dividends, servicing of foreign loans, payment of fees and charges for technology transfer agreements and remittance of proceeds (net of all taxes and other obligations) where the company is wound up. Also, dividends are subject to withholding tax of 8%.

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

Project companies in Ghana may establish and maintain onshore and offshore foreign currency accounts, subject to the laws of Ghana as well as the laws of the relevant offshore jurisdictions.

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

Other than the requirement that a company shall not pay a dividend to its shareholders, unless it is able after the payment to pay its debts as they fall due and the value of the payment does not exceed the income surplus of the company immediately before the payment of the dividend, there are no restrictions on the payment of dividends, regardless of whether the parent company is incorporated in Ghana.

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

The Environmental Protection Act, 1994 (Act 490) contains significant requirements for undertakings whose activities impact the environment. Additionally, there are various health and safety laws and regulations depending on the industry. The Labour Act, 2003 (Act 651) has health and safety requirements for employment conditions, such as provision of requisite training to maintain a safe working environment and adequate toilet facilities. Some more specific requirements are built into industry practices, laws and regulations. For example, mining companies are subject to specific Environmental Protection Agency rules.

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

The Public Procurement Act, 2003 (Act 663), as amended, governs the procurement and tendering process in Ghana. Where the project involves a partnership with the Government of Ghana, the National Policy on Public Private Partnership (the PPP policy) will apply (the Public Private Partnership Bill, 2017 is currently before Parliament). For example, where the partnership is classified as a public-private partnership ("PPP"), it would require Parliamentary and/or Cabinet approval where required by Article 174 or 181 of the 1992 Constitution or where the estimated project costs involve over GHS 50 million.

## 8 Foreign Insurance

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

Under the Insurance Act, 2006 (Act 724), a foreign insurance company must register and obtain a licence in Ghana to provide insurance. Also, a foreign insurance company may not provide insurance for property located in Ghana, liabilities arising in Ghana or for goods (other than personal effects) imported into Ghana. A person in Ghana, however, may apply to obtain insurance from a foreign company for specific instances such as where the required insurance policy cannot be obtained in Ghana. Also, the Income Tax Act, 2015 (Act 896) imposes a 5% withholding tax on insurance premiums paid by residents of Ghana to foreign insurance companies.

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

Yes they are, subject to any laws specific to that industry that may require the foreign creditor to be registered in Ghana.

## 9 Foreign Employee Restrictions

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

In general, a foreigner must obtain a work and residence permit to work in Ghana. The project company, in its application for a work and residence permit must provide sufficient evidence as to why it is necessary to hire a foreigner, i.e. that the skills required have not been found in a Ghanaian citizen. Some industries, such as minerals and mining industries, provide automatic quotas for foreign employees – work and resident permits will be granted upon application.

In addition, the GIPC provides automatic quotas upon registration. For example, where the project company with foreign ownership has a stated capital of up to $250,000, it is entitled to one automatic quota.

Also, foreign employees who are working in areas where professional licences are required may have to register with the licensing authority.

## 10 Equipment Import Restrictions

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

Generally, all imported equipment are subject to customs duties; however, there are exemptions for specific industries such as the agricultural and petroleum industries. Where the company registers with GIPC or the Free Zones Board, it will enjoy various exemptions and incentives. Where the good is exempted for custom duties, it must be used solely for its intended use in the project company. If the good is later sold in Ghana, the exempted custom duty will now be payable.

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

Goods being imported into Ghana are classified in accordance with the Harmonized System Code to determine the applicable tax. Some applicable taxes are Value-Added Tax, special tax and customs and excise duties unless an exemption or concession exists.

## 11 *Force Majeure*

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

*Force majeure* exclusions are available and enforceable under Ghanaian law and are usually included in financing agreements.

## 12 Corrupt Practices

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

Project companies are subject to general anti-bribery and corruption laws. Bribery and corruption under Ghanaian law is limited to acts of bribery by public officers, jurors or voters. Hence, bribery or corruption committed between private persons are not recognised as criminal offences in Ghana. The Public Procurement Act, 2003 (Act 663), as amended, which regulates procurement processes for state entities, agencies and departments, enjoins entities and participants involved in a procurement process to refrain from corrupt practices as construed under the Criminal and other Offences Act, 1960 (Act 29). Under Act 29, an act of bribery or corruption is considered to be a misdemeanour and a person convicted of such offence is liable to a maximum term of imprisonment of 25 years. Foreign persons are also subject to the provisions of the Anti-Money Laundering Act, 2008 (Act 749) and the Economic and Organised Crime Office Act, 2010 (Act 804), which authorise relevant institutions to monitor money laundering activities and empowers state institutions to seize and recover the proceeds of crime and prosecute offenders.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Parties are at liberty to choose the governing law of a contract. In practice, English law is typically selected. The Public Private Partnership Bill, 2017, currently before Cabinet for approval, however, provides that PPP agreements shall be governed by Ghanaian law.

### 13.2 What law typically governs financing agreements?

Parties to a financing agreement typically select the laws of the jurisdiction where the lenders are located.

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

Security agreements are typically governed by domestic law.

## 14 Jurisdiction and Waiver of Immunity

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

A party's submission to a foreign jurisdiction is generally enforceable in a Ghanaian court, except where the court in its discretion determines otherwise given the specific facts of a particular case. For instance, where the court determines that a contract is so intricately connected with Ghana that it does not make sense to subject disputes arising thereunder to determination by a foreign jurisdiction. This is, however, rare and generally the courts would uphold the parties' choice of forum for resolving disputes. Contractual waivers of immunity are binding and enforceable.

## 15 International Arbitration

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

Generally, Ghanaian courts will not assume jurisdiction over matters which the parties have agreed to resolve by arbitration. If the court is satisfied that the matter is one in respect of which there is a valid arbitration agreement and that the contract does not fall outside the scope of matters that are arbitrable under Ghanaian law, a submission to arbitration will be enforced. Arbitral awards are recognised by Ghanaian courts and may be enforced through an application to the court. Leave to enforce a local arbitral award shall be granted by a court unless it is shown that the arbitral tribunal lacked jurisdiction to render the award. The enforcement of foreign arbitral awards require the satisfaction of additional requirements including showing the court that: (a) the award was made by a competent authority and under the laws of the country in which the award was made; (b) a reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Parliament of Ghana; (c) the original award and the agreement pursuant to which the award was made or duly authenticated copies of both have been produced to the court; (d) there is no appeal pending against the award in any court under the law applicable to the arbitration; and (e) no grounds for invalidating the award as provided under the Courts Act exist.

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

Ghana is a contracting state to the New York Convention.

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

Under Ghanaian law, matters involving the national or public interest, the environment, the enforcement and interpretation of the Constitution or any other matter that by law cannot be settled by an alternative dispute resolution method are not arbitrable.

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

Under the Labour Act, 2003 (Act 651) and its regulations, the Labour Commission is mandated to resolve, by reference to compulsory arbitration, any labour dispute which remains unresolved after seven working days following a strike or lockout by employees or employers. The compulsory arbitration award is binding, unless set aside on appeal to the Court of Appeal on questions of law only.

## 16 Change of Law / Political Risk

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

In PPP transactions, lenders typically insist on direct agreements with the governmental agencies or departments whom the borrower/private party is partnering with. Direct agreements and political risk guarantees with or from central government are resisted by the latter, and hence, lenders typically turn to development finance institutions for partial risk guarantees for their investments. Contractual protections against change of law and material adverse governmental actions are also quite common in project financing agreements.

## 17 Tax

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

Under the Income Tax Act, 2016 (Act 896), withholding tax of 8% is deductible from interest payments on loans, except where the lender is a resident financial institution. Interest payments to individuals are also subject to a reduced rate of 1% withholding tax.

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

There are no preferential tax incentives for foreign investors or creditors. Foreign investors, however, may take advantage of general tax incentives granted to free zones companies and sector-specific businesses or businesses sited in specific locations.

## 18 Other Matters

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

The main issues to consider when structuring a project finance transaction include foreign exchange risk (especially for foreign currency financed projects whose income is expected to be generated in Ghana Cedis), local participation and local content laws for certain regulated industries and the non-availability of government support in the form of sovereign guarantees for projects, due to restrictions imposed by the IMF under the current extended credit facility programme being supervised by the IMF.

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

The issuance of capital market instruments by project companies are subject to the general requirements prescribed by the Ghana Stock Exchange (GSE) for listed companies set out in the Listing Rules and the Securities and Exchange Commission's (SEC) applicable laws and regulations. To list on the GSE, a company must be a public limited liability company incorporated under the Companies Act of Ghana. For an original listing application, the company must submit an application to the GSE, together with the draft prospectus, which also needs to be submitted to the SEC for approval. The company must appoint a licensed dealing member of the GSE to act as its sponsor, and provide the GSE with information regarding its business, capital structure, directors and key management personnel, details of long-term and funded debt, investments and assets, profit and loss accounts, and any other relevant information. The company should also have passed a shareholders' resolution approving the issuance of the securities, the number of securities to be issued and the price per security on offer. Debt securities, other than government securities, for which listing is sought, must be created and issued pursuant to a trust deed. Once regulatory approval for the prospectus is granted and the application is approved by the GSE, a date is set for the launch of the public offer. Listed companies are required to comply with the GSE Listing Rules, which set out initial and continuing listing obligations for companies.

## 19 Islamic Finance

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

Although the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) states that a licensed bank or specialised deposit-taking institution may provide non-interest banking services, and a few banks and micro-finance institutions do provide such services, the regulatory framework and operational structures to support Islamic financing (such as the establishment of a *Shari'ah* board) have not yet been developed or operationalised.

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

Ghanaian courts would generally respect the choice of governing law by parties to a contract. Therefore, unless any circumstances exist (for example, in respect of matters deemed contrary to public policy) that necessitate that the parties' choice be disregarded, the courts would uphold the chosen law of the parties. Under the rules of court and the Evidence Act, 1975 (NRCD 323), the party seeking to rely on the law is obliged to prove it. We are not aware of any cases on jurisdictional issues on *Shari'ah* law relevant to the finance sector.

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

The inclusion of interest payment obligations in a contract would not affect its validity and enforceability, unless such payments are penal in nature.

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Chapter 17

# India


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## 1 Overview

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

In India, the infrastructure sector is a key driver of growth and demand for project finance. The key areas are power, roads, ports, airports, transmission and renewable energy. The Government of India has recently launched several initiatives to improve connectivity in India, including a scheme to promote regional flights, known by its abbreviation UDAN, an active participant in the International Solar Alliance, a project known as the Sagarmala Project to improve port-road connectivity, modernisation and mechanisation of ports where works worth Rs 80,000 crore have been awarded.

In financing, some of the key developing trends are refinancing using investment-grade/high-yield overseas listed bonds denominated in Rupees or foreign currencies, domestic bonds issued to domestic and foreign portfolio investors, and structured funding where funding is provided to a contractor instead of the project developer, where the developer pays the contractor over a period of time, akin to a loan.

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

Most of the fresh project finance funding in recent years has been absorbed by the booming renewable energy sector in India. Significant borrowers include the ReNew Power group, GMR Group, EDF – EN and Azure Power, who have collectively raised huge amounts of financing from domestic lenders including L&T Infrastructure Finance Limited and public and private sector banks.

In the past few years, several big ticket refinancing transactions have taken place in mature infrastructure assets where the construction risk is absent and a steady revenue flow has been established such as Adani Transmission, Adani Ports, Delhi International Airport Limited and Hyderabad International Airport Limited, where international listed bonds were issued by Indian borrowers to refinance high-cost domestic debt.

## 2 Security

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

Typically, security is taken over the following asset classes, *viz.* immoveable property, moveable fixed assets, current assets, shares and rights in project contracts. A security interest on moveable fixed assets and current assets can be created under a single charging document *viz.* a deed of hypothecation. Immoveable property is mortgaged by way of an indenture of mortgage or by a deposit of the title deeds pertaining to the property, the deposit of which is usually recorded in writing *post facto*. An assignment of rights under project documents is done along with a mortgage of immoveable properties under an indenture. The charge over moveable property, immoveable property and assignment of rights can be clubbed under a single document *viz.* an indenture. A pledge of shares, if in physical form, is done by an act of physically depositing the share certificates and if in dematerialised form can done by recording the same with the depository of the shares. Both types of pledge are recorded in terms of an agreement to pledge. A power of attorney to enforce a pledge is also usually taken.

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

Security can be taken over real property such as land and building by way of a mortgage over such property under an indenture or by the deposit of title deeds. If the land is not held as a freehold property, permissions may be required from the lessor of such land to create a mortgage. Security can be taken over other moveable properties under a deed of hypothecation or by execution of an indenture of mortgage, if taken together with a security over an immoveable property. Once a security has been taken by execution of any of the aforementioned instruments, such security, if under an indenture, is required to be registered with the local registrar of assurances. Further, an equitable mortgage is required to be registered in some states mandatorily. All security created over assets, by a company, is required to be registered with the registrar of companies.

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

Charges can be taken over receivables without notifying the debtor of such receivables. Where there is a charge on receivables, it is a floating charge. In such cases, on the occurrence of an event of default, the floating charge gets converted to a fixed charge and thereafter, the receivables will be subject to a fixed charge. Any receivables after the declaration of an event of default will be required to be applied towards payment of the underlying loan of such fixed charge.

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

Security on cash-in bank accounts and the bank accounts themselves can be taken under a deed of hypothecation or an indenture of mortgage. If the charger is a company, the charge is recorded by registering the charge with the registrar of companies.

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

Shares in companies are usually pledged as security. If they are in certificate form, the certificates are deposited, along with a signed blank share transfer form and the terms of the pledge are recorded in a pledge agreement. If they are in an electronic form, certain forms (as per the relevant depository) would need to be filed with the depository to record the pledge, in addition to signing a pledge agreement.

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

Only a mortgage by way of an indenture is compulsorily registrable with the local sub-registrar of assurances throughout India. An equitable mortgage, i.e. mortgage b, is registrable by choice, except in some states such as Madhya Pradesh and Chattisgarh, where it is mandatory. Additionally, all security over assets (shares, real estate, receivables and chattels) created by a company is mandatorily registrable with the registrar of companies within 30 days of the creation of such charge. Further, registration of an equitable mortgage (*immovable property*) in favour of a bank or non-banking financial institution with the Central Registry of Securitisation Asset Reconstruction and Security Interest is mandatory. Stamp duties and registration fees (with sub-registrar of assurances) for instruments vary from state to state, and in some states they are uncapped and *ad valorem*, whereas in some states, there is a maximum amount stipulated for some instruments. Powers of attorney are required to be notarised.

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

Registration with the registrar of companies is not cost-intensive or time-intensive. Registration of mortgages with local registrars may involve some time based on the local administrative efficiency. Registration with the Central Registry of Securitisation Asset Reconstruction and Security Interest is an online process. Stamp duties and registration fees (with the sub-registrar of assurances) for instruments vary from state to state and in some states they are uncapped and *ad valorem*, whereas in some states, there is a maximum amount stipulated for some instruments.

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

No consents are required for a mortgage of freehold land, unless it comes with reservations such as coastal land, forest land, or if it has been acquired by a statutory body for a specific purpose. Security over leasehold lands typically requires consents from lessors, particularly if the lessor is a government body. No regulatory consents are required for security over Rupee loans to domestic lenders. All security created for an external commercial borrowing by an Indian borrower requires the consent of the authorised dealer bank from an exchange control perspective who will verify compliance of terms of the loan and security with RBI regulations governing external commercial borrowings prior to issuing such consent.

## 3 Security Trustee

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

Yes, a trustee will be recognised as acting for the interest of different lenders and can sue on their behalf.

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

A trust structure will be recognised. Alternatively, the individual lenders may be free to enforce their legal rights should the trustee fail to act as per their instructions.

## 4 Enforcement of Security

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

The steps a lender would need to take to enforce security would depend on several factors. Assuming that there is a pledge of shares, which is in dematerialised form, enforcement of such a pledge would be fairly simple to enforce, requiring an intimation to the relevant depository participant. Some projects which are part of a government body's concession may have preferential rights to the government body to take over the asset and make termination payments to the lenders on the occurrence of an event of default. Further, since foreign lenders would not have rights under SARFAESI, save for the above-mentioned enforcement mechanisms, the lenders would need to approach the relevant civil court with pecuniary jurisdiction to adjudicate their claims and enforce their security. Once a decree is received, such a decree would need to be enforced in separate enforcement proceedings, if the counterparty fails to comply. Under the Insolvency and Bankruptcy Code, 2016, bidders for an insolvent company are required to submit sealed resolution plans with competitive bids to settle the claims of the creditors of the insolvent company and take over the assets of such company. Here, the creditors of the company may assess the bids on their merits and seek for the acceptance of the plan of their preference to the National Company Law Tribunal which is dealing with such insolvency proceedings.

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

Foreign investors and creditors can repatriate proceeds of the recoveries made by any foreclosure proceedings of an Indian borrower. Any sale of any immoveable property charged to a foreign person in a foreclosure proceeding can only be made to an Indian person, and the foreign person cannot assume ownership in such a situation. Further, any surplus after repatriating the dues to such a foreign person should be returned to the Indian mortgagor of such asset. In enforcement of a charge on shares of an Indian company, they may be sold to a foreign person subject to the compliance of the then prevalent foreign investment regulations. Moveable properties which have been charged can be sold to any person, Indian or non-Indian, subject to then prevailing norms for export of goods with regard to sale to non-Indians.

## 5 Bankruptcy and Restructuring Proceedings

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

Under the current bankruptcy law, if a corporate debtor's or creditor's application for insolvency resolution is admitted by the national company law tribunal, a moratorium shall be ordered which shall remain in effect until the insolvency process is resolved, during which period, no new actions, including for foreclosure, recovery of property, etc., can be initiated against the debtor, and any existing actions shall remain in suspension for the duration of such moratorium period. The resolution may be concluded by 75% or more creditors accepting a resolution proposal. If such resolution proposal is not acceptable to any lender, then the resolution applicant seeking to resolve the insolvency would have to pay the liquidation value of the claim of such a dissenting lender.

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

Under the extant Insolvency and Bankruptcy Code, 2016, alienation of properties to creditors in the past one year can be deemed to be preferential (two years if the creditor is a related party), unless such transaction was in the ordinary course of business or a security interest was created to secure a new loan and was registered within 30 days of its creation with the registrar of companies. In an insolvency resolution, the insolvency resolution costs and workmen's dues have priority in repayment with secured creditors.

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

The Insolvency and Bankruptcy Code, 2016 is applicable to corporate persons, partnership firms and individuals. However, the provisions pertaining to insolvency of individuals have not yet been made operational. Winding up of banking companies is governed under the Banking Regulation Act, 1949.

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

Under SARFAESI, rights to take over properties which have been secured and/or management control of borrowers are available to secured creditors (which under SARFAESI means banks, notified financial institutions and debenture trustees). However, foreign lenders are not entitled to such rights available under SARFAESI. However, under the Transfer of Property Act, 1882, a mortgagee holding an English Mortgage may be subject to the following steps stipulated in Section 69 of the said Act, and can sell a mortgaged property without the intervention of a court.

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

The borrower, if it is borrowing from scheduled banks in India, may avail of the restructuring mechanisms permitted by the Reserve Bank of India, whereby banks are permitted to explore ways to restructure a debt to align the debt with cashflows of a borrower, including conversion of debt to equity, postponement of repayments, etc. contractually.

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

Under the Insolvency and Bankruptcy Code, 2016, if an interim resolution professional has been appointed, the board of directors shall cease to have powers in the management of a corporate debtor and shall be suspended until the insolvency of such debtor is resolved as per the aforementioned code.

Further, under the aforementioned code, a resolution professional has the right to make an application during the corporate insolvency resolution process to seek the National Company Law Tribunal to order directly that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if it finds that before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor where due diligence shall be deemed to have been exercised if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

## 6 Foreign Investment and Ownership Restrictions

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

The foreign ownership in an Indian company is controlled under the Foreign Exchange (Management) Act, 1999. The permitted investment limits varies from sector to sector and is broadly permissive in the infrastructure sector, other than telecom, where some limits are in place. It is prohibited in activities such as chit funds, real estate and agricultural activities and activities where private sector investment is not permitted, i.e. atomic energy and railway operations.

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

Bilateral and multilateral treaties exist which encourage bilateral and multilateral trade and commerce with India. Further, India has signed double taxation avoidance agreements with several jurisdictions to avoid double taxation on investments, earnings and capital gains thereon. However, there are no treaties which enable a foreign entity to specifically overcome exchange control restrictions.

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

Under India's constitution, the government can legislate to compulsorily acquire any property for a public purpose and provide compensation as provided for in such acquisition law. No specific types of investment are protected.

## 7 Government Approvals/Restrictions

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

For roads (national highways), it is the National Highways Authority of India ("**NHAI**"); for electricity, it is the state and central electricity regulatory commissions; for aviation, it is the directorate general of civil aviation; and for ports, it is the relevant port trusts or the ministry of shipping. For telecom, it is the Telecom Regulatory Authority of India; and for airports, the airports authority of India.

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

In road projects under concession from the NHAI, financing documents are to be approved with the NHAI. Concession agreements, power purchase agreements and transmission service agreements have limited scope for negotiation, where the procurer or customer is a government entity, the formats for such agreements are pre-determined and not easy to modify significantly. Further, accepting the same may part of a bidding process for such projects. The formats are usually prepared after consultations with different stakeholders and consultants to ensure that they comply with market practices and are bankable.

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

Ownership of land and natural resources is a sovereign right of the government. Any ownership of land and underlying natural resources shall be subject to licences or concessions granted by the government for limited purposes and subject to terms and conditions as it may see fit to impose, subject to the then prevailing laws.

Land may be held by an Indian entity owned and/or controlled by foreign entities, provided that the said Indian entity is using such land for a permitted purpose; however, it cannot be directly owned by a foreign entity.

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

Yes. Royalties are payable to the government on the exploitation of mineral natural resources such as coal and mineral ores, etc. The amount of royalty paid would depend on the manner in which the mining concession was obtained, which, in particular, could vary significantly if such mining concession was auctioned. Rates of royalty payable in respect of extraction of various minerals are determined and governed in accordance with the Mines and Minerals (Development and Regulation) Act, 1957.

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

The Indian Rupee is not a freely convertible currency. In India, capital account transactions in foreign exchange are prohibited generally, unless permitted specifically by the Reserve Bank of India. Current account transactions in foreign exchange are permitted generally, unless specifically restricted by the Reserve Bank of India.

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

There are no restrictions on remittance/repatriation of investment returns or loan payments. However, certain prescribed compliances are required to be undertaken before repatriation/remittance to non-residents. Further, the taxability of such investment returns or loan payments needs to be analysed, depending on the facts of each case.

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

Foreign currency accounts in India are not generally permitted. Offshore accounts are generally prohibited for Indian entities and permitted if specifically allowed. Offshore accounts can be established to park proceeds of an external commercial borrowing temporarily until it is deployed for its end-use or for specific purposes if an Indian company has a joint venture or a subsidiary abroad.

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

There is no exchange-control based restriction on payment of dividends to a foreign holding company on common equity shares.

The Companies Act, 2013 provides for how and when dividends may be paid by an Indian company. Dividends can be paid only out of profits and after maintaining reserves for depreciation. Financing documents of an Indian company may also have dividend payment restrictions. However, any such payment will be subject to domestic income taxes and a dividend distribution tax as applicable, which are non-discriminatory *vis-à-vis* the domicile of a shareholder.

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

The prevailing laws on environment conservation require environmental clearances for certain types of projects and also vary based on their nature, size and scale. State-level pollution control boards' approvals for air and water pollution aside, environmental clearances may also be required to be obtained on the basis of an environmental and social impact assessment for larger projects from the Central Ministry of Environment and Forests.

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

The procurements by private project companies for their business are not specifically governed by a statute, but may be governed by the terms of a government concession. However, all procurements should be in compliance with the statutory clearances they obtain, including environmental clearances.

## 8 Foreign Insurance

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

Foreign insurers are not currently permitted to operate freely in India. Insurance companies authorised to operate in India are governed by certain restrictions on the extent of foreign ownership. Goods and Services Tax will be applicable on insurance policies and the quantum and quality of insurance taken would depend on contractual obligations of a project company and market practice.

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

If a foreign creditor takes a charge over the proceeds of insurance policies as part of the security for a loan, in furtherance of the enforcement of security, the foreign creditor may successfully sue to obtain the benefit of the same. All security created for the benefit of a foreign creditor is subject to prior approval of an authorised dealer bank.

## 9 Foreign Employee Restrictions

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

Save for immigration clearances and registration and periodic reporting to a local foreigners' registration office, there are no particular restrictions. Currently, the bureau of immigration stipulates the following key conditions to issue an employment visa, i.e. (a) the applicant should be a highly skilled and/or a qualified professional who is engaged or appointed by a company/organisation/industry/undertaking in India on a contract or an employment basis at a senior level, skilled position such as technical expert, senior executive or in a managerial position, etc., (b) the employment visa cannot be granted for routine, ordinary or secretarial/clerical jobs, and (c) the employee's salary must be in excess of US$ 25,000 per year.

## 10 Equipment Import Restrictions

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

Indian trade policy permits the importation of goods unless restricted or prohibited. Items which are restricted may be imported with a licence from the government. A significant number of items which are in the restricted category are in the food, agricultural products and weapons categories.

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

Import duties vary for various categories of goods and are subject to favourable trading arrangements with different countries or trading blocs.

## 11 *Force Majeure*

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

*Force majeure* is a recognised legal exclusion and is usually specifically defined in contracts between parties. In financing agreements for project finance, *force majeure* as a specific ground for non-performance by the borrower is usually excluded in order to avoid frustration of such financing agreements.

## 12 Corrupt Practices

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

The Prevention of Corruption Act, 1988 is the principal anti-corruption law. It penalises offences committed by public servants in relation to the acceptance or attempted acceptance of any form of illegal gratification (i.e. anything of value other than a legal entitlement). A bribe giver may also be prosecuted if it is proven that he or she was involved in the abetment of the offence committed by the public servant. The (Indian) Penal Code, 1860 is the penal law of India and sets out provisions which are interpreted to cover bribery and fraud matters, including those committed in the private sector. Its provisions include offences relating to cheating and dishonestly, inducing the delivery of property, and criminal breach of trust.

The Companies Act, 2013 contains certain provisions to prevent corruption and fraud in the corporate sector, including: (a) the duty of statutory auditors to disclose any instances of fraud (which covers instances of corruption and bribery) committed by company employees; (b) increased penalties for fraud offences (up to 10 years of imprisonment and a fine of up to three times the amount involved in the relevant fraudulent transaction); (c) vesting increased powers (e.g. power to arrest) with the Serious Frauds Investigation Office; (d) provisions for the establishment of vigilance mechanisms and audit committees; and (e) increased responsibilities of independent directors.

Additionally, the various other laws that prohibit corrupt practices are: the Prevention of Money Laundering Act, 2002; the Whistle Blowers Protection Act, 2014; the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015; and the Foreign Contribution (Regulation) Act, 2010. The penalties for violation of these Acts are in the form of imprisonment and/or a fine/monetary penalty.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Generally, project agreements are governed by Indian law unless the relevant parties impose the application of a foreign law, when there is at least one foreign contracting party. According to Indian law, the choice of foreign law is valid and legally binding. An Indian court would apply such law provided that the contents of the relevant provisions of the chosen laws may be duly proved before the Indian court following the principles of evidence applicable to an Indian court.

### 13.2 What law typically governs financing agreements?

In loans given by a foreign lender to an Indian borrower, we typically see the governing law being either Indian or English law. In agreements entered into between persons in India, the governing law is required to be Indian law.

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

In the context of cross-border project finance, the documents in relation to the creation and enforcement of security interests on assets which are situated in India are typically governed by Indian law.

## 14 Jurisdiction and Waiver of Immunity

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

India is not a party to any international treaty in relation to the recognition or enforcement of foreign judgments. However, Section 44A of the Code of Civil Procedure, 1908 provides that where a foreign judgment has been rendered by a superior court within the meaning of that section in any country or territory outside India, which the Government of India has by notification declared to be in a reciprocating territory, it may be enforced in India by proceedings in execution as if the judgment had been rendered by the relevant court in India. However, Section 44A of the Code of Civil Procedure, 1908 is applicable only to monetary decrees not being in the nature of any amounts payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. Further, a judgment of a court in a jurisdiction which is not a reciprocating territory may be enforced only by a suit upon judgment initiated in a court in India. However, the submission to the jurisdiction of a foreign court may not oust the jurisdiction of Indian courts which may disregard the contractual choice of jurisdiction if a party shows "good and sufficient reasons" or such submission results in "perpetuating injustice". Waiver of immunity is usually recognised by Indian courts. Where a state instrumentality is in a commercial marketplace, courts have held a view is that it is subject to the same rules applicable to all in such marketplace.

## 15 International Arbitration

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

Yes, save for matters which an Indian court considers non-arbitrable (dealt in response to question 15.3 below), arbitration clauses for international arbitration between a foreign party and an Indian party would be recognised in an Indian court.

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

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**") as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("**Geneva Convention**"). If a party receives a binding award from a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India, the award would then be enforceable in India.

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

Based on certain judicial precedents, several matters, including criminal matters, matrimonial disputes, guardianship disputes, insolvency and winding-up, testamentary matters, tenancy matters and matters regarding trusts, are non-arbitrable (cannot be settled under arbitration).

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

Under certain enactments, instead of voluntary arbitration, the arbitration is imposed by the statute itself, for example, the Electricity Act, 2003, and certain labour legislations provide for arbitration of disputes arising from the said statutes.

## 16 Change of Law / Political Risk

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

India is a country with a relatively stable political structure and independent judiciary. Several infrastructure sectors have independent regulators, as mentioned above, and the laws and regulations governing such sectors are substantially governed under relevant statutory and regulatory frameworks. No specific practice exists in project finance in India to enter into direct agreements with the government, unless it is a government or government body's concession project, which may require an agreement to be entered into between lenders and the government body. Typically, in concession agreements, where government bodies are parties, compensation for consequences of a change in law is agreed upon.

## 17 Tax

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

Interest payments on loans to domestic lenders are subject to withholding tax at the rate of 10%. Interest payments made to foreign lenders are taxable in India and subject to withholding at the applicable rate which generally ranges between 5% to 20% (plus applicable surcharge and cess). The applicable tax rate varies depending upon various factors (such as the nature of borrowing, category of borrower, etc.). The tax rates are further subject to applicable tax treaty benefits, if any. The interest payments made by an Indian guarantor shall be subject to the same withholding tax regime.

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

From an income tax perspective, the incentives which may be available to foreign investors will depend upon a number of factors like the type of investment, category of investor/investee, provisions of applicable tax treaty, etc. and, thus, the same will vary on a case-to-case basis. With respect to tax implications on foreign creditors, the same is discussed in response to question 17.1 above.

## 18 Other Matters

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

As noted, India is politically and economically stable. India has codified laws and an independent judiciary, which is protected by executive overreach from an active political opposition, free media and vocal citizenry.

India follows common law standards and is fairly aligned with global practices. From a legal perspective, so long as reasonable due diligence is carried out, as would be done in any other country, the investor would be in a good position. Commercial and technical due diligence is advisable to make a sound investment decision. Investors and lenders should make themselves well aware of the legal and regulatory framework of the sector in which they are participating, particularly governing the returns on the investment, the manner in which monies can be repatriated out of India and the extant provisions on enforcement of security available to a foreign lender.

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

There are no legal impositions to issuance bonds. Indian companies are free to access capital markets in India and issue various types of bonds, including structured instruments and market-linked bonds. India has a very wide capital market on equity. Indian issuers have issued bonds domestically and overseas.

Bonds issued domestically can be issued by private placement or through a public issue, and the SEBI (Issue and Listing of Debt Instruments) Regulations, 2008 governs this process and sets out the disclosure standards in any offering memorandum for such an issue, the compliances to be maintained by an issuer of such instruments, the penalties for non-compliance, etc. Issues can be privately placed and subsequently listed on a stock exchange. The SEBI, which is India's securities regulator, actively monitors issues and compliance by issuers.

## 19 Islamic Finance

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

Banks in India do not currently offer Islamic finance products. The current regulations of the RBI on external commercial borrowings require that the interest rates be agreed upon and which rates are linked to certain market-determined rates such as LIBOR. Currently, we do not see Islamic finance products in project financing in India, as most of the organised lenders are governed by the regulations of the RBI, which currently does not recognise such products.

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

Indian courts do not use *Shari'ah* law for the resolution of disputes, and rely upon common law and other codified law in force in India. *Shari'ah* law is principally applied in India only in matters of marriage, divorce and testamentary and intestate succession in the Muslim community in India.

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

Payment of interest is the norm in lending transactions in India. Such a provision would be enforced. There are laws which prohibit charging of exploitative interest rates by money lenders, in certain states of India.

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# Indonesia

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## 1 Overview

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

Project finance is one of the main financing schemes used in Indonesia. This system has been used for several years in many transactions such as infrastructure development, power plant projects and others.

On 20 March 2015, the Indonesian Government issued Presidential Regulation No. 38 of 2015 regarding Public-Private Partnerships ("**PPP**"), which revokes and replaces Presidential Regulation No. 67 of 2005 regarding Public-Private Partnerships as amended several times. Presidential Regulation No. 38 of 2015 strengthens the role of the Government Infrastructure Guarantee Fund in increasing the creditworthiness of the PPP infrastructure, and develops sound procedures for granting security over project finance. Therefore, to date, project finance has made good progress and has often been used in Indonesia.

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

In light of the Government of Indonesia's focus to improve the infrastructure sector, some of the most significant project financings in Indonesia in recent years have been the financing of infrastructure projects, such as power plants and toll roads. Some notable power projects reached financial close last year, such as Muara Laboh 1x80 MW and the expansion of the Tanjung Jati (5&6) and Cirebon power plants. Furthermore, in 2017, the Minister of Energy of Mineral Resources ("**MEMR**") issued Regulation No. 10 of 2017 on the Key Provisions of the Power Purchase Agreement as amended by Regulation No. 49 of 2017. As a result of this new regulation, PLN (the State Electricity company) introduced a new model of power purchase agreement ("**PPA**") to be proposed to power producer companies. The expansion of Suralaya Power Plant in Banten, with ultra-supercritical technology and net dependable capacity of 2x1000 MW, is regarded as the first large-size power plant development using a new form of PPA which is expected to reach financial close later this year.

## 2 Security

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

No, it is not possible to give asset security by means of a general security agreement, since there are several types of security which have their own unique characteristics, therefore it is better if each type of asset has its own agreement. Such security agreements represent accessory rights upon the loan agreement. A corporate guarantee would be another type of security, but it does not give preference rights to the lender as it constitutes merely a contractual obligation of the guarantor against certain underlying liabilities. All of the assets of the guarantor would be the objects when the lenders enforce the corporate guarantee through a civil lawsuit.

In relation to general security agreements, there are several security documents (which will be explained below) that it is advisable to have executed in the form of a notarial deed. According to Law No. 30 of 2004 on Notaries as amended by Law No. 2 of 2014 ("**Notary Law**"), any deed made before a Notary must be made in an Indonesian language. If agreed by the parties, a notarial deed may be made in a foreign language, with a translation into the Indonesian language. If there is a difference of interpretation between the foreign language deed and its translation, then the Indonesian language must be used as the prevailing language.

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

Yes, it can.

For security over the land, the security is in the form of:

**a. Mortgage**

Under Law No. 4 of 1996 on Mortgage (*Hak Tanggungan*) ("**Mortgage Law**"), a security interest known as a real property mortgage may be encumbered on land rights.

<u>Procedure</u>

Mortgages are established through a two-step procedure – namely:

(i) The signing of the mortgage deed before the Land Officer ("**PPAT**") with jurisdiction over the land to be mortgaged. This deed must be in Indonesian and in the prescribed PPAT form.

(ii) The registration of the mortgage deed at the relevant Land Registration Office ("**BPN**").

The mortgage is established at the moment it is entered in the land book located at the BPN. The PPAT must submit the executed mortgage deed to the BPN at the latest seven (7) days after the execution date of the mortgage deed, and the actual date of the registration is deemed as the seventh (7th) day after the complete application of the mortgage received by BPN.

For plant and machinery, the security may be in the form of a mortgage, as explained above, or:

**b. Fiduciary transfer**

Fiduciary transfers are governed by Law No. 42 of 1999 concerning Fiduciary Security ("**Fiduciary Law**").

A fiduciary transfer can be effected with respect to movable assets (whether tangible or intangible) and certain immovable assets (including buildings which cannot be the subject of a mortgage under the Mortgage Law). The only specific exceptions are that a fiduciary transfer cannot be effected in respect of:

a. land, buildings and all things appertaining thereto (including machinery affixed thereto) which are subject to the Mortgage Law;

b. registered vessels with a gross weight of 20 cubic metres or more which are subject to the Mortgage Law and its regulations;

c. aircraft which are subject to the Mortgage Law and its regulations; and

d. assets which are subject to the pledge laws and regulations.

Therefore, machinery may be subject to mortgage or fiduciary. If the machinery is affixed to the land, it is considered as immovable property and can then fall as an object of mortgage. However, if the machinery is not affixed to the land but placed on the land instead, such machinery is categorised as movable property and accordingly falls under the fiduciary security.

Procedure

- Making the fiduciary transfer agreement in Bahasa Indonesia in a notarial form.
- The fiduciary transfer must be registered in the fiduciary transferee at the Fiduciary Registration Office by attaching a Statement of Fiduciary Transfer Registration.
- The fiduciary transfer comes into effect on the date of registration in the Fiduciary Registration Book kept by the Fiduciary Registration Office. Upon acceptance of the registration application, the applicant will obtain a Fiduciary Security Certificate. Based on Letter of Directorate General of General Law Administration No. AHU-06.OT.03.01 TAHUN 2013 dated 5 March 2013 regarding the Implementation of Online System of Registration Administration System of Fiduciary, the registration of a fiduciary conducted by the relevant Notary is done through an online system and the original supporting documents are submitted to the Fiduciary Registration Office in the hard-copy version.

**c. Pledge**

A pledge under Indonesian law can only be encumbered on tangible movable properties (such as machinery, vehicles and equipment) and intangible movable property (such as shares, bonds, Indonesian Government bonds, receivables, debentures and patents) which are regulated in Articles 1150 to 1160 of the Indonesian Civil Code ("**ICC**").

Procedure

There is no formal legal requirement to have a pledge agreement in writing. However, it is standard practice in Indonesia for pledges to be embodied in a deed of pledge (notarised or executed privately), setting forth the particulars of the pledge.

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

Yes, it can. Receivables are one type of intangible asset that may be secured by fiduciary transfer as regulated in Article 19 of the Fiduciary Law; the procedure to secure the receivables by fiduciary transfer is described in question 2.2 (b) above. The notification itself should be officially served on the debtor by a court bailiff. The acknowledgment by the debtor can be in the form of a deed of transfer. The legal effect of the notification is that the debtor can no longer validly settle with the fiduciary transferor and is required to make payments directly to the fiduciary transferee.

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

Yes, a bank account is an intangible movable property, so that pledges over it are now being used instead. In general, the process to encumber cash deposited in bank accounts shall refer to the general procedure of creating a pledge for other tangible and intangible movable properties (please refer to question 2.2 (c) above). However, the perfection of the pledge shall be subject to the service of each notice to and acknowledgment from the banks holding the relevant accounts. This notification acceptance shall be deemed as the transfer of control over the pledged accounts from the pledgor to the pledgee.

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

Yes, pledge of shares is one of the mechanisms. The procedures that have to be followed are: making the Pledge of Shares Agreement, together with a Power of Attorney to Vote Shares ("**POA to Vote**") and a Power of Attorney to Sell Shares ("**POA to Sell**"). Under Indonesian law, a pledge of shares does not include voting rights, as the voting rights are not assigned through a pledge. This principle is explicitly stated in Article 60 of the Indonesian Company Law.

The POA to Vote attempts to authorise the pledgee to exercise the voting rights of the pledgor without assigning them voting rights and, therefore, without violating Article 60 of the Indonesian Company Law. It must be noted that although the granting of an (irrevocable) power of attorney to vote shares is customary in Indonesia, there is no certainty that an Indonesian court will uphold such a power of attorney since it may circumvent the general rule under Article 60 of the Indonesian Company Law that such voting rights must remain with the pledgor/shareholder, notwithstanding the grant of any security interests.

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

There will be several fees in relation to such security which consist of the following (*inter alia*):

- Notary's fee in making a fiduciary transfer deed/pledge of shares agreement/power of attorney;
- Land Officer Deed/PPAT fee for making a mortgage deed;
- stamp duties; and
- registration fee in the Fiduciary Registration Office/BPN.

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

Yes, asset security filing, notification and registration each require a certain period of time.

**a. Mortgage**

The registration of the mortgage deed and the issuance of the mortgage certificate as evidence of registration can take between two (2) weeks and six (6) months, although it most commonly takes two (2) to four (4) weeks.

**b. Pledge**

There is no requirement for registration or notification with the Pledge Registration Office.

**c. Fiduciary transfer**

The issuance of the Fiduciary Security Certificate may take one (1) week to one (1) month.

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

If land and machinery are secured by mortgage, then they will have the requirements as stipulated in question 2.2 (a) above. However, if land is covered by mortgage, while plant, machinery and equipment are covered by fiduciary, then the stipulation under question 2.2 (c) above shall apply.

## 3 Security Trustee

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

Trust is regulated under the Financial Service Authority (*Otoritas Jasa Keuangan* – "**OJK**") Regulation No. 27/POJK.03/2015 as lastly amended by OJK Regulation No. 25/POJK.03/2016 concerning Business Activity of Bank in Form of Trust. This regulation recognises the Trustee as the receiver and the manager of the assets to enforce the Trust in accordance to the prevailing law and regulation. The Trustee may represent the lenders under the Trust agreement to conduct the following:

- act as a paying agent;
- act as conventional investment fund agent and/or based on *Shari'ah* principles; and/or
- act as conventional borrowing agent and/or funding agent based on *Shari'ah* principles.

These actions may be carried out by the Trustee based on written instruction from the lenders under the Trust agreement.

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

Please refer to question 3.1 above.

## 4 Enforcement of Security

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

Yes, there are requirements for a public auction or private sale as the enforcement of security, which must be complied with.

**a. Mortgage**

Public auction

In the event of the debtor's default, the mortgagee will have the right to enforce the mortgage based on:

(i) the mortgagee's right of instant or direct execution (*parate eksekutie*) (Article 6 of the Mortgage Law); or

(ii) the executory title in the mortgage certificate (Article 14, paragraphs (2) and (3) of the Mortgage Law).

The right of instant or direct execution is a right conferred by operation of the law by which the mortgagee is entitled to sell the mortgaged property based directly on its own authority through a public auction without consent from the mortgagor.

Private sale

Based on the Mortgage Law, the procedures to effect a private sale of the mortgaged land and buildings are as follows:

(i) the mortgagee and the mortgagor agree to foreclose on the mortgaged land and buildings by means of a private sale;

(ii) the mortgagee and/or mortgagor serve at least one (1) month's prior written notice to the concerned parties of the mortgaged land and buildings. Within this period, the mortgagor and/or mortgagee must announce the intended private sale in at least two (2) newspapers and/or local radio stations circulating in the area where the mortgage land and building/s is/are located; and

(iii) the private sale may only be conducted if there is no objection from third parties.

**b. Pledge**

Public auction

Pursuant to Article 1155 of the Indonesian Civil Code, pledged property is required to be sold by public auction in accordance with the rules of local custom.

Private sale

The sale of pledged property through a private sale is only possible if:

- it is consented to by the pledgor after the debt is due and the debtor is in default; or

- the pledgor agrees to the sale of such pledged property by being a party to any sale agreement and the proceeds of such sale are used to satisfy the creditor's claim.

**c. Fiduciary transfer**

Public auction

In the event of the debtor's default, the fiduciary transferee will have the right to enforce fiduciary transfer over the goods which are subject to this, by:

(i) exercising the executorial title as provided under the Fiduciary Certificate (Article 29, paragraph (a), and Article 15, paragraphs (1) and (2), of Law No. 42); or

(ii) exercising the right of direct execution (Article 29, paragraph (b), and Article 15, paragraph 3, of Law No. 42).

Private sale

Foreclosure by private sale can only be conducted after the expiry of one (1) month as of the date of written notification of the intended sale to interested parties, and publication thereof in at least two (2) daily newspapers having circulation at the place concerned, so long as no third party has voiced an objection against the private sale.

In addition, with regard to the enforcement of fiduciary assignment of tangible goods, Regulation of Head of Police Department of Republic of Indonesia No. 8 of 2011 regarding Fiduciary Execution Protection ("**Regulation No. 8/2011**") provides that the holder of fiduciary rights may ask the police department to secure and protect the repossession and execution of its fiduciary objects by submitting the application. The fiduciary objects themselves should have been registered with the Fiduciary Registration Office. In the event the application is approved, the Operational Head of the Police Department will prepare, plan and perform the protection procedure whose purpose is to make the execution process of fiduciary objects run in a smooth and orderly way.

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

No, there are no restrictions on foreign investors or creditors to foreclose the security. Such foreclosure is generally regulated under Article 227 HIR.

## 5 Bankruptcy and Restructuring Proceedings

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

The mortgage, the pledge and the fiduciary transfer are "*in rem* rights" which are "absolute" and "exclusive" and create preferential rights to the holder of the security, even in bankruptcy. Bankruptcy of the mortgagor, the pledgor and the fiduciary transferor does not, in principle, affect the security right of the mortgagee, pledgee and transferee, in that the assets in question are not regarded as being part of the bankruptcy assets.

The bankruptcy declaration, however, triggers an automatic stay of the bankruptcy estate upon the issuance of the Commercial Court decision declaring the bankruptcy of the debtor. The secured creditors' rights to enforce security are subject to automatic stay for a maximum of 90 days (Article 56 section (1) of the Law No. 37 of 2004 regarding Bankruptcy and Insolvency (Indonesian Bankruptcy Law "**IBL**")). Under the bankruptcy proceedings, the automatic stay period may be less than 90 days if the bankruptcy proceedings are terminated earlier or if the state of insolvency is commenced. Once the state of insolvency is declared, the secured creditors must start exercising their privileged right over the collateral within 2 (two) months as of the insolvency. Otherwise, the appointed receiver is required to request the delivery of the collateral to be sold by the receiver. If the receiver enforces the collateral, the proceeds that will be distributed to the secured creditors need first to be deducted by not only the mandatory preferred claims (which will also apply if the secured creditors enforce the collateral by themselves), but also the bankruptcy cost (including the receiver's fee).

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

Yes, there are several kinds of creditors which are generally regulated in the ICC, IBL and Law No. 6 of 1983 which was latterly Law No. 16 of 2009 regarding General Provision of Taxation ("**Tax Law**") which have preferential right, as follows:

- *Creditor who holds any tax debts.* Such creditor has a higher position than the creditor who is the holder of the security; this is regulated under Article 21 of the Tax Law and Article 1137 of the ICC.
- *Separatist/concurrent creditor.* Such creditor is the holder of the security as regulated under Article 1134 of the ICC.
- *Preference creditors.* Such creditors are categorised as *general preference creditors* under Article 1149 of the ICC and special preference creditors as stipulated under Article 1139 of the ICC.

When a bankruptcy estate is declared to be in a state of insolvency and the receiver decides to liquidate the bankruptcy estate to be distributed to the creditors of the bankrupt debtor, a certain ranking order will need to be applied.

The general rule on distributing the proceeds of a bankruptcy estate to unsecured creditors is one of equality, subject to the statutory priority rights of certain categories of creditors. Shareholders rank behind all creditors in the distribution of the proceeds of the bankruptcy estate. Based on various Indonesian laws and pieces of legislation, the ranking order of creditors under the bankruptcy is as follows:

- Specific expenses stipulated by the Tax Law consisting of:
  - legal expenses arising solely from a court order to auction movable and/or immovable goods;
  - expenses incurred for securing the goods; and
  - legal expenses arising solely from the auction and settlement of inheritance.
- *Preferred creditors* having ranks above the secured creditors as provided by the Indonesian Civil Code, for example: tax claims; court charges which specifically result from the disposal of a movable or immovable asset (these must be paid from the proceeds of the sale of the assets over all other priority debts, and even over a pledge or mortgage); and legal charges exclusively caused by sale and saving of the estate (these will have priority over pledges and mortgages).
- *Bankruptcy estate creditors/post-bankruptcy creditors* (i.e. claims against the bankruptcy estate), for example: (i) the fee of the receiver; (ii) the costs of liquidating the bankruptcy estate (fees of an appraiser, an accountant, etc.); (iii) new financing; (iv) the lease costs for the bankrupt's house or offices as of the date of the declaration of bankruptcy; and (v) the wages of the employees of the bankrupt debtor as of the date of the declaration of bankruptcy (Article 39, paragraph 2 IBL).

- *Secured creditors*, which under Indonesian law consist of: (i) mortgage (for land); (ii) pledge (over movable intangible assets); (iii) fiduciary transfer (over movable and intangible assets); and (iv) hypothec (for aircraft and ships having a size of more than 20 cubic metres).
- *Specific statutorily preferred creditors*, whose preference relates only to specific assets.
- *General statutorily preferred creditors* (for example, revenue authorities, etc.).

Other unsecured creditors receive their *pro rata* share of any of the remaining proceeds. The cost of the bankruptcy is shared *pro rata* among the statutorily preferred creditors and the unsecured creditors.

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

Any entities can be declared bankrupt. However, there is a specific provision for entities that are restricted from the general bankruptcy proceedings:

a. The petition for a declaration of bankruptcy for a bank may only be filed by Bank Indonesia.

b. The petition for a declaration of bankruptcy for a Security Company, Stock Exchange, Clearing and Custodian Institution, Settlement and Depository Institution may only be filed by the Capital Market Supervisory Board.

c. The petition for a declaration of bankruptcy for an Insurance Company, Reassurance Company, Pension Funds, or State-Owned Enterprise may only be filed by the Minister of Finance.

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

No, there is no process other than court proceedings that is available to a creditor to seize the assets of the project company in an enforcement.

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

Currently, the only formal insolvency proceedings available in Indonesia are regulated under the IBL. However, in relation to debt restructuring and/or cramdown of dissenting creditors, as long as the company has not been declared bankrupt by the court, the parties can still conduct private negotiation regarding their outstanding obligations/debt.

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

The directors shall conduct activities which are (i) legally determined under the scope of the Articles of Association of a company, and (ii) based on common business practice since the directors have fiduciary duty to the shareholders. If the directors conduct themselves in violation of (i) the Articles of Association of the company, or (ii) business practice, and such conduct is not approved by the shareholders of the company and reflected in the Financial Statement of the company, the directors may be personally liable for the loss.

## 6 Foreign Investment and Ownership Restrictions

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

Foreign investment in Indonesia in project companies is governed under Law No. 25 of 2007 on Capital Investment ("**Investment Law**") and can only be made through the establishment of, or investment in, a limited liability company (*perseroan terbatas* or "**PT**"), which must be registered with the Investment Coordinating Board ("**BKPM**"). For certain lines of business (e.g., mining, oil and gas, plantations, education, etc.) the recommendation of the relevant supervising Government institution must be obtained before registration with BKPM will be granted. In 2017, BKPM issued Regulation of Head of BKPM No. 13 of 2017 regarding the Guidelines and Procedures for Licensing and Investment Facilities ("**Regulation 13**") which came into effect on 2 January 2018. Under such regulation, BKPM determines that: (i) a minimum investment shall be more than Rp 10,000,000,000 (ten billion rupiah) or the equivalent value in US dollars, outside the land and building investment, for each type or classification of business activity; (ii) a minimum issued and paid-up capital of approximately Rp 2,500,000,000 (two billion five hundred million rupiah) or the equivalent value in US dollars; (iii) each of the shareholders of the company shall hold at least Rp 10,000,000 (ten million rupiah) or the equivalent value in US dollars; and (iv) the percentage of share ownership is calculated based on the shares' nominal value. This provision is exempted for investment activities in particular lines of business, such as industry and property development and management.

Foreign investors who wish to invest in Indonesia must comply with a specific regulation which lists specific lines of business in Indonesia that are open for foreign investment with certain requirements (usually a local party must hold a minimum percentage interest in the foreign investment company) and those business lines closed to investment (Negative List). Any business lines not on the Negative List can be opened for foreign investment (100% foreign-owned). The current Negative List of Investment shall be referring to the President Regulation No. 44 of 2016 concerning the Lists of Business Fields that are Closed to Investment and Business Fields that Conditionally are Open for Investment.

Under the Negative List, the Government has opened foreign investment in geothermal projects to a maximum foreign shareholding of 95%. Foreign investment in certain construction contractor services has also increased by a maximum of 67%, including construction work for roads, railways, airport runways, bridges, flyovers, tunnels, subways, water pipelines, telecommunications networks and electricity cables.

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

The Indonesian Government has entered into the Protocol to Implement the Eighth Package of Commitments under the ASEAN Framework Agreement on Services with other members of ASEAN. Furthermore, this protocol was implemented into the current Negative List, as it provides an exemption for maximum foreign shareholding applicable for investors having their origin in an ASEAN member country.

The Indonesian Government has also entered into treaties with various countries which give special tax treatment for entities having their origin in such countries. Such treatment may be in the form of a reduction in net income of up to 30% of the amount invested, accelerated depreciation deductions, extension of tax losses carried forward for up to 10 (ten) years, and reduction of the withholding tax rate on dividends paid to non-residents to 10% (or lower if applicable).

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

Pursuant to Article 7, paragraph 1 of Law No. 25 of 2007 regarding Investment, the Indonesian Government assured that it would not conduct any nationalisation or expropriation against the proprietary rights of investors, unless provided by law. If the Government takes measures in such nationalisation or expropriation, then the Government shall pay compensation, the amount of which shall be determined by market value.

## 7 Government Approvals/Restrictions

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

The relevant Government agencies or departments with authority over projects are, among others:

a. the Ministry of Energy and Mineral Resources, for projects in the energy sector, such as mining, geothermal and electricity;

b. SKKMigas, for projects in the oil and gas upstream sectors;

c. BPHMigas, for projects in the oil and gas downstream sectors;

d. the Ministry of Public Works and Ministry of Transportation, for the infrastructure sectors;

e. the Ministry of Telecommunication and Information Technology, for the telecommunications sectors;

f. the Ministry of Environment and Forestry, for any projects requiring environmental licences;

g. the National Land Agency, for any projects requiring use of land; and

h. Bappenas, as the coordinator and facilitator for general development planning activities.

There may be other agencies or departments with authority depending on the project sector. As an example, electricity projects will also involve a role for the Development and Finance Supervisory Board (*Badan Pengawasan Keuangan dan Pembangunan* or "**BPKP**") in determining the price of electricity. Furthermore, regional governments may have authority as well on project finance arising in their regions, especially in relation to licences issued by the regional government, such as environmental impact analysis (*Analisis Mengenai Dampak Lingkungan* or "**AMDAL**"), and spatial plans of the region.

Previously, BPMigas was the authorised Government agency that entered into contracts on behalf of the Government for projects in oil and gas upstream. However, BPMigas was dissolved and its authority transferred to SKKMigas which is structurally under the organisation of MEMR as an impact of the ruling of the Constitution Court of Indonesia under its Decision No. 36/PUU-X/2012 dated 13 November 2013.

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

Presidential Decree No. 39 of 1991 regarding the Coordination of Management of Offshore Commercial Loans ("**PD 39/1991**") established the PKLN Team, a Government institution which reports directly to the President of Indonesia. The general task of the PKLN Team is to manage the utilisation of offshore commercial loans as one of the sources for financing national development.

PD 39/1991 requires companies which intend to obtain offshore commercial loans to seek approval from the PKLN Team for the plan to borrow said loan, and must report the implementation of the loan and the repayment. The offshore loans that are under the coordination of the PKLN Team are: (i) offshore commercial loans relating to construction projects whose financing has the following nature/characteristics: "non-recourse", "limited-recourse", "advance payments", "trustee borrowings", "leasing", etc.; and (ii) offshore commercial loans relating to development projects whose financing is based on the scheme of "BOT" (build, operate and transfer), "B&T" (build and transfer), etc.

PD 39/1991 also provides that the following types of loans are not considered offshore loans under the management of the PKLN Team and thus do not require approval:

a. offshore commercial loans for short-term trade purposes;

b. offshore commercial loans obtained by private companies for financing projects which are not related to the Government of Indonesia ("**GOI**") or State-Owned Companies (including GOI institutions and PT Pertamina (*Persero*)) in the form of GOI capital participation, assurance on the supply of raw material, assurance of the purchase of the products or any other relation; or

c. other offshore commercial loans as determined by the PKLN Team.

Under Article 12 of PD 39/1991, the borrower of an offshore loan shall submit a regular report to the PKLN team regarding the implementation of the offshore loan obtained. In addition, there are reporting requirements for an individual, legal entity or other entity domiciled and/or planning to be domiciled in Indonesia having offshore loan obligations to non-residents, to Bank Indonesia, and/or to the Minister of Finance.

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

Foreign entities may not directly own land or natural resources or undertake the business of ownership or operation. Law No. 25 of 2007 on Investment requires a foreigner or foreign entity wishing to do business in Indonesia to establish a limited liability company (except for upstream oil and gas mining which is permitted under Law No. 22 of 2001 on Oil and Gas). Such foreign-owned company will be able to obtain rights of land, such as rights to build (*Hak Guna Bangunan* or "**HGB**"), and licences, and/or undertake business of ownership or operation, such as leasing of land or buildings, so long as it complies with the Negative List of Indonesia.

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

With regard to extraction, there is an obligation imposed on certain mining and oil and gas companies to fulfil national needs of such mining and oil and gas products. Further, there are also non-tax revenue impositions including: (i) dead rent; (ii) exploration royalties; (iii) production royalties; and (iv) compensation for data information, toward companies holding mining business licences.

The GOI, through several Ministries, enacted four (4) key regulations related to the obligation of mining companies to conduct processing and refining activities domestically as embodied in Article 103 of Law No. 4 of 2009 on Mineral and Coal Mining ("**Mining Law**"). Those four (4) key regulations are as follows:

- Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities as amended lastly by Government Regulation No. 1 of 2017 ("**GR 23/2010**");
- Minister of Energy and Mineral Resources Regulation No. 5 of 2017 on the Increase of Added Value of Minerals Through Activities of Processing and Refining/Smelting Domestically as amended by Minister of Energy and Mineral Resources Regulation No. 28 of 2017 ("**MEMR Regulation 5/2017**");
- Minister of Finance Regulation No. 13/PMK.010/2017 on the Stipulation of Export Goods that are Subject to Export Duty and its Tariff ("**MOF Regulation 13/2017**"); and
- Minister of Trade Regulation No. 1/M-DAG/PER/1/2017 on the Provision for Exporting Mining Products Resulting from Processing and Refining ("**MOT Regulation 1/2017**").

GR 23/2010 requires the holder of the Contract of Work ("**COW**") and IUP for the Operation Production (locally known as *Izin Usaha Pertambangan Operasi Produksi* or "**IUPOP**") to refine their mined products domestically. Further, COW and IUPOP holders performing metal mineral mining and refining activities can conduct exports in a certain quantity.

Pursuant to MEMR Regulation 5/2017, each type of metal mineral mining commodity must be processed and/or refined by fulfilling at least the minimum requirements stipulated in the Attachment to MEMR Regulation 5/2017. Metal mineral mining commodities, including its by-products/waste products/associated mineral, non-metal mineral and certain rocks which will be sold abroad, must meet the said minimum requirements. IUPOP and COW holders may export raw material or ore once they obtain recommendation from the MEMR. Such recommendation can be obtained if the IUPOP and COW holders have fulfilled the requirements as stated in MEMR Regulation No. 6 of 2017 on Procedures and Requirements for Granting Recommendation for the Implementation of Export Sales of Minerals Resulting from Processing and Refining/Smelting Activities as amended by MEMR Regulation No. 35 of 2017 ("**MEMR Regulation 6/2017**") such as: (i) a certificate of validation of the documents; (ii) an integrity pact to carry out construction of domestic refining facilities; (iii) a copy of clear and clean certificate for a holder of a Production Operation Mining Permit; (iv) a construction plan of domestic refining facilities which has been verified by an Independent Verifier; (v) the approved current year's working plans and budget; and (vi) the plan of export sales.

Holders of IUPOP and COW of metal minerals, including nickel, are obligated to conduct the processing and/or refining of their minerals domestically, and this processing and/or refining process may be conducted directly by themselves. If the direct/self-processing and/or refining is viewed as unfeasible for economic reasons, the IUPOP and COW holder may do the processing and refining in cooperation with another IUPOP and COW holder. A cooperation between IUPOP and COW holders requires the approval of the Director General of Mineral Mining.

The cooperation may be in:

- the sale and purchase of ore or mineral concentrates; or
- the processing and/or refining process activities.

MOF Regulation 13/2017 regulates that Export Tariffs on exported processed mineral products, as intended, shall be those provided in the Attachment to MOF Regulation 13/2017. Mining companies that export processed mineral products are subject to phases of physical construction of refining/smelting facilities. The export duty tariff will gradually decrease per phase, starting from 7.5% in the first phase, 5% in the second phase, 2.5% in the third phase until 0% in the fourth phase. Such export tariffs are applicable from 1 March 2017 up to 11 January 2022.

This MOT Regulation 1/2017 generally stipulates the limitation for several metal mining products as well as restriction to export several products including raw material or ore. The regulation further stipulates the requirement for a mining company which will export metal mining products as a result of processing and/or refining/smelting.

Export of metal mining products may be conducted by companies which hold Operation Production Mining Business Licence (*IUP Operasi Produksi*) registered as clean and clear and Special Operation Production Mining Business Licence (*IUPK Operasi Produksi*), Operation Production Mining Business Licence specifically for processing and refining, or Industrial Business Licence (*Izin Usaha Industri*). The exports of minerals which have passed a certain purified standard or as listed in Attachment I of MOT Regulation 1/2017 can be carried out after the verification and technical study has been conducted and without a requirement to obtain Export Approval. On the other hand, minerals which have passed a certain purified standard but are listed in Attachment II and minerals which have not passed a certain purified standard, or are listed in Attachment III, can be exported after the verification and technical study and after obtaining Export Approval.

One of the requirements to obtain an Export Approval is a recommendation from the Director General of Mineral and Coal which must at least stipulate the type, quantity and loading port for mining products resulting from processing. The Export Approval remains valid as long as recommendation from the Director General of Mineral and Coal is still valid. Mining products resulting from processing and/or refining that will be exported must be verified and technically scrutinised by the surveyor appointed by the Minister of Trade. There are also provisions on reporting requirements and sanctions for Exporters and Surveyors.

Furthermore, on 14 October 2014, the Government issued Government Regulation No. 77 of 2014 on the Third Amendment of Government Regulation No. 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities ("**Regulation 77**"). Regulation 77 stipulates a new provision which states that every holder of a Mining Business Licence (locally known as *Izin Usaha Pertambangan* or "**IUP**") and a Special Mining Business Licence (locally known as *Izin Usaha Pertambangan Khusus* or "**IUPK**") who would like to change the investment status of the company may only change its investment status from a domestic investment company to a foreign investment company provided that the foreign ownership is not more than:

- 75% (seventy-five per cent) for a company in the exploration stage;
- 49% (forty-nine per cent) for a company in the production operation stage, in the event the processing and/or refining activities are conducted by third parties;
- 60% (sixty per cent) for a company in the production operation stage, in the event the processing and/or refining activities are conducted by the mining company itself; and
- 70% (seventy per cent) for a company in the production operation stage, in the event the mining company conducts an underground mining method.

Another major provision under Regulation 77/2014 is regarding the extension of Contract of Work COW ("**COW**") and Coal Contract of Work ("**CCOW**"). Based on Article 112, paragraph (2) of Regulation 77/2014, COW and CCOW will be converted into a first extension or second extension of IUPK depending on whether the COW or CCOW has previously been extended. The application for the extension may be submitted at the soonest two (2) years prior to the expiration and at the latest six (6) months prior to the expiration of the COW and CCOW.

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

Concerning currency exchange, the GOI has passed Law No. 7 of 2011 on Currency ("**Currency Law**") which provides that each and every transaction conducted in Indonesia must use the currency of rupiah, with exceptions for: (i) certain transactions in implementing State revenues and expenditure budgets; (ii) receipt or distribution of grants from or to an overseas country; (iii) international trade transactions; (iv) bank savings in foreign currency; or (v) international financing transactions.

Furthermore, Bank Indonesia has issued Bank Indonesia Regulation No. 17/3/PBI/2015 ("**PBI 17/2015**") on the Obligation to Use Rupiah. PBI 17/2015 imposes the obligation to use rupiah for every transaction (cash or non-cash) within Indonesian territory, including any payment transaction, fulfilment of other obligation which is satisfied by monies, and/or another financial transaction. Furthermore, PBI 17/2015 also implements such obligation for every contract executed in the Indonesian territory and/or involving an Indonesian party.

Law No. 24/1999 provides that a person may freely hold, use and transfer foreign exchange. The foreign exchange transfer to and from an overseas country is, however, subject to the reporting requirement to Bank Indonesia as regulated under Bank Indonesia Regulation No. 16/22/PBI/2014 on the Reporting of Foreign Exchange Activity and Implementation of Prudential Principle in the Management of Foreign Debt of Non-Bank Corporation dated 31 December 2014 ("**PBI 16/22**"). According to PBI No. 16/22, non-bank institutions owned either by State-owned, region-owned, privately owned or individually owned enterprises, are required to deliver monthly foreign exchange reports to Bank Indonesia no later than fifteen (15) months after the foreign exchange activity is conducted.

Certain transactions in rupiah have been restricted by Bank Indonesia Regulation No. 18/18/PBI/2016 dated 5 September 2016 and Circular Letter No. 18/34/DPPK dated 13 December 2016 concerning Foreign Currency Transaction Between Bank and Domestic Party ("**PBI 18/18**") and Bank Indonesia Regulation No. 18/19/PBI/2016 dated 5 September 2016 and Circular Letter No. 18/35/DPPK dated 13 December 2016, concerning Foreign Exchange Transactions Against Rupiah between Banks and Foreign Parties ("**PBI 18/19**").

There are no restrictions or requirements which limit the availability or transfer of foreign currency, except that, pursuant to PBI 18/18 and PBI 18/19, the conversion of Indonesian rupiah to foreign currencies or the purchase of foreign currency in the amount of more than US$25,000 per month (or its equivalent) per customer for Spot Transactions or in the amount of more than US$1,000,000 for foreign parties and US$100,000 for domestic parties either per month per customer, or per outstanding derivative transaction, must be based on an underlying transaction, with a maximum amount required under the underlying transaction. The term "Underlying Transaction" shall include all activities of:

(a) goods and services trade, domestic and overseas;

(b) investment in the form of direct investment, portfolio investment, loan, capital, and other investment, domestic and overseas; and/or

(c) extension of credit or financing by banks in foreign currency and/or in rupiah for trading and investment activities.

According to the amendment, the Finance Agreements would satisfy the requirement for an underlying transaction for the purpose of any conversion required for the project. In addition, the party purchasing the above-stated foreign currencies is required to submit the following documents to the bank making the conversion:

(i) a copy of the underlying agreement;

(ii) a Tax Registration Number for Indonesian parties (known as "**NPWP**"); and

(iii) a statement from the party purchasing the foreign currencies that the underlying agreement is a valid document and that the foreign currency will only be used to settle the payment obligations under the underlying agreement.

Pursuant to Bank Indonesia Regulation No. 15/8/PBI/2013 dated 7 October 2013 as amended by Bank Indonesia Regulation No. 16/18/PBI/2014 dated 17 September 2014 concerning Hedging Transactions ("**PBI 15/8**"), the limitation for the underlying economic activities of hedging transactions is anything to be decided by Bank Indonesia, and any kind of hedging transactions shall be carried out in accordance with PBI No. 18/18 and Bank Indonesia Regulation No. 7/31/PBI/2005 as amended by Bank Indonesia Regulation No. 10/38/PBI/2008 concerning Derivative Transactions ("**PBI 7/31**"), as well as risk management regulations issued by the Financial Services Authority. Such hedging transaction shall be supported by a valid supporting document. Further, the settlement procedures will be carried out in accordance with PBI 18/18.

In the event that the local bank intends to conduct a hedging swap transaction with Bank Indonesia, the local bank shall also present the underlying transaction documents which are possessed by the local bank itself or its customers as stipulated under Bank Indonesia Regulation No. 15/17/PBI/2013 as amended by Bank Indonesia Regulation No. 18/13/PBI/2016 dated 10 August 2016 concerning Hedging Swap Transaction with Bank Indonesia ("**PBI 15/17**"). PBI 15/17 only covers any hedging swap transaction above US$10,000,000. The hedging contract made by the local bank and Bank Indonesia shall be valid for a maximum of three (3) years but hedging swap transactions shall be valid for a three (3)-month period, six (6)-month period, or twelve (12)-month period and may be extended for a minimum of a three (3)-month period to a maximum of a twelve (12)-month period. Further, for this hedging swap transaction with Bank Indonesia, such transaction is considered as a pass-on to the derivative transaction position of the related party to the local bank.

Any Non-Bank Corporation that has foreign loans must implement prudential principles, by satisfying certain obligations to meet prescribed hedging ratios, liquidity ratios, and credit ratings as stipulated under Bank Indonesia Regulation No. 16/21/PBI/2014 dated 29 December 2014 as amended by Bank Indonesia Regulation No. 18/4/PBI/2016 dated 21 April 2016 on the Implementation of Prudential Principles on the Management of Foreign Loans of Non-Bank Corporations ("**PBI 16/21**"). The obligation to implement these prudential principles does not apply to foreign loans in foreign currency in the form of trade credits. Furthermore, the obligation to meet a certain credit rating does not apply to foreign loans in foreign currency for the following purposes: (i) refinancing; (ii) financing obtained from international organisation(s) for infrastructure projects; (iii) financing for central government and regional government infrastructure projects; (iv) foreign loans guaranteed by international organisations (both bilateral or multilateral); (v) foreign loans in the form of trade credit; or (vi) foreign loans in the form of other loans. Companies must report their implementation of these prudential principles for the management of their foreign loans, along with supporting documents that outline the following:

a. hedging ratio, liquidity ratio and credit rating; and

b. any applicable exemptions (as mentioned above).

The report must be delivered in accordance with PBI 16/22.

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

Other than the above and the requirement of withholding tax upon certain types of passive income (e.g. interests, dividends, royalties, leases, etc.), we are not aware of any such restrictions, controls, fees on the remittance and repatriation returns or loan payments to parties in other jurisdictions. However, the currency of such remittance shall be foreign currency instead of rupiah.

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

We are not aware of any regulation restricting a company from maintaining foreign currency accounts in Indonesia and/or offshore accounts outside Indonesia. Thus, project companies should be allowed to maintain such types of account. Additionally, Bank Indonesia has enacted Bank Indonesia Regulation No. 16/10/PBI/2014 dated 14 May 2014 as lastly amended by Regulation No. 17/23/PBI/2015 dated 23 December 2015 on the Receipt of Export Foreign Exchange and Withdrawal of Offshore Loan Foreign Exchange ("**PBI 16/10**"). Such regulation specifically stipulates that the receipt of export foreign exchange and withdrawal of offshore loans have to be conducted at foreign exchange banks which have been appointed by Bank Indonesia. Failure to do so will cause the exporter or withdrawer to be subject to a monetary sanction.

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

Essentially, every shareholder is entitled to receive a dividend. However, Article 48 (3) of Law No. 40 of 2007 on Limited Liability Companies stipulates that a shareholder who does not fulfil the requirements of share ownership will not be able to exercise his/her/its rights as a shareholder, including receiving a distributed dividend.

Law No. 24 of 1999 dated 17 May 1999 on the Flow of Foreign Exchange and Exchange Rate Systems provides that a person may freely hold, use and transfer foreign exchange. Any transfer of foreign exchange to and from abroad by such person is, however, subject to a reporting obligation to Bank Indonesia.

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

The answer depends on what field a project financing is for. If the objective is to finance a project involving environmental affairs or other fields requiring health and safety protections, then specific environmental and or safety licences will be required. The authorities are, among others, the Ministry of Environmental and Forestry and Ministry of Manpower and Transmigration and Regional Governments, including representatives such as regents and mayors.

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

The Indonesian regulations of procurement would only apply to procurement of works which are financed (either entirely or partially) by the State Budget (*Anggaran Pendapatan Belanja Negara* or APBN or *Anggaran Pendapatan Belanja Daerah* or APBD) as set forth in Presidential Regulation No. 54 of 2010 on Procurement of Government Goods/Services as amended lastly by Presidential Regulation No. 4 of 2015.

In general, the appointment of construction companies in Indonesia is subject to tender requirements. Direct appointment is only permitted for very limited reasons. This tender requirement is stated in Government Regulation No. 29 of 2000 regarding the Implementation of Construction Services as lastly amended by Government Regulation No. 54 of 2016 ("**GR No. 29/2000**"). One notable amendment of GR No. 29/2000 is that a State-owned company may perform direct appointment only to another State-owned company or the subsidiary of the State-owned company.

## 8 Foreign Insurance

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

Generally, the object of insurance in Indonesia must be insured in Indonesia. Article 2 of Government Regulation No. 73 of 1992 on the Implementation of Insurance Business, as last amended by Government Regulation No. 81 of 2008 ("**GR No. 73/1992**"), stipulates that the insurance object in Indonesia may only be insured by an insurance company holding a business licence from the Ministry of Finance, unless:

a. there is no insurance company in Indonesia, either severally or jointly, which has the capability to hold insurance risk of such object;

b. there is no insurance company willing to cover insurance of such object; or

c. the owner of such insurance object is not a citizen or legal entity of Indonesia.

In the event of exceptions, insurance coverage can be granted by an insurance company abroad.

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

Yes. They can be payable to foreign secured creditors when there is an arrangement between the related parties, such as a banker's clause.

## 9 Foreign Employee Restrictions

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

The Minister of Manpower has issued Regulation No. 16 of 2015 regarding Procedure for the Utilization of Foreign Manpower as amended by Regulation No. 35 of 2015 ("**Regulation 16/2015**"). Under Regulation 16/2015, a company may hire a foreign worker for a specific position only for a specific time. Regulation 16/2015 does not clearly provide restrictions on foreign works. However, there is an unwritten policy of the Ministry of Manpower, which requires the company to employ three (3) Indonesian employees for every employment of one (1) foreign employee. The Indonesian employee hired shall include at least one (1) assisting employee to the foreign employee for the purpose of transfer of knowledge. Failing to comply with this requirement may cause the application by the relevant company for the Foreign Manpower Utilisation Plan (*Rencana Penggunaan Tenaga Kerja Asing* or "**RPTKA**") to be rejected, or the revocation of the Work Permit (*Izin Mempekerjakan Tenaga Kerja Asing* or "**IMTA**") of the relevant foreign employee.

## 10 Equipment Import Restrictions

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

Pursuant to Law No. 10 of 1995 as amended by Law No. 17 of 2006 on Customs ("**Law 10/1995**"), goods imported into a customs area are classified as imported goods and are therefore subject to import duties. The tariff of import duties is determined and classified by the goods classification system.

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

Article 26 of Law 10/1995 provides that the exemption or dispensation of import duties may be granted for particular imported goods. Among others, the import of goods and materials for industrial construction and expansion of the framework of investment are exempt. These goods and materials are defined as all goods or materials, for all types and composition that will be used as materials or components to produce finished goods. Machinery for industrial construction and expansion means all machines, tools, equipment and factory installations that shall be needed for industrial construction and expansion. Exemption from import duties will be granted as long as the imported machines and/or goods and materials:

a. have not been produced domestically;

b. have been produced domestically, but do not fulfil the specification; or

c. have been produced domestically, but the volume of production has not yet fuelled industrial demand.

A foreign-owned company (*Penanaman Modal Asing* or "**PMA**") or a domestic-owned company (*Perusahaan Milik Dalam Negeri* or "**PMDN**") may apply for a fiscal facility to reduce, defer or discharge the tariff imposed on machineries and goods/materials. A company that has already had a Principal Licence (*Izin Prinsip*) and is already a legal entity or has a valid Business Licence (*Izin Usaha*) can apply to BKPM to obtain a fiscal facility as stipulated in Head of BKPM Regulation No. 16 of 2015. Fiscal facilities consist of: (i) an import duty facility for imported machinery (excludes any spare parts); (ii) an import duty facility for imported materials and goods; (iii) the possibility to obtain a facility on Value Added Tax (*Pajak Pertambahan Nilai*) for the imported goods; and (iv) the possibility to obtain a facility on Income Tax (*Pajak Penghasilan*) for the entity. The approval of the application for import duty facilities shall be in the form of an approval letter on import duty facilities issued by the Head of BKPM (and the Minister of Finance). Pursuant to this regulation, import duty facilities are granted for a certain period and can be extended.

## 11 *Force Majeure*

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

Yes. *Force majeure* is regulated under Articles 1244 and 1245 of the Indonesian Civil Code. As the Articles fall under Book III of the Contracts of the Indonesian Civil Code, the binding power of such Articles may be waived by the parties. Consequently, the *force majeure* exclusions clause may be available and enforceable so long as the parties agree.

## 12 Corrupt Practices

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

Corruption and bribery practices are specifically regulated under Law No. 31 of 1999 on Eradication of the Criminal Act of Corruption as amended by Law No. 20 of 2001 ("**Anti-Corruption Law**"). The Anti-Corruption Law identifies a wide scope of persons who can be charged with criminal acts of corruption, in that the law does not only apply to civil servants but also to people who work in private enterprises. In the event that the criminal act of corruption is committed by or on behalf of a corporation, a criminal prosecution can be undertaken against such corporation and/or its management board. The management board must represent the corporation in a lawsuit relating to a criminal act of corruption. The basic criminal sentence against a corporation shall only be a fine, with the imposition of an additional ⅓ (one-third) of the maximum fines mentioned above.

Civil and criminal penalties are applicable under the Anti-Corruption Law. Criminal penalties are in the form of imprisonment and/or a fine, while civil penalties can be granted through civil claims before a court. Civil penalties may be claimed based on illegal actions causing losses to State finances. It is regulated in the Anti-Corruption Law that in the event the investigator finds and assumes that there is insufficient evidence against one or more elements in the criminal act of corruption while State finances are suffering losses, the investigator shall submit the docket to the State attorney in order to process a civil suit, or deliver such docket to the institution harmed in order to file suit.

Indonesia established a Court of Criminal Act of Corruption through Law No. 46 of 1999. The Court is authorised to examine, hear and decide in cases of:

a. criminal acts of corruption;

b. criminal acts of money laundering originating from corruption; and/or

c. criminal acts stipulated as corruption under the law.

The Court is also authorised to examine, hear and decide on corruption cases conducted by an Indonesian citizen outside the territory of Indonesia.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Normally, these would fall under English law.

### 13.2 What law typically governs financing agreements?

Normally, these would fall under English law.

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

Typically, the transfer of assets or security over assets located in Indonesian territory is governed by domestic law.

## 14 Jurisdiction and Waiver of Immunity

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

Yes, submission to a foreign jurisdiction (subject to the proper nexus to such jurisdiction) and waiver of immunity should be binding and enforceable.

## 15 International Arbitration

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

Yes, international arbitration clauses are recognised by local courts.

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

Yes. Indonesia ratified the New York Convention through Presidential Decree No. 34 of 1981. However, Indonesia is not a contracting State to any other prominent dispute resolution conventions.

### 15.3 Are any types of disputes not arbitrable under local law?

Pursuant to Law No. 30 of 1999, the disputes that can be settled through arbitration are those of a commercial nature. As far as other types of dispute are concerned, this is not possible.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No. The parties may choose to settle the dispute through domestic or international arbitration.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

The GOI has enabled the provision of infrastructure guarantees with the purpose of improving infrastructure projects' creditworthiness, as part of an effort to encourage private sector participation in Indonesia's infrastructure development. Infrastructure guarantees can be provided to infrastructure projects that are implemented under PPP schemes as regulated under Presidential Regulation No. 38/2015 on Public-Private Partnership ("**Perpres 28/2015**").

Perpres 38/2015 stipulates the provision of infrastructure guarantees by the Minister of Finance ("**MoF**"), which can be implemented through a State-Owned Enterprise ("**SOE**") mandated to process and provide infrastructure guarantee (Infrastructure Guarantee Entity or *Badan Usaha Penjaminan Infrastruktur* – "**BUPI**").

The process for infrastructure guarantee through a BUPI is further regulated through Presidential Regulation No. 78/2010 on Infrastructure Guarantees in Public-Private Partnership Projects provided through the Infrastructure Guarantee Entity (BUPI) ("**Perpres 78/2010**"), as well as through Minister of Finance Regulation No. 260/PMK.011/2010 on Guidelines for Implementation of Infrastructure Guarantee in Public-Private Partnership Projects ("**PMK 260/2010**").

**The Establishment of the Indonesia Infrastructure Guarantee Fund ("IIGF")**

The IIGF was established in 2009 through Government Regulation No. 35/2009 ("**PP 35/2009**") on the Republic of Indonesia State Equity Participation for the Establishment of a State Owned Enterprise in the Field of Infrastructure Guarantees. With the issuance of Perpres 38/2015, IIGF's role as BUPI is further defined within the framework for infrastructure PPPs.

<u>Objectives of the IIGF</u>

The primary objectives of the IIGF's establishment are:

- Providing guarantees for PPP projects in infrastructure.
- Improving creditworthiness, particularly bankability of PPP projects from the perspective of investors/lenders.
- Improving governance and transparent processes in the provision of guarantees.
- Minimising the possibility of sudden shocks to the APBN and ring-fencing the exposure of the Government's contingent liabilities.

As IIGF guarantees are aimed at improving the creditworthiness of Indonesia's infrastructure PPP projects, this will in turn reduce the risk of projects for private investors and lenders, thereby attracting more private investment and increasing competition among potential bidders in the tender process.

The lower degree of risk would also enhance the potential projects' credit ratings, and may reduce the cost of project debt and lengthen the maturity of available financing. Lower cost of debt would ultimately translate into lower tariffs for consumers. The higher ratings of project debt may allow some PPP project companies ("**PCs**") to issue bonds on the capital markets, including local markets, thereby contributing to the development of Indonesia's capital markets.

The IIGF operates as a "single window" for the management of the provision of all guarantees provided to infrastructure projects proposed by the Government's CA.

As the single-window administrator of infrastructure guarantees in Indonesia, the IIGF will:

1. provide consultation and guidance to CAs interested in obtaining IIGF guarantees for their projects;
2. screen infrastructure projects for the eligibility to receive IIGF guarantees;
3. evaluate guarantee proposals for infrastructure projects in accordance with the IIGF project appraisal guidelines and, in turn, accept or reject guarantee proposals;
4. customise the guarantee structure and, if needed, propose and coordinate other guarantee programmes with other co-guarantors or GOI institutions; and
5. establish a monitoring framework and closely monitor projects supported by the IIGF.

**Infrastructure Guarantee Arrangements**

An infrastructure guarantee is a form of MoF fiscal support to privately financed infrastructure projects. It guarantees the commitment of a CA to fulfilling its financial obligations under a PPP agreement. Under the current regulations, such guarantee can be provided by a BUPI.

As a BUPI, the IIGF shall enter into a Guarantee Agreement with the investor or PC, guaranteeing the performance of the CA under the PPP Agreement, specifically for those risks allocated to the CA in the PPP agreement, and which have been agreed by the IIGF to be included under the guarantee structure. In providing such guarantee, the IIGF will require the CA to enter into a Recourse Agreement with the IIGF.

Other than the above, and the explanation under question 6.3 above, we are not aware of any political risk protections.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, there are requirements to deduct or withhold tax from interest payable on loans made to domestic or foreign lenders, as stipulated in the Income Tax Law. Other than the interest and fees for various agents' portions of such proceeds, the proceeds of a claim under a guarantee or the proceeds of enforcing security should not be subject to the withholding.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No tax incentives would be given to foreign creditors. The tax incentives which are provided preferentially to foreign investors are in the form of the following:

**1. Investment Allowance**

The investment allowance has several types, including, among others:

- 30% of the invested capital;
- accelerated depreciation and amortisation;
- reduction of the Dividend Income Tax Rate; and
- extended loss carried forward.

**2. Tax Holiday**

This type of facility consists of the following:

- Corporate income tax relief for five (5) to ten (10) years after commencing commercial production.
- An additional reduction of 50% on the corporate income tax payable for a period of two (2) years.
- Taking into account the competitiveness of national industry and the strategic value of certain business activities, the Minister of Finance may extend the period of the tax holiday.

The criteria for obtaining the tax holiday facility are as follows:

- The activity is in a "pioneer industry".
- Having a plan for new capital investment of Rp 1 trillion, which has been approved by the competent authority.
- Depositing capital in Indonesian banks in the amount of at least 10% of the total new capital investment plan. The fund cannot be withdrawn before the implementation of capital investment.
- Having Indonesian legal entity status issued since/after/at least twelve (12) months before the issuance of the Minister of Financial Regulation (15 August 2011).

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

The Investment Coordination Board of Indonesia recently issued a regulation stating that minimum foreign investment shall be: (i) more than Rp 10,000,000,000 (ten billion rupiah) or the equivalent value in US dollars, beyond the land and building investment with an equity debt ratio of 1:3; (ii) a minimum of approximately Rp 2,500,000,000 (two billion five hundred million rupiah) or the equivalent value in US dollars of issued and paid-up capital; and (iii) each of the shareholders of the company shall hold at least Rp 10,000,000 (ten million rupiah) or the equivalent value in US dollars, and the percentage of share ownership is calculated based on the shares' nominal value.

Furthermore, there is a recent development regarding the language of the contract. The language of the contract may be one of the key issues since the stipulation of Law No. 24 of 2009 on Flag, Language, National Coat of Arms and National Anthem ("**Law 24/2009**"). Under Law 24/2009, Indonesian language is required in any MOU or agreement involving Indonesian parties. On 20 June 2013 the District Court of Jakarta Barat nullified a Loan Agreement executed only in English. The District Court interpreted that provision to mean that an agreement not using *Bahasa Indonesia* is void as a matter of law. The District Court decision was affirmed on 7 May 2014 by the Jakarta High Court, and the Indonesian Supreme Court announced that it had rejected the appeal filed by the petitioner on 31 August 2015, thus re-affirming the High Court's decision. Therefore, any party contracting with an Indonesian counter party, be it in a cross-border or domestic transaction, shall enter into an agreement in the Indonesian language or bilingually so as to comply with Law 24/2009. For any English-only agreement involving Indonesian parties concluded after the enactment of Law 24/2009 (July 9 2009), it is advised to re-execute the agreement in the Indonesian language (or bilingually) so as not to leave it vulnerable to challenge.

### 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

In order to obtain project financing, a company can issue bonds or stocks, the procedure for which is regulated by the Indonesian Stock Exchange and Capital Market Supervisory Board Financial Institution (*Badan Pengawas Pasar Modal Lembaga Keuangan* – "**Bapepam-LK**") which is currently known as the Financial Service Authority (*Otoritas Jasa Keuangan* – "**OJK**").

In the event that the company would like to issue stocks in the stock exchange through an Initial Public Offering ("**IPO**"), Decree of Chairman of Bapepam-LK No. Kep-122/BL/2009 concerning the Procedure of Public Offering Registration ("**Regulation IX.A.2**") states that the company, as the issuer, shall submit the registration statement and any supporting documents to the OJK, as well as announcing the short prospectus in a local newspaper. After the applications have been completed, the company will obtain the effectiveness of registration so that it can begin to offer its stocks to the public.

With regard to the bond issuance, Law No. 24 of 2002 regarding Government Bonds ("**Law No. 24/2002**") and Decree of Chairman of Bapepam – LK No. KEP-07/BL/2006 regarding Bond Transaction Reporting ("**Regulation No. X.M.3**") states that bond transactions may be conducted on the stock exchange or over the counter, but the issuer shall report any of its bond transactions (i.e. issuance or transfer) to the OJK.

Further, it is advisable to issue bonds or conduct an IPO after a project company has been established for a certain period. Basically, in the IPO or bond issuance process, the OJK will check the accountability and capability of the company in conducting business activity. Those are the important aspects which will be assessed by the people who would like to purchase the stocks or bonds issued by that company. In the newly established company, however, business activity has not been firmly conducted so the financial capability or assets of that company cannot be assessed or offered to the public. In the event that the newly established project company still intends to obtain funding from an IPO or bond issuance, accordingly its sponsor may conduct such IPO/bond issuance, then inject the funds to the newly established project company.

## 19 Islamic Finance

### 19.1 Explain how Istina'a, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

Indonesia has applied and regulated the common structure of the application of the *Shari'ah* law *akad* in Islamic project financing, as described below:

**a) *Istisna'a***

*Istisna'a* is an Islamic project financing conducted in schemes of sale and purchase. Pursuant to Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 06/DSN-MUI/IV/2000 regarding *Istisna'a* Sale and Purchase, *Istisna'a akad* is defined as a request/reservation of certain goods with specific terms and requirements that have been agreed by the purchaser and the seller in which the payment will be conducted via the instalment method.

Pursuant to Law No. 21 of 2008 regarding *Shari'ah* Banking ("**Law No. 21/2008**"), a *Shari'ah* bank is allowed to conduct project financing under *Istisna'a akad*. In practice, *Istisna'a akad* is commonly used for construction projects such as buildings or roads.

In corporate financing, commonly *Istisna'a* is conducted at two levels. At the first level, the *Shari'ah* bank will provide payment to the builder to construct the building in accordance with the *Shari'ah* bank's request (the specification of the *Shari'ah* bank's request has been agreed by its customer). Payment from the *Shari'ah* bank will be delivered to the builder depending on the term of completion that has been agreed by the parties; for instance, the first term payment is delivered after the completion of 30% of the requested building, and will be settled after the building has been fully constructed. At the second level, the *Shari'ah* bank will enter into *Istisna'a akad* with its customer for the same object. This method is advisable as long as the *Istisna'a akad* is conducted separately for each transaction. After the completion of the building, at the first level of *Istisna'a* the right of ownership of the building will be owned by the *Shari'ah* bank, and subsequently the *Shari'ah* bank will transfer the right of ownership to the customer at the second level of *Istisna'a*.

**b) *Ijarah***

In practice, financing under *Ijarah akad* is essentially similar to a leasing agreement. Pursuant to the Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 09/DSN-MUI/IV/2000 regarding *Ijarah* payment, *Ijarah* payment can be conducted by parties that have entered into a lease agreement either verbally or in writing.

Generally, in practice, there are two forms of *Ijarah*, as follows:

- ***Al-Ijarah*** is an agreement for the transfer of rights to utilise goods and services for a period of time as stipulated in the lease agreement without being followed by the transfer of ownership of the lease object after the lease term has expired.
- ***Al-Ijarah Al-Muntahia Tamlik Bit-Ijarah*** is an agreement for the transfer of rights to utilise goods and services for a period of time as stipulated in the lease agreement, which is followed by the transfer of ownership of the lease object after the lease term has expired.

In practice, financing of projects by *Shari'ah* banks in Indonesia is preferable to using *Al-Ijarah Al-Muntahia Tamlik Bit-Ijarah* schemes for providing financial assistance for customers, since the *Shari'ah* bank does not need to maintain and hold the lease object after the lease term has expired.

**c) *Wakala***

*Wakala* is essentially an agreement to act on behalf of another person, commonly known as power of attorney. In commercial practice, *Wakala akad* is used by many sectors, for instance, to perform Letter of Credit transactions, enter into insurance agreements or finance via *Shari'ah* banking.

In the insurance sector, pursuant to Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 52/DSN-MUI/III/2006 regarding *Wakala Bil Ujrah Akad* on *Shari'ah* Insurance and Re-insurance, *Wakala Bil Ujrah Akad* is used by an insurance company to act on behalf of its customer to manage their fund for insurance purposes and also to obtain a compensation fee (*ujrah*). In the banking sector, pursuant to Law No. 21/2008, a *Shari'ah* bank may act as a trust agent (*wali amanat*) for the holder of a warrant (*surat berharga*) under *Wakala akad*.

**d) *Murabaha***

The structure of *Murabaha* generally is a financing method under the structure of a sale and purchase agreement. A *Shari'ah* bank will purchase goods from the seller and then sell the goods to its customer. Payment under the *Murabaha* structure can be conducted in cash or instalments depending on the agreement between the parties without interest (*riba*), pursuant to Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 04/DSN-MUI/IV/2000 regarding *Murabaha*.

After the purchase of goods, the right of ownership of goods will be owned by the *Shari'ah* bank, thus in order to transfer the right of ownership to its customer, such goods will be re-sold by the *Shari'ah* bank to its customer either by the instalment or cash method. If the method of payment under the *Murabaha akad* is based on instalments, the object of the *akad* shall be transferred to the customer at the beginning of the instalments. The purchase price is based on the price that has been agreed by the bank and its customer.

Both *Murabaha* and *Istisna'a* are *akad* under sale and purchase schemes, but there are differences between *Murabaha* and *Istisna'a* in Islamic financing, as described below:

(i) under *Murabaha akad*, the object of the *akad* will be directly transferred from the *Shari'ah* bank to its customer in the beginning of *akad*, while under *Istisna'a akad* the object of the *akad* will be transferred after the end period of *akad*; and

(ii) under *Istisna'a akad*, the object of the *akad* shall be based on the specification as requested by the buyer, while in *Murabaha* such object may be based on a specific request, or has been provided by the *Shari'ah* bank and/or seller.

The above is the common understanding of each *akad* in Indonesia, particularly for Indonesian project financing practice.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Not all principles of *Shari'ah* law can be chosen as governing laws of a contract. Only principles of *Shari'ah* law that have been regulated in the form of Indonesian law and regulations can be chosen as the governing law of a contract; for instance, the *Murabaha* principle may be a governing law for a sale and purchase agreement, since the principle of *Murabaha* has been regulated under Instruction (*Fatwa*) of the National *Shari'ah* Board (*Dewan Syariah Nasional*) No. 06/DSN-MUI/IV/2000 regarding *Istisna'a* Sale and Purchase. This stipulation is required in order to prevent disputes between parties caused by a difference of interpretation of the governing law for such contract.

One of the notable cases is one regarding disputes in relation to *Murabaha akad* between PT Atriumasta Sakti and Bank Syariah Mandiri before the Supreme Court of Indonesia in 2010 regarding the annulment of award of National *Shari'ah* Arbitration Tribunal (*Badan Arbitrase Syariah Nasional*) by the judgment of Religious Court of Jakarta. The Supreme Court of Indonesia judged and declared that the annulment was invalid.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Generally, the inclusion of an interest payment obligation in a loan agreement is allowed under Indonesian law. However, if the parties of the agreement agree to choose the principle of *Shari'ah* law, as regulated under Indonesia law, as their governing law, then it will be conflicted if the agreement contains clauses which state an interest payment.


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ABNR
COUNSELLORS AT LAW

Ali Budiardjo, Nugroho, Reksodiputro, usually abbreviated to ABNR, was established in Jakarta in 1967 as a partnership of legal consultants in Indonesian business law. The firm is one of Indonesia's largest independent full-service law firms. The commitment we make to clients is to provide broad-based, personalised service from top-quality teams of lawyers with international experience that includes ground-breaking deals and projects. ABNR's reputation has been recognised around the world by independent industry surveys and law firm guides. ABNR was selected, based on its high level of integrity and professionalism, to be the sole Indonesian member of the world's largest law firm association Lex Mundi, and of the prestigious Pacific Rim Advisory Council ("**PRAC**").

# Japan


Kunihiro Yokoi

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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

After the introduction of a feed-in tariff for renewable energy in July 2012, photovoltaic (PV) power projects have been the main target for project finance in Japan. Since around the second half of 2014, however, the momentum for such projects has subsided, mainly due to the over-supply of PV power that led to decreased sales prices since 2012 and a newly enacted uncompensated and unlimited restriction on power supply. Recently, projects investing in renewable energy other than PV power, such as wind power and biomass power, have started to attract attention.

Since its introduction in 2011, the "concession right" scheme, in the field of public-private partnership (PPP) and private finance initiative (PFI) projects, has undergone further development. The concession right scheme is a scheme that enables a public entity to confer upon a private entity concession rights to operate and maintain existing facilities by financially relying on users' fees. The leading examples of where concession rights have been granted are Sendai Airport and Kansai and Osaka International Airports, further detail of which is set out in question 1.2 below. Expectations are that in the coming years water supply services, sewage services, highways and other airports will also become subject to the concession right scheme.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

As mentioned above in question 1.1 above, Kansai and Osaka International Airports were monumental transactions in terms of their scale. The concession right to operate Kansai and Osaka International Airports, for a term of approximately 44 years, was conferred on a special purpose company (SPC) established by a consortium consisting of ORIX Corporation and VINCI Airports S.A.S. in December 2015 for a consideration of approximately JPY 2,200 billion in total, paid over the 44-year term. The SPC commenced operation in April 2016.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to create security interests by means of a general security agreement, as long as each asset is clearly specified therein. However, the security interest in each type of asset must be perfected separately.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

**(1) Real property (land)**

Under Japanese law, the typical security interest in real property is a mortgage (*teito-ken*). For a revolving facility with a maximum claim amount (*kyokudo-gaku*), a revolving mortgage (*ne-teito-ken*) is applicable.

A mortgage in respect of land or a building is created by an agreement between a mortgagor and a mortgagee. In order to perfect the mortgage against a third party, the mortgage must be registered with the Legal Affairs Bureau (LAB) having jurisdiction over the property. There are approximately 500 LABs throughout Japan.

It should be noted that the land and any building on the land are treated independently of each other. It is, therefore, important to separately create and perfect the mortgage as a first lien upon both the land and the building.

**(2) Plant**

A typical "plant" consists of land, a building, machinery and equipment. As mentioned above, land and a building can be collateralised by a mortgage (*teito-ken* or *ne-teito-ken*). Machinery and equipment are classified as movables, and can be collateralised by assignment as security (*joto-tanpo*) (discussed below).

In addition, Japanese law provides for two comprehensive security interests for property located in a factory. One is a factory mortgage (*kojo-teito-ken*), and the other is a factory estate mortgage (*kojo-zaidan-teito-ken*). A factory mortgage over land covers all machinery and equipment located in the factory. A factory estate mortgage is a particularly strong security interest that can actually eliminate pre-existing security interests over movables in the factory estate. Notice regarding the factory estate mortgage is published in the Japanese official gazette and if an existing security interest holder fails to object within a certain period (specified as being from one to three months), that party's existing security interest is extinguished. Both a factory mortgage and a factory estate mortgage require each piece of machinery and equipment to be identified, and therefore require more burdensome procedures and costs than normal mortgages. The factory mortgage and factory estate mortgage are not very common and are used mostly for large factories.

**(3) Machinery and equipment**

Machinery and equipment are movables. Movables can be collateralised by way of assignment as security (*joto-tanpo*). This security interest can be created by a security agreement between an assignor and an assignee. In order to perfect this security interest, the target movable must be "delivered" from the assignor to the assignee. Delivery can be made by (i) physical delivery, (ii) constructive delivery, or (iii) (where the assignor is a legal entity (including a company)) if a movable assignment registration (*dosan-joto-toki*) is filed with the LAB, the registration itself is deemed to be delivery from the assignor to the assignee. The LAB located in the Nakano Ward of Tokyo is the exclusive designated LAB for any movable assignment registration.

In creating a *joto-tanpo*, it is necessary to identify the target movable by whatever means is sufficient to specify it, such as the kind of movable, its location, number and so forth. This identification rule is also applicable to perfect the *joto-tanpo* by way of physical or constructive delivery. In perfection by movable assignment registration, there are two statutory ways to identify the target movable: (i) specification by both the kind of movable and by a definitive way to specify the target (such as a serial number); and (ii) specification by kind of movable and its location. The former is usually used for a fixed asset, and the latter is usually used for inventory (aggregate movables).

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A security interest in receivables (claim) may be taken by a pledge (*shichi-ken*) or assignment as security (*joto-tanpo*). These security interests can be created by a security agreement between the pledgor/assignor and pledgee/assignee.

In creating the security interest, it is necessary to sufficiently identify the target receivable to specify it (such as kind of movable, date of origination and other items to the extent applicable). If the target is a claim to be generated in the future (*shorai-saiken*, "future claim"), the period (the beginning and end dates of the period during which the claim will be generated) must be specified in the security agreement and in connection with perfection. If there is an agreement made between the debtor and the obligor of the target receivable which prohibits a pledge/assignment of the target receivable, the pledge/assignment is basically invalid, with two exceptions: (i) if the pledgee/assignee is unaware of the prohibition agreement without gross negligence on the part of the pledgee/assginee, the pledge/assignment shall be valid; and (ii) the pledge/assignment will become valid retroactively from the time of the pledge/assignment (to the extent not harmful to a third party) if the obligor of the target receivable consents to the pledge/assignment, even if there has been a prohibition agreement.

The pledgee/assignee can assert the security interest ***against the obligor of the target receivable*** upon (i) notice to the obligor from the pledgor/assignor, or (ii) the acknowledgment of the obligor. The pledgee/assignee can assert the security interest ***against a third party*** (such as a double pledgee/assignee or bankruptcy trustee of the pledgor/assignor) upon (i) notice to the obligor of the target receivable from the pledgor/assignor by a certificate with (a stamp of) a fixed date, (ii) the acknowledgment of the obligor of the target receivable by a certificate with (a stamp of) a fixed date, or (iii) (only where the pledger/assignor is a legal entity (including a company)) a claim pledge/assignment being registered with the special LAB located in Nakano Ward of Tokyo. The registration can be made with the LAB upon creation of the security interest without notice to the obligor. In such a case, practically, the notice to the obligor of the target receivable will be sent upon the event of default of the pledgor/assignor, and the notice must be accompanied by a registration certificate (this notice can be sent by the pledgee/assignee).

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, a pledge over cash deposits is commonly used. A pledge over deposits is created by a pledge agreement between a depository bank and a depositor and perfected by a notice to, or acknowledgment by, a depository bank with a stamp of fixed date. The validity of a pledge over an ordinary deposit (*futsu-yokin*) has been debated but no Supreme Court decision addressing this issue exists. Despite this, such pledges are often used for project financing.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Shares of stock companies (*kabushiki-kaisha*) incorporated in Japan can be pledged or assigned as security (*joto-tanpo*), and pledges are relatively common. The articles of incorporation of the company will specify whether the shares are represented by physical certificates. If the shares are "certificated" (i.e., if physical certificates representing the shares are issued or will be issued), then a pledge can be created by physical delivery of the certificates to the pledgee, and perfected by continuous possession of the certificates by the pledgee.

On the other hand, if the shares are not and will not be certificated, a pledge may be created by a security agreement between the pledgor and pledgee, and perfected by registration of the pledge on the issuer's shareholders' list.

It is not expected that a project company conducting project finance transactions would be a listed company. If it is listed, however, the shares of a listed stock company are managed in a book-entry system electronically and the pledge over the shares are created and perfected in the system.

In each case, the stock company's approval is not necessarily required upon creation of the pledge, but will be needed when the pledge is to be enforced. For security assignments, the issuer company's approval will be necessary at the time of its creation as well as its enforcement.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Registration taxes are imposed on (i) mortgage registrations (0.4% of the claim amount (or, for a revolving mortgage, 0.4% of the maximum claim amount)), (ii) movable assignment registrations (JPY 7,500 per filing (up to 1,000 movables)), and (iii) claim assignment registrations (JPY 7,500 per filing (up to 5,000 claims) and JPY 15,000 per filing (exceeding 5,000 claims)). Creation of assignment as security (*joto-tanpo*) over claims may be subject to a fixed stamp duty of JPY 200.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No, except for the factory estate mortgage, which requires the procedures discussed in question 2.3 above.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

No regulatory consents are required to grant security, except for general consents for transfers required by the terms of the asset itself (such as licences).

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

A security trustee is recognised under the Trust Law of Japan. In practice, however, a security trust scheme is not commonly used, mainly due to a lack of precedents.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

See question 3.1 above.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

In principle, security shall be enforced through a court-supervised auction (*keibai*). However, it is possible and common to agree to enforce security without a court-supervised auction, such as by way of a private sale.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

No, there are no such restrictions.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

There are three types of bankruptcy proceedings: bankruptcy (*hasan*); civil rehabilitation (*minji saisei*); and corporate reorganisation (*kaisha kosei*). Under both bankruptcy (*hasan*) and civil rehabilitation proceedings (*minji saisei*), secured creditors can enforce their own security interests outside the proceedings (*betsujo-ken*) unless the court orders the deletion of the security interest in response to the petition by a bankruptcy trustee under certain limited requirements. On the other hand, under corporate reorganisation proceedings (*kaisha kosei*), the enforcement of security interests is prohibited or suspended (*kosei-tanpo-ken*).

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

A bankruptcy trustee may exercise clawback rights (*hinin-ken*). With respect to the security, if a debtor repays its debts, or grants security to a specific creditor after becoming "unable to pay its debts" and being aware of such situation, or after a bankruptcy filing (or grants security without obligation or repays debts before maturity within 30 days prior thereto), then such act may be avoided by the bankruptcy trustees. Administrative expenses, pre-bankruptcy adjudication taxes, certain labour costs, etc. are treated as claims that have priority over general claims, but secured creditors have priority over the collateral irrespective of the existence of these claims.

**5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

No, there are no such exclusions.

**5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?**

As set out in question 5.1 above, secured creditors can enforce their own security interests outside bankruptcy (*hasan*) or civil rehabilitation proceedings (*minji saisei*).

**5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?**

Turnaround alternative dispute resolution (ADR) proceedings (or business turnaround ADR) are a method overseen by the Japanese Association of Turnaround Professionals that can be used to restructure an insolvent business without involving courts. The process works by forming an agreement between the insolvent business and its creditors that includes debt write-offs and the rescheduling of debt payments.

**5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.**

Directors are liable against the company if they breach their duty of care as a good manager; however, this can be tempered by the application of the business judgment rule to directors' decisions. Also, directors are liable against third parties for any loss or damages incurred by a third party due to a director's wilful misconduct or gross negligence. Criminal liability would arise in certain limited cases where directors intentionally breach their duty and cause damages to the company.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

A foreign investor is required to lodge a filing if it obtains shares in a non-listed company, obtains more than 10% of shares in a listed company, or conducts certain other activities under the Foreign Exchange and Foreign Trade Act. Investment in certain types of businesses (such as electricity, mining, oil, gas, water supply, transportation, telecommunication and shipbuilding) requires prior filing with the Japanese government. Investment in certain industries (such as telecommunications, airlines and broadcasting) is subject to maximum shareholding restrictions.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

While Japan has executed bilateral investment treaties with certain countries, these treaties do not provide protection from the restrictions noted above.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Expropriation may be permitted for a limited public interest (such as transportation, electricity facilities and airlines) under the Compulsory Purchase of Land Act, with compensation provided. No form of investment is specially protected.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The relevant government agencies or departments will vary depending on the types of projects over which regulatory bodies in the state or local government have authority. Among the agencies and departments, the Ministry of Economy, Trade and Industry (METI) is the responsible authority in relation to matters such as energy, natural resources and other industries, and the Ministry of Land, Infrastructure, Transportation and Tourism (MLIT) is the responsible authority in relation to matters such as construction, transportation and ports.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Financing or project documents do not generally require registration or filing with any governmental authority. However, a guarantee agreement must be executed in writing, and perfection of security rights may require registration with the relevant authority. Stamp duty may be imposed depending on the type of financing or project documents if they are executed in Japan.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Ownership of land or a pipeline does not require a licence. However, development or, in some situations, the acquisition of land, as well as the instalment or operation of pipelines, are subject to various regulations such as agricultural land regulations and pipeline business regulations. While these matters are regulated by various acts, a licence is generally required for the extraction of natural resources and the operation of pipelines. A licence under the Mining Act is given only to Japanese nationals. On the other hand, activities for quarrying and/or gravel gathering, subject to local regulations, can be performed by a registered foreign entity. Acquisition of an oil pipeline or gas pipeline business is subject to a pre-notice filing requirement under the general restrictions of the Foreign Exchange and Foreign Trade Act and may also be subject to a suspension order in case it disturbs public order.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Fees apply depending on the mining activities. Certain prefectural and municipal mining taxes are payable on the extraction of natural resources, as applicable. The rates for these taxes may vary depending on the location and the resource, but in general, a prefectural tax is imposed on the area of the allotted mining area, and a municipal tax, the standard rate of which is 1% of the relevant mineral price, is also imposed.

There are no general export restrictions relating to natural resources, provided that they do not fall into the exceptional categories regulated under the Export Trade Control Ordinance. No tax is imposed on the export of natural resources.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

No, other than a *post facto* filing under the Foreign Exchange and Foreign Trade Act.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Generally no, but a *post facto* filing is required under the Foreign Exchange and Foreign Trade Act if the remittance exceeds JPY 30 million. Withholding of Japanese income tax at the rate of 20.42% (including special reconstruction income tax) will be taxed for dividends and interest paid to foreign lenders, unless a double tax treaty applies.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can, but a report is required to be filed with the tax authority if the offshore assets exceed JPY 50 million.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

No, there is no such restriction.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

There are various regulations including local prefectural or municipal regulations that handle environment, health and safety issues. The necessity of an environmental impact assessment under state or local regulations would have a big impact on the costs and schedule of a project financing. Regulations on certain areas (such as forest areas and agricultural land) would also affect the project financing. Environmental matters are generally handled by the Ministry of the Environment (MOE) and/or similar environmental division at the local government level, and health and safety matters are generally handled by the Ministry of Health, Labour and Welfare and similar divisions at the local government level.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

No, privately owned project companies are not subject to such procurement regulations.

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Except for certain exceptions, foreign insurers are, in principle, required to obtain insurance business licences as a condition to underwriting insurance relating to project assets located in Japan.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Insurance policies over project assets can be generally payable to foreign creditors.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

Foreign workers, technicians, engineers or executives may be employed by a project company as long as it obtains an appropriate visa (certificate of eligibility). The visa requirements vary depending on the type of visa.

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

Construction contractors may generally import project equipment, except for limited restrictions such as goods that are deleterious to health and safety under the Foreign Exchange and Foreign Trade Act. A licence is not generally required in order to import equipment. Contractors may be subject to customs duties and VAT (consumption tax).

**10.2 If so, what import duties are payable and are exceptions available?**

Import duties may differ depending on product type, origin and other relevant conditions.

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

*Force majeure* provisions are set out in many project agreements. Generally, exclusions based on such provisions are enforceable as long as they are clearly defined in such agreements. Normally, *force majeure* exclusions do not apply to payment obligations.

## 12 Corrupt Practices

**12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?**

Bribery is a criminal offence under the Criminal Code, with a penalty of imprisonment for up to three years or a fine of up to JPY 2.5 million. Conducting corrupt business practices with foreign government officials is a criminal offence under the anti-bribery provisions of the Unfair Competition Prevention Act, with a penalty of imprisonment for up to five years and/or a fine of up to JPY 5 million (for the offender) and fine up to JPY 300 million (for the corporate body).

## 13 Applicable Law

**13.1 What law typically governs project agreements?**

Project agreements are typically governed by the laws of Japan.

**13.2 What law typically governs financing agreements?**

Financing agreements are typically governed by the laws of Japan. However, securities documents may be legally required to be governed by the laws of the state in which the collateral is located.

**13.3 What matters are typically governed by domestic law?**

The parties may generally choose the governing law. However, securities documents for collateral located in Japan are typically governed by the laws of Japan. In addition, enforcement, insolvency, consumer protection and employment matters will be subject to mandatory provisions of Japanese law.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

A waiver of sovereign immunity is legally valid and enforceable subject to the conditions in the Immunity Act. The Immunity Act is based on the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) and became effective from April 1, 2010.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Generally, yes. Japan is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes, the Convention became effective from 1961 with a reservation of reciprocity. Japan is also a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as ICSID).

### 15.3 Are any types of disputes not arbitrable under local law?

Unless otherwise provided by law, civil and commercial disputes that may be resolved by settlement between the parties (excluding that of divorce or separation) are arbitrable (Art. 13.1 of the Arbitration Act). Examples of matters which are generally considered to not be "arbitrable" include: (i) the validity of intellectual property rights granted by the government; (ii) shareholders' actions seeking revocation of a resolution of the shareholders' meeting; (iii) administrative decisions of government agencies; and (iv) insolvency and civil enforcement procedural decisions.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No, they are not.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

There has been no call for political risk guarantees. Lenders will typically require direct agreements with governmental authorities if the project is a PPP or PFI project. Lenders usually seek criteria to approve the potential transferee of shares in the project company or concession right since a transfer thereof requires a consent of the relevant governmental authority under the PFI Act and its relevant regulations.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Withholding of Japanese income tax is required on interest paid to foreign lenders at the rate of 20.42% (including special reconstruction income tax). This is subject to a double tax treaty between Japan and the country where the foreign lender resides, which in many cases will reduce withholding of such tax.

The proceeds of enforcing security may be subject to income tax if it is categorised as Japanese-sourced income.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Various tax or other incentives are available to foreign investors to attract more foreign investment; however, such incentives are not intended specifically for project financing.

Registration tax is imposed on the registration of certain rights and securities. Rates vary depending on the type of rights and securities (e.g., 0.4% of the claim for mortgage). Stamp duty is imposed on the execution of certain documents. The amount of stamp duty for a loan agreement ranges from JPY 200 to JPY 600,000.

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

Foreign investors should take into account currency exchange risk, since revenues generated by a project are generally paid in Japanese yen.

A wide variety of regulations will generally need to be considered for the development of a project. Generally, applicable permits and/or licences may differ depending on the site or facilities, and they are handled by the competent government and/or local government having regulatory oversight of the subject matter. Administrative officers sometimes have broad discretion on permits and/or licence application procedures, and this may result in a certain degree of unpredictability.

If lenders to a project are not banks, loans for project financings will generally be subject to the Money Lending Business Act, which requires registration with the authority and compliance with other obligations.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Project bonds are considered securities and are therefore subject to the Financial Instruments and Exchange Act. Offering securities to the public will require filing securities registration statements and following certain continuous disclosure obligations, unless exempt under certain exceptions.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

To the extent of our knowledge, Islamic project finance has not been used in Japan. However, Japanese law has a similar legal framework corresponding to the Islamic finance concept. While compliance with *Shari'ah* is required to be reviewed separately, Japanese law would likely recognise: *Istina'a* as a procurement and construction agreement (*seizou itaku*); *Ijarah* as a lease agreement (*chintaishaku*); *Wakala* as an agency agreement (*dairi* or *toiya*); and *Murabaha* as a sales agreement with an instalment payment (*kappu hanbai*). Therefore, in a possible structure for a project financing, (i) an *Istina'a* arrangement may be used in order to provide funds for the construction of the plant during the construction period, and (ii) an *Ijarah* arrangement may be used in such a manner that the financier leases the plant to a project company and receives the rent during the operation period. In addition, (iii) a *Wakala* arrangement may be used for syndication fund providers to provide funds to the project company through a financing special purpose vehicle. Also, (iv) *Murabaha* financing would in theory be permissible to make a working capital facility or equity bridge finance available to the project company. Note that in such cases, project participants may also be subject to their applicable regulatory restrictions (e.g., the Banking Act of Japan).

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

We doubt that a Japanese court would recognise *Shari'ah* law as the governing law of a contract or dispute. No notable cases have been determined in this area.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

In general, inclusion of an interest payment obligation does not affect the validity or enforceability of a loan agreement, although usury laws will apply.


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The Project Finance practice at Anderson Mōri & Tomotsune frequently advises all parties involved in projects, including sponsors, project companies, domestic and international commercial lenders, export credit agencies, suppliers, contractors and governments. We provide comprehensive and practical legal advice on the successful structuring and implementation of major infrastructure projects in all sectors, including electricity, oil and gas, transport, water and telecommunications. We are able to draw on our firm's expertise in complementary areas, such as Japanese corporate law and regulation, tax-effective structured financing and capital markets. In addition to our commitment throughout the entire duration of a project, we are able to exploit our international experience to recognise specific cultural, political or environmental issues, enabling the successful implementation of major cross-border and transnational projects.

Our support also extends to energy and resources projects and PFIs, which are a relatively recent, but increasingly important, development in Japan. Anderson Mōri & Tomotsune is a pioneer in these transactions and we have been involved in many of the major projects in this field in Japan.

# Kenya


Pamella Ager

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James K. Kituku


## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

The year 2017 saw a slowdown of economic growth in Kenya as the year was coupled with reduced agricultural activities, tighter credit conditions, political uncertainty and inflation. The project finance market was inevitably affected by these occurrences and many projects stalled as a result of the uncertainties that were being experienced in the country and the economic slump the country faced.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The proposed expansion of the Nairobi-Mombasa Road covering 473 kilometres into a dual carriage-way. The project is expected to commence later this year (2018) and will be undertaken in ten (10) sections. The projected completion date is in six (6) years from the date of commencement. It is jointly funded by the United States Export Credit Agencies, United States Export Import Bank and the Overseas Private Investment Corporation.

Kenya Power and Lighting Company signed a EUR 60m contract for the construction of new power lines and transformers to enable access to electricity in 626,700 homes. This project is jointly funded by the World Bank and the African Development Bank.

The Japanese government also extended a USD 116.7m loan to the Kenyan government for the construction of the Mombasa Port Area Road Development Project. This loan is to be repaid over a period of 30 years while attracting an interest of 1.2%.

The agreement to fund the extension of Olkaria I Geothermal Plant for EUR 72m was also signed in 2017. The project consists of the extension of the existing 140 MW Olkaria I Unit 4&5 geothermal plant with an additional 70 MW turbine. The aim of the project is to help meet the growing electricity demands in the country.

Kenya Ferry Services also signed a USD 57m concession agreement with Trapos Limited for the construction of cable cars across the Likoni channel to enable transport of people across the channel. This project is a public-private partnership and is to be completed two (2) years from the commencement date. The project financing will be 40% equity and 60% debt.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In Kenya, a general financing agreement would be used, either in the form of a loan agreement or facility agreement. Security documentation would differ depending on the type of security a financier has opted to obtain. For example, where the assets of a company include movable assets such as machinery and motor vehicles, the financier would have a charge by way of debenture registrable in the Companies Registry. On the other hand, where the security was to be over immovable property, for example, land and/or buildings, Kenyan law requires that a charge be created over these particular immovable assets and be registered in the Lands Registry. Third-party securities in the form of guarantees would entail the preparation of a separate security document.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes. In the case of a company, requisite board resolutions would need to be obtained from the company borrower authorising the creation of the security. A charge document would be prepared, securing the financial obligations of the borrower to the financier. This charge would then be executed by all the parties in the presence of an Advocate. Thereafter, the stamp duty, based on the amount secured, would be paid to the Commissioner of Domestic Taxes. In cases where the charge involves agricultural land, the consent of the relevant land control board would have to be sought and obtained. Further, where the charge involves leasehold property, the consent of the lessor would need to be obtained. Where the charge is over a property belonging to a married individual, the consent of the spouse would be obtained. The charge would thereafter be submitted for registration at the relevant Lands Registry, accompanied by a rates clearance certificate from the relevant county government (confirming that all land rates applicable have been paid in full) and, in the case that the property is leasehold, a rents clearance certificate (confirming that the applicable land rent has been paid on full). Where the charge is created by a company, the charge would also have to be registered in the Companies Registry. In the event that the proposed security is already charged to a financier, the consent of the financier is required. An Inter-lenders Agreement or a Security Sharing Agreement will be required in such circumstances, to govern the relationship between the various lenders.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security can be taken over receivables. It is the practice in Kenya to either have a charge over the receivables or have a deed of assignment created over such receivables. Financiers are usually advised to place an obligation on the borrower to notify the debtors of such security. The financier will also be required to file an Initial Notice online at the Moveable Properties Securities Registry (MPSR). The requirement for filing under the MPSR is a new development which took place in 2017.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

When a customer places a deposit with a bank, the deposit represents a loan made to the bank. The bank is the debtor and the customer is the creditor. It had generally been recognised by legal practitioners that there was no difficulty in a bank taking a charge over a cash deposit held by it. It has generally been accepted that with regard to a fixed deposit, the secured party must take control over the charged accounts and prevent the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without consent from the chargee.

The bank is also required to file a notice under the MPSR, as noted under question 2.3 above.

However, the legality of a charge over a cash deposit was not accepted in the English case of *Re Charge Card Services*. This judgment caused a major controversy in legal and banking circles in England. The judge in this case argued that as the deposit represented a debt owed by the bank and grants the right for the depositor to sue the bank for its recovery, the debt cannot be assigned or taken as security, as a debtor – the bank – cannot sue for a debt it owes. The judge stated that it was "conceptually impossible" for a debtor to take a charge over his own debt.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes. Shareholders (especially those in private companies) are usually granted share certificates in respect of the shares they own. If a company holds shares in another company and it wishes to offer these shares to a financier as security, a charge may be prepared over these shares and registered in the Companies Registry. It should, however, be noted that a company cannot create security over its own shares. In the case of shares owned by a natural person, it has been the practice in Kenya by most financial institutions to require the borrower to surrender the relevant share certificate to the financial institution. In addition, the borrower is required to execute a blank share transfer form and give the financial institution authorisation to transfer the shares to any person in case of default.

The lender is required to file an Initial Notice under the MPSR concerning the security.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The following are the charges payable in respect of a charge:

- Security documents are required to be prepared by an Advocate and legal fees at the rate set out in the Advocates Remuneration Order are applicable. Attestation fees would also be payable to any Advocate witnessing the execution of the security documents.
- The stamp duty payable is based on the amount secured by the charge or debenture at the rate of 0.1%, which is a fixed rate regardless of the type or sequence of security. For example, the stamp duty payable on a charge, further charge or debenture is the same rate of 0.1% of the principal amount. In the case of a guarantee, the stamp duty payable is the nominal amount of KES 200.
- Bank charges – KES 100.
- Lessor's consent (if the relevant property is leasehold) – this varies from lessor to lessor.
- Land Control Board Consent (if the property is agricultural) – KES 1,000. In addition, the Land Control Act provides that: an allowance of KES 500 inclusive of lunch shall be paid to each unofficial member of a land control board for every meeting which he attends; an allowance of KES 1,300 inclusive of lunch shall be paid to each unofficial member of a provincial land control appeals board for every meeting which he attends; and a mileage allowance at prevailing government rates shall be paid to unofficial members of a land control board.
- Registration fees at the Lands Registry (if security is over immovable property) – KES 500.
- Filing fees at the Companies Registry (if the chargor is a company) – KES 600.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Provided that the security documents have been duly executed and consented to (where applicable) and the requisite stamp duty paid and rates and rents clearance certificates obtained, registration of securities at a Lands Registry may take a day, or even much longer. There have, however, been instances where a file relating to a particular property cannot be located, and this usually causes significant delays in the registration process. It should be noted that time varies from registry to registry depending on how busy that particular registry usually is. There have also been instances where different registries are closed by Executive Orders to pave way for urgent developments in various registries. For example, the Lands Registries in Nairobi were closed for two (2) weeks, from 19th March 2018 to 3rd April 2018, to allow digitalisation of its systems. This was done by an Executive Order. It has been our experience that registration at the Companies Registry would take approximately one week.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

The Land Control Act requires that the consent of the relevant Land Control Board be obtained in cases where the land is agricultural.

The Matrimonial Property Act prohibits the alienation in any form of matrimonial property during the subsistence of a marriage without the consent of both spouses either by way of sale, gift, lease, mortgage or otherwise.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

If the parties involved have an instrument recognising this role, then the provisions in the particular instrument will be binding on the parties, because this would be a contractual matter.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

See question 3.1 above.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?**

Charges rank according to the order in which they are registered unless so provided in the charge instrument.

The Land Act sets out the remedies available to a charge in the event of default. If a chargor fails to pay interest or any other periodic payment due under any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing. If the chargor does not comply within two months after the date of service of the notice, the chargee may:

(a) sue the chargor for any money due and owing under the charge;
(b) appoint a receiver of the income of the charged land;
(c) lease the charged land, or if the charge is of a lease, sublease the land;
(d) enter into possession of the charged land; or
(e) sell the charged land.

In the event that a charge opts to appoint a receiver, the chargee shall serve a notice in the prescribed form on the chargor and shall not proceed with the appointment until a period of 30 days, from the date of the service of that notice, has elapsed.

In the event that a chargee opts to exercise the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least 40 days have elapsed, from the date of the service of that notice to sell. The notice is required to be served on several people, including:

(a) the National Land Commission, if the charged land is public land;
(b) the holder of the land over which the lease has been granted, if the charged land is a lease;
(c) a spouse of the chargor who had given the consent;
(d) any lessee and sub-lessee of the charged land or of any buildings on the charged land;
(e) any person who is a co-owner with the chargor;
(f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
(g) any guarantor of the money advanced under the charge;
(h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
(i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at, or as near as possible to, the charged land.

A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer. The price at which the charged land is sold should not be 25% or below the market value at which comparable interests in land of the same character and quality are being sold in the open market.

If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be by private contract at market value or public auction with reserve price. If a sale is to proceed by public auction, it shall be the duty of the chargee to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land are, as near as may be, followed in respect of that sale.

A chargee exercising the power of sale may, with leave of the court, purchase the property. A court shall not grant leave unless the chargee satisfies the court that a sale of the charged land to the chargee is the most advantageous way of selling the land.

The purchase money received by a chargee who has exercised the power of sale shall be applied in the following order of priority:

(a) first, in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the charged land. The Rating Act provides that any land rates due in respect of land shall be a charge against the land on which the rate was levied; and the charge shall take priority;
(b) second, in discharge of any prior charge or other encumbrance subject to which the sale was made;
(c) third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
(d) fourth, in discharge of the sum advanced under the charge or so much of it as remains outstanding, interests, costs and all other money due under the charge, including any money advanced to a receiver in respect of the charged land; and
(e) fifth, in payment of any subsequent charges in order of their priority, and the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the charge.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

See question 4.1 above.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

The recently enacted Insolvency Act provides that if the property of a bankrupt is subject to a charge, the creditor who holds the charge may choose either of the following options:

(a) to realise the property by having it sold (but only if the creditor is entitled to do so under the terms of the charge);

(b) to have the property valued and prove in the bankruptcy as an unsecured creditor for the balance due (if any) after deducting the amount of the valuation; or

(c) to surrender the charge to the bankruptcy trustee for the general benefit of the creditors and prove in the bankruptcy as an unsecured creditor for the whole debt.

The bankruptcy trustee may at any time, by notice, require a creditor who holds a charge over a bankrupt's property:

(i) within thirty (30) days after receipt of the notice, to choose one of the options above; and

(ii) if the creditor chooses option (b) or (c), to exercise the chosen option within that period.

A creditor who fails to comply with the notice is taken to have surrendered the charge to the bankruptcy trustee under option (c) for the general benefit of the creditors, in which case the creditor may prove as an unsecured creditor for the whole debt.

Further, the Insolvency Act provides that if property of a bankrupt is subject to a security, the bankruptcy trustee may make an application to the court for an order enabling the bankruptcy trustee to dispose of the property as if it were not subject to the security, but only if it is satisfied that the disposal of the property would be likely to provide a better overall outcome for the creditors of the bankrupt.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

The Insolvency Act provides that debts of a person who is adjudged bankrupt or of a company that is in liquidation are payable in the following order of priority:

(a) The expenses of the bankruptcy or liquidation will have first priority.

(b) The following debts will have second priority:

- all wages or salaries payable to employees in respect of services provided to the bankrupt or company during the four months before the commencement of the bankruptcy or liquidation;
- any holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the bankruptcy or liquidation;
- any compensation for redundancy owed to employees that accrues before, or because of, the commencement of the bankruptcy or liquidation;
- amounts deducted by the bankrupt or company from the wages or salaries of employees in order to satisfy their obligations to other persons (including amounts payable to the Kenya Revenue Authority in accordance with the Income Tax Act);
- any reimbursement or payment provided for, or ordered by the Industrial Court under the Labour Institutions Act, 2007 to the extent that the reimbursement or payment does not relate to any matter specified in the Labour Relations Act, 2007 in respect of wages or other money or remuneration lost during the four (4) months before the commencement of the bankruptcy or liquidation;
- amounts that are preferential claims under section 175(2) and (3); and
- all amounts that are, by any other written law, required to be paid, in accordance with the priority established by this subparagraph, by a buyer to a seller on account of the purchase price of goods.

(c) The following debts will have third priority:

- tax deductions made by the bankrupt or company under the "pay as you earn" rules of the Income Tax Act;
- non-resident withholding tax deducted by the company under the Income Tax Act; and
- resident withholding tax deducted by the company under the Income Tax.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No entities are excluded from bankruptcy proceedings.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

The Land Act, 2012 provides similar remedies to a chargee in the event that a chargor defaults. The statute gives a clear procedure to be followed in such circumstances. If a chargor fails to pay interest or any other periodic payment due under any charge and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing. If the chargor does not comply within two months after the date of service of the notice, the chargee may:

(a) appoint a receiver of the income of the charged land;

(b) lease the charged land, or if the charge is of a lease, sublease the land;

(c) enter into possession of the charged land; or

(d) sell the charged land.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

No, there are no other processes of this nature available. To this extent, companies can only enter into private contractual negotiations which may then introduce new payment plans. Under the Insolvency Act of 2015, the law provides for eligibility thresholds for companies that may or may not enter into moratoria under voluntary arrangements for payment of debt. For eligible companies who wish to enter into such arrangements, a procedure is followed.

The directors shall:

(a) Prepare:

(i) A document setting out the terms of the proposal; and

(ii) a statement of the company's financial position containing such particulars of its creditors and of its debts and other liabilities and of its assets as may be prescribed by the insolvency regulations for the purposes of this section, and such other information as may be so prescribed.

(b) Unless a provisional supervisor has already been appointed in respect of the proposal, appoint as its provisional supervisor an authorised insolvency practitioner who has consented to supervise it.

After preparing the proposal and statement and, if appropriate, making the appointment, the directors shall submit the proposal and statement to the provisional supervisor for consideration and comment.

The directors shall then vote on the proposal.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Such directors are liable to imprisonment if convicted. Courts also have the power to disqualify directors. Under section 218 of the Companies Act, a court shall make a disqualification order against a person if satisfied, on an application made to it, that the person is or has been a director or secretary of a company that has at any time become insolvent, whether while the person was a director or secretary or subsequently and in the circumstances where the conduct of the person as a director or secretary of that company, either taken alone or taken together with the person's conduct as a director or secretary of any other company or companies, makes the person unfit to take part in the management of a company.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

No. The government provides the right for foreign and domestic private entities to establish and own business enterprises and engage in all forms of remunerative activity. However, a company whose shareholders are not Kenyan cannot own agricultural land, freehold land or leasehold property whose term exceeds 99 years. There are also restrictions as to foreign shareholding in the banking, insurance and telecommunications industries. In an effort to encourage foreign investment, the government repealed some regulations that imposed little foreign ownership limitation for firms listed on the Nairobi Securities Exchange, allowing such firms now to be 100% foreign-owned, as reported by the *UNCTAD World Investment Report 2016*. In 2015, the government established regulations requiring that Kenyans own at least 15% of the share capital of derivatives exchanges, through which derivatives such as options and futures can be traded.

When the Companies Act of 2015 came into force, foreign companies seeking registration in Kenya were required under section 975(2)(b) of the Act, to ensure that by the time they are making the application for registration, at least 30% of their shareholding is held by a Kenyan citizen. This 30% local shareholding threshold, however, only applies in respect of branch office registrations in Kenya for telecommunication companies and does not apply to locally incorporated companies which may be 100% foreign-owned. Companies that are 100% fully owned are required to have at least one local representative in the country.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No, there are no such treaties with such protection provisions ratified by Kenya. In the recent past, Kenya has received an improvement in Foreign Direct Investment. Foreign investors seeking to establish a presence in Kenya generally receive the same treatment as local investors, and multinational companies make up a large percentage of Kenya's industrial sector. Through its official bilateral trade promotion agency Ken Invest, Kenya has been viewed favourably by the international trade community. According to the United Nations Conference on Trade and Development (UNCTAD)'s Global Enterprise Registration Network, the Ken Invest site makes Kenya one of only 25 countries to earn a perfect rating on its information portal. Further, before any laws touching on foreign investment are passed, there are substantive reviews and deliberations by stakeholders before any such laws are passed. As there is no bilateral treaty protecting investors from harsh trade restrictions, investors are made to feel secure by Kenya's local arrangements and foreign investment policies. However, Kenya has signed 14 bilateral investment bilateral conventions. This shows the commitment that Kenya has in advancing foreign investment.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

There are no laws regarding the nationalisation and expropriation of project companies or assets. The Constitution protects the right to private property, save in the case where such property needs to be compulsorily acquired for the public benefit. Article 5 of the Foreign Investments Protection Act states that investments by investors of a Contracting Party in the territory of another Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation, except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt and full compensation. Any compensation that may need to be made under the Act shall be done at current commercial rates and shall be settled at freely convertible currencies.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The relevant agency is the Kenya Investment Authority, whose role is to assist and facilitate investments in Kenya. Its main functions are to promote investments in Kenya by local and foreign business enterprises, to liaise with the relevant Ministries responsible for approving all new private sector projects and expansion of existing projects, to assist business enterprises in implementing the projects approved by the relevant Ministries and, generally, to assist all business enterprises in overcoming managerial, institutional and bureaucratic problems.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Financing and project documents would need to be stamped in respect of the applicable stamp duty payable. Most mega projects that need project financing usually involve development projects that impact heavily on the community. As such, government agencies involved are usually involved in oversight roles. Since project financing involves a long string of contractual deals, lawyers involved ensure all paperwork involving payment of duties is completed to the end.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

In the case of land and/or immovable property, an owner is usually provided with a document of title, and this could either be a Grant, a Certificate of Title, a Title Deed or a Lease. There is a restriction on foreign ownership of freehold land, leases exceeding 99 years and agricultural land. These leases can, however, be renewed with the expiry of the 99-year period.

The Constitution, the Mining Act and the Petroleum (Exploration and Production) Act all provide that natural resources in the form of minerals and petroleum belong to the Government of Kenya. An interested party may obtain a prospecting right or licence from the Government in respect of such natural resources. There are currently no restrictions on foreign ownership of companies intending to undertake such businesses.

To undertake a business in Kenya, the business entity would need to apply for a single business permit in addition to the licences that may be required in the particular economic sector. The Kenya Investment Authority (KIA) will process and grant approvals of new investment, once proposals are submitted on a prescribed application form. Proof of company registration must be attached to the application.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Yes. There are applicable fees which one must pay to obtain a mining licence or a petroleum exploration licence. One must obtain a licence from the relevant authorities in order to be allowed to export extracted minerals or petroleum out of Kenya. There are also royalties that are payable in respect of extracted natural resources. For example, the Mining Regulations provide that "there shall be payable on all diamonds originating in Kenya an *ad valorem* royalty of fifteen per centum of the gross value thereof as assessed by an approved valuer appointed under the Diamond Industry Protection Regulations".

There is the National Resource Benefit Sharing Bill of 2014 which if passed will establish formulae in which proceeds from exploitation of natural resources shall be shared by the mining companies, national government, county governments and local communities. This role shall be under the scope of the Benefit Sharing Authority.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Kenya does not operate a fixed exchange rate against any foreign currency. Therefore, the exchange rate between the Kenyan Shilling and any other currency is determined by market forces, subject of course to interventions from time to time by the Central Bank of Kenya. The Central Bank of Kenya and the commercial banks usually publish the exchange rates applicable on a day-to-day basis.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Kenya does not have exchange control laws in force since the repeal of the Exchange Control Act in December 1995. However, the Central Bank of Kenya Act (the CBK Act) establishes the Central Bank of Kenya (the CBK). Under the CBK Act, the CBK is empowered to formulate and implement the monetary policy in Kenya.

According to Central Bank Circular No. 12 of 1996 – "Revised Foreign Currency Transaction Guidelines to Authorised Banks", commercial banks were assigned a monitoring role by the CBK and each commercial bank is required to submit returns to CBK on a regular basis. Foreign currency is freely repatriable from Kenya, provided there is written evidence of an underlying business transaction and the respective bank handling the repatriation is satisfied as to the genuineness of the transaction. However, for any amount equivalent to USD 500,000 or more, the CBK has requested that a commercial bank first consult with them as to the amount and purpose of the remittance. This is stated to be for statistical purposes. For any amount below the equivalent of USD 10,000, commercial banks are not required to obtain any documentary evidence to back the transaction, although in certain cases banks will nonetheless seek an explanation.

The Foreign Investments Protection Act provides that a foreign national who proposes to invest foreign assets in Kenya may apply to the Cabinet Secretary in charge of finance, for a certificate that the enterprise in which the assets are proposed to be invested is an approved enterprise. The Cabinet Secretary shall consider every application made and, in any case in which he is satisfied that the enterprise would further the economic development of, or would be of benefit to Kenya, he may in his discretion issue a certificate to the applicant. The holder of a certificate may, in respect of the approved enterprise to which such certificate relates, transfer out of Kenya in the approved foreign currency and at the prevailing rate of exchange:

(a) the profits, including retained profits which have not been capitalised, after taxation, arising from or out of his investment in foreign assets, provided that any increase in the capital value of the investment arising out of the sale of the whole or any part of the capital assets of the enterprise or revaluation of capital assets shall not be deemed to be profit arising from or out of the investment for the purposes of the Foreign Investments Protection Act;

(b) the capital specified in the certificate as representing and being deemed to be the fixed amount of the equity of the holder of the certificate in the enterprise for the purpose of this Act, provided that:

- where any amendment or variation is made in the amount of the said capital, the amended or varied amount shall be substituted for the original amount; and
- no additional amount or sum shall be added to the capital specified in the certificate (as amended or varied) to represent any increase in the capital value of the investment since the issue of the certificate or since the last amendment or variation of the certificate; and

(c) the principal and interest of any loan specified in the certificate.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

No, there is no such restriction.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

Yes. The Environmental Management and Co-ordination Act (the EMCA) requires a project proponent to carry out an environmental impact assessment (EIA) study and submit a project report "before financing, commencing, proceeding with, carrying out...or causing to be financed, commenced, proceeded with, carried out..." any undertaking of certain projects, including mining, activities out of character with their surroundings, and major changes in land use.

The EMCA requires the owner of premises or the operator of a project to take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report, and shall prepare and submit an environmental audit report on those measures to the National Environment Management Authority (NEMA) annually or as NEMA may in writing require. NEMA is established under section 7 of EMCA with the mandate, *inter alia*, to coordinate and supervise environmental matters and serve as the principal government institution for the implementation of environmental policies.

The EMCA provides that no owner or operator of any trade or industrial undertaking shall discharge any effluents or other pollutants into the environment without an effluent discharge licence issued by NEMA. The EMCA defines "effluent" to mean "gaseous waste, water or liquid or other fluid of domestic, agricultural, trade or industrial origin treated or untreated and discharged directly or indirectly into the aquatic environment".

In line with Sustainable Development Goals No. 13 on climate action, foreign investment companies that set up in Kenya are required to strictly adhere to environment-friendly practices for realisation of sustainable development.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

This is governed by the Public Procurement and Disposal Act (which establishes procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities) and the Public Private Partnership Act (which provides for: the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the government through concession or other contractual arrangements; and the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects).

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

There are no restrictions against insurance policies over project assets provided or guaranteed by foreign insurance companies. There may be VAT implications as the provision of insurance by a foreign company may be deemed to be an imported service.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Yes, they are.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

Such workers would need to apply for and obtain visas (where applicable) and any requisite work permits. Work permits and visas are issued under different classes by the Department of Immigration. The general guiding principle for issuance of work permits by the government is that these should be issued to foreign workers, technicians, engineers or executives only where the tasks cannot be undertaken by qualified Kenyans. Even where the work permits are issued to foreigners, there is a general expectation by the government that there should be knowledge transfer, before the lapse of the work permit.

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

There are no restrictions on importing project equipment. Applicable customs duty would, however, be payable.

The Import Declaration Fee was recently lowered to 2% from 2.25% of Cost Insurance and Freight.

Goods and services for the construction of infrastructure works in industrial and recreational parks of 100 acres or more in Nairobi, Nakuru, Kisumu, Mombasa and Eldoret are VAT-exempt.

**10.2 If so, what import duties are payable and are exceptions available?**

The Customs and Excise Act contains an extensive list of the items attracting import duty. In terms of exceptions, the Customs and Excise Act also contains quite an extensive list of the institutions and persons that enjoy exemptions in respect of various items as indicated in the Act.

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

Yes. These would have to be set out in the applicable contracts. *Force majeure* exclusions do not apply to payment obligation.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

State officers and public officials are involved in major projects. Chapter 6 of the Constitution of the Republic of Kenya (which is the supreme law of the country) provides for Leadership & Integrity of state officers.

Chapter 6 clearly stipulates that such officers are required to take an oath of office before assuming office and conduct themselves ethically. The Chapter further provides for financial probity of state officers. Any officers found to have been engaged in unethical or corrupt business practices is, under the Constitution, prohibited from holding such offices in the future.

There is also the Leadership & Integrity Act No. 19 of 2012 (the LIA), which is a statute that gives effect to the provisions of Chapter 6 of the Constitution discussed above.

Under the LIA, where there have been investigations and a public officer is found to have committed an offence, a referral may be made for civil or criminal proceedings against the officer and under section 43, the matter may be referred to the Ethics and Anti-Corruption Commission (established under the Ethics and Anti-Corruption Act No. 22 of 2011) or the Attorney-General, for civil matters, the Director of Public Prosecutions, for criminal matters, or any other appropriate authority.

Under section 49 of the LIA, where it is proved that a state officer obtained any property in breach of the Act, the officer shall subject to any appeal, which he/she may make, forfeit the property and the property shall be held by the Commission or an agent appointed by the Commission, in trust for the country, until it is lawfully disposed of. The Commission may also order the state officer to compensate such sum including interest, as may be determined by the Commission as just, having regard to the loss suffered by the government and such order shall be deemed to be a decree under the Civil Procedure Act.

The LIA further creates various offences and penalties. For example, under section 47, "any person who is convicted an offence under this Act, for which no penalty is expressly provided, shall be liable on conviction to a fine not exceeding five hundred thousand shillings (KShs.500,000), or to imprisonment for a term not exceeding three years, or to both".

The Anti-Corruption and Economic Crimes Act provides for the prevention, investigation and punishment of corruption, economic crime and related offences. There are several offences under this Act and each offence attracts a penalty. Penalties range from fines of KES 300,000 to KES 2,000,000, to maximum prison sentences ranging from three years to 10 years.

Government officials are also subject to Public Officer Ethics Act, which regulates the conduct of public officers in the discharge of their duties. The purpose of the Act is to advance the ethics of public officers by providing for a code of conduct and ethics, and requiring financial declaration from certain public officers. Under this Act, where a person is found to have hindered or interfered with others exercising their duties under the Act, they shall be liable under the Act and may be convicted for a fine not exceeding five million shillings (KShs.5,000,000) or to imprisonment for a term not exceeding five (5) years.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements are typically governed by contract, save in the case where one of the parties is the government, a state corporation or a county government, in which case provisions of statutes such as the Constitution, the Government Contract Act, the State Corporations Act, the County Governments Act, Public Private Partnerships Act and the Public Procurement and Disposal Act would need to be considered.

### 13.2 What law typically governs financing agreements?

Financing agreements are typically governed by contract law, banking law and debt finance law.

### 13.3 What matters are typically governed by domestic law?

Contracting parties have the freedom to choose the governing law in respect of their contract. Parties would, however, still have to adhere to the laws of the land in respect of various aspects of their project, including but not limited to land. Land-related agreements, permits and consents, employment, etc. are normally governed by the law of the location of the project.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes, it is. To this effect, bold pronouncements were made in the case *of Talaso Lepalat v The Embassy of the Federal Republic of Germany & 2 Others* [2014].

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, they are.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes, it is. Kenya has also enacted the Investment Disputes Convention Act which gives legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

### 15.3 Are any types of disputes not arbitrable under local law?

Disputes involving matters that are criminal in nature are not generally arbitrable under local law.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No, they are not.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Kenya has had no recent call for political risk protections for companies investing in Kenya. Generally, letters of undertaking and guarantees are the two most common commitments that the government formally issues to guarantee payments. The Public Finance Management Act and the Public Private Partnerships Act, read together with the Constitution of Kenya, recognise guarantees by the government subject to specified conditions prescribed thereunder. The choice as to which one it issues will depend on the circumstances of each case. Although both can be binding in law, there is some doubt over the enforceability of letters of undertaking, especially considering that the Public Finance Management Act is silent on the same, though the Public Private Partnerships Act provides for their issuance, albeit vaguely. A guarantee may, in the context of the present legal framework, be preferable and recommended. Once issued, the Public Finance Management Act provides that no further parliamentary authorisation shall be necessary for payment under a guarantee, and that the same shall be a charge on the consolidated fund. Under the Public Finance Management Act, issuance of a guarantee is the prerogative of the Cabinet Secretary responsible for Finance. Once the guarantee is issued, parliament is required to approve it. As to changes in law, Kenya's Constitution provides that any newly enacted law shall not apply retroactively. To cushion any unfavourable changes in law, there is usually room for extensive deliberations by stakeholders before such a law is passed.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest to be paid on loans from foreign lenders for the purposes of investing in the energy or water sectors, or in roads, ports, railways or aerodromes, are exempt from tax.

Further, instruments (including charges, debentures and guarantees) executed with respect to the transactions relating to loans from foreign sources received by investors in the infrastructure (energy, roads, ports, water, railways and aerodromes) development sector, shall be exempted from the provisions of the Stamp Duty Act.

However, for companies not falling in the above bracket, Kenya imposes a withholding tax at the basic rate of 15% *per annum*. The Income Tax Act prescribes how to compute withholding tax on deemed interest.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

See question 17.1 above.

Both fiscal and non-fiscal, incentives are available in Kenya. The Kenya Revenue Authority implements the issuance of the fiscal (tax) incentives in collaboration with other regulators and facilitators such as the Capital Market Authority, the Export Processing Zones Authority, among others, as provided under the Income Tax Act, Laws of Kenya.

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

Equity investors and/or lenders should undertake due diligence investigations on a particular project and/or project company before advancing any funds. The due diligence exercise should cover the legal and financial status of the companies that the investors or lenders would be contracting with.

Further, due diligence should extend to the nature of projects invested in. Each project financing has its own unique structure. For example, many financiers shy away from funding road construction projects because of its high income return risks. Realistically, demand/traffic risk is often unavoidable. Financiers should, as need be, conduct their own traffic projections to be in a good position to assess this risk involved in financing these projects as opposed to relying on traffic projections done by project companies. This balancing of information is crucial in the steering of mega projects.

### 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

There are legal impositions on project companies issuing bonds or capital market instruments in Kenya. The local legal and regulatory requirements for the issuance of capital markets instruments are set out in the Capital Markets Act. The Capital Markets Act prohibits any person from carrying on business as a stockbroker, derivatives broker, real estate investment trust (REIT) manager, trustee, dealer, investment adviser, fund manager, investment bank, central depository, authorised securities dealer, authorised depository, or from holding himself out as carrying on such a business unless he holds a valid licence issued under the Capital Markets Act or under the authority of the Capital Markets Act. However, foreign companies can issue bonds even regionally according to part II section 7 of the Capital Markets Securities Public Offers Listing and Disclosures Regulations of 2002.

## 19 Islamic Finance

### 19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

*Istina'a* – In *Islamic finance*, *Istina'a* is generally a long-term contract whereby a party undertakes to manufacture, build or construct assets, with an obligation from the manufacturer or producer to deliver them to the customer upon completion. This instrument may be used in the manufacturing industry and also in infrastructure projects.

*Ijarah* – This contract represents a transaction in which a known benefit (usufruct) associated with a specified asset is sold for a payment. In the course of this sale of usufruct, ownership of the asset is not transferred – the bank maintains ownership of the asset. An *Ijarah* may be used in a construction project where the financier would be involved in the construction of the development, then subsequently lease out the property to the end consumer, with the end consumer's last instalment being used as the amount required to purchase the property.

*Wakala* – Describes an agency or a delegated authority where a principal appoints the agent to carry out a specific job on behalf of the principal. *Wakala* agreements are agency agreements where the principal and the agent share in the profit and risk of loss of investment. Any guarantee on minimum return is not *Shari'ah*-compliant. This can be used where a company acts as the agent for a financier or lender by investing the funds from that financier or lender. The company may choose to invest the funds in different projects, and profits and losses would be shared equally by both parties.

*Murabaha* – It is often referred to as "cost-plus financing" and frequently appears as a form of trade finance based upon letters of credit. In its simplest form, this contract involves the sale of an item on a deferred basis. This could be used to finance the movable assets that may be used in a project; for example, motor vehicles.

### 19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

The Constitution is the supreme law of Kenya. Islamic finance products, on the other hand, are to be governed by *Shari'ah*.

Article 170(5) of the Constitution states that the jurisdiction of a *Kadhis'* court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the *Kadhis'* courts. As such, the jurisdiction of the *Kadhis'* court does not extend to contractual relations. The *Kadhis'* Courts Act further reiterates this point by providing that a *Kadhis'* court shall have and exercise jurisdiction over the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

The Judicature Act provides the sources of law in Kenya which include the Constitution, written laws, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12th August 1897, and African customary law. It should be noted that *Shari'ah*, Islamic or Muslim law is not referred to in the Judicature Act. Therefore, although a contract may be prepared in accordance with *Shari'ah*, the governing law will be Kenyan, as Kenya does not recognise *Shari'ah* law as governing contracts in Kenya.

To our knowledge, there have not been any notable cases to date over jurisdictional matters pertaining to *Shari'ah* law.

### 19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

Islamic finance prohibits the charging or payment of interest. Consequently, Kenya, in an attempt to regulate Islamic banking operations and products, made slight changes to its Banking Act. Initially, the Banking Act only made reference to "interest". The Banking Act was subsequently amended in 2008 by adding the phrase "or a return in the case of an institution carrying out business in accordance with Islamic law" when referring to interest chargeable on a savings account. It would be interesting to see what Kenyan courts would determine in cases where an interest payment obligation was included in a loan agreement that is meant to be *Shari'ah*-compliant. In the English case of *Dunlop Pneumatic Tyre Co Ltd v New Garages & Motor Co Ltd* [*1915*] *AC 79*, the court held that, generally, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability unless that interest payment obligation is deemed a penalty offending the rules laid down in that particular case. With the common law doctrine of precedent, this position may have a bearing in future transactions in Kenya if *Shari'ah* law changes to allow charging or payment of interest.

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As head of the Corporate & Commercial, Real Estate, Conveyancing and Securities teams, Pamella has been part of various Kenyan ground-breaking commercial transactions; for instance, the privatisation of several government entities – including Mumias Sugar Company and Kenya Electricity Generating Company. She also acted in a flotation exercise by KCB (Kenya's biggest bank, in network terms), two successful rights issues for KCB, the development of Kenya's Central Depository and Settlement Corporation, the Private Placement of The Cooperative Insurance Company of Kenya (CIC). Pamella specialises in the following areas: banking & finance; capital markets; conveyancing; mergers & acquisitions; and regulatory work. Pamella is recognised for her breadth of expertise, and has served as a Lecturer at the University of Nairobi's renowned Faculty of Law. In addition, she holds an LL.M. degree, 1st Class Honours from Auckland University.

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James' legal experience spans for a period of over five years. He has worked in several high-profile corporate and conveyancing briefs for both local and foreign clients. He has also acted for developers and financial institutions in diverse property transactions and major project financing projects in Kenya. James has also advised on several infrastructure projects.

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Established 38 years ago, by George Oraro SC (one of Kenya's top litigators), Oraro & Company Advocates is a top-tier, full-service Kenyan law firm. The firm's areas of strength include Corporate & Commercial, Dispute Resolution, Intellectual Property, Real Estate, Conveyancing & Securities and Tax. Its partnership includes some of Kenya's best legal minds and its lawyers are recognised by several international leading legal directories. The firm is also well-recognised for its contribution to Kenyan jurisprudence (through its formidable dispute resolution team), work on some of Kenya's largest deals and its significant contributions to Kenya's legal profession. The firm's corporate and commercial team specialises in all aspects of transactional work such as banking and finance, capital markets, corporate finance, corporate regulatory work, energy law, mergers & acquisitions and project finance. It also has Islamic finance capabilities and has advised Islamic finance clients on a variety of matters, including *Shari'ah* compliance.

# Malaysia

Mohamed Ridza Abdullah

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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

The financial markets have an important role in the productive mobilisation of savings and allocation of capital. Efficient financial markets also support the effective transfer of risks and management of liquidity. As Malaysia transitions towards a high-value-added, high-income economy, vibrant, competitive and resilient financial markets are necessary to meet the diverse and more complex demands of a more developed and internationally integrated economy.

The Malaysian capital market grew to Malaysian Ringgit ("**MYR**") 2.84 trillion in 2016 with total capital raised amounting to MYR 98.5 billion, according to Securities Commission Malaysia ("**SC**") in conjunction with the release of its annual report. Despite global uncertainties and episodes of pronounced volatility affecting markets, the Malaysian capital market remained resilient with orderly market conditions. The market recorded growth across several market segments with favourable investor interest and provided sustainable long-term financing for issuers. Higher levels of fundraising are expected in 2018, with current estimates of between MYR 102 to MYR 105 billion.

In 2016, MYR 86.7 billion was raised through the primary market, with corporate *sukuk* and bond issuances of MYR 85.7 billion and new equity listings of MYR 1 billion. In addition, MYR 11.8 billion was raised through the secondary equity market. The bond market grew to MYR 1.17 trillion, while equity market capitalisation ended the year at MYR 1.67 trillion. The size of the Islamic capital market ("**ICM**") totalled MYR 1.69 trillion, representing 60% of the domestic capital market. Corporate *sukuk* outstanding increased by 8.9% to MYR 393.5 billion, while corporate *sukuk* issuances represented 75.7% of the total corporate *sukuk* and bond issuances. Islamic fund management grew 13% to MYR 149.6 billion in assets under management, primarily driven by the expansion of Islamic unit trust funds.

The Malaysian fixed income market remains vibrant, supported by strong demand from a global pool of steadfast investors. According to SC, the bond market is an important source of funds as evidenced by the compounded annual growth rate of 10% over the last decade. Malaysia has developed deep experience in structuring and raising funds in both the conventional and Islamic fixed income market, and is widely recognised as being the leading international marketplace for *sukuk* issuances. Foreign companies, including well-known corporate names, have also demonstrated their confidence in the Malaysian fixed income market by choosing Malaysia as their preferred base for bond issuances. The bond market grew 6.8% from MYR 1.17 trillion at the end of 2016 to MYR 1.25 trillion in the first half of 2017. The Malaysian bond market is expected to continue to grow strongly to a value of MYR 2.1 trillion by 2020. The expected strong growth is reflected in the compounded average annual growth rate of 10% from 2006 until 2017.

The growth opportunities in the bond market are also expected to further escalate as the entry point projects under the Malaysian Government's Economic Transformation Programme ("**ETP**") and National Transformation ("**N50**") progress into implementation. Under these programmes, potentially high-growth projects, including large infrastructure projects such as the second phase of the mass rapid transit system for the capital city Kuala Lumpur and a large petroleum complex in Pengerang, Johor, will be fast-tracked and implemented. There are also an increasing number of new start-up companies from the N50 initiative.

The range of debt securities issued has in part assisted in increasing the types of products available to cater to an increasing demand for innovation and portfolio diversification from investors. The focus on product diversity forms part of the efforts by SC in deepening and developing the country's fixed income market, and in turn increasing liquidity. Some of these products include asset-backed securities, perpetual bonds, agro-*sukuk* and stapled securities, among others.

The Malaysian economy is expected to remain on a growth trajectory in 2018 and is well-poised to grow beyond 5% (Central Bank Malaysia's ("**CBM**") Gross Domestic Product ("**GDP**") target is between 4.3% and 4.8%). According to the CBM, the first half of 2017 has seen a tremendous increase in the GDP of Malaysia (5.8%), exceeding its initial GDP target of between 4.3% and 4.8%. Growth will continue to be steered by domestic demand, and recovery in some advanced economies will sustain demand for Malaysian exports, growing foreign direct investments ("**FDIs**") with large-scale investments expected from China, India and Saudi Arabia, and the launch of the first phase of the Digital Free Trade Zone ("**DFTZ**") in March 2017. Monetary policy will meanwhile remain accommodative to support sustainable growth and ensure sufficient liquidity in the financial system.

Malaysia is a member of the Organisation for Economic Co-operation and Development ("**OECD**"). The OECD is a group of 34 member countries that discuss and develop economic and social policy. The OECD members are democratic countries that support free market economies. The OECD estimates that by 2030, globally, United States Dollar ("**USD**") 71 trillion would be required for investments in public infrastructure such as road, rail, telecommunication, electricity and water (without taking into account sea ports, airports and social infrastructure). The development of infrastructure is vital to support commerce and trade. It also forms an important determinant for long-term economic growth. To finance these infrastructure projects, massive investments are required and normally incurred during the initial stages of the projects. The operational lives of such projects are long, hence requiring longer financing tenures.

The ICM has the means and ways to raise the much-needed funds. *Sukuk*, which has gained significant acceptance as a source for long-term financing, can be leveraged to support the infrastructure financing needs. There are varieties of *sukuk* structures using different Islamic contracts such as *Ijarah*, *Murabahah* and *Wakala* or a combination thereof that are able to provide customised solutions. *Sukuk* is also backed by real economic activity and has the ability to tap a wider investor base from both Islamic and conventional spectrum. To help mobilise long-term capital, emerging and developing markets should accelerate the development of their local currency domestic bond and/or *sukuk* market. This requires putting in place the ecosystem and enabling environment for a deep and liquid bond and/or *sukuk* market to flourish. One of the examples on *sukuk* issuance for an infrastructure project financing in Malaysia was Danainfra Nasional Berhad's MYR 46 billion *sukuk* programme, to part finance the construction of the Mass Rapid Transit network in the Greater Kuala Lumpur urban area. Another mega project in the pipeline is the Pan-Borneo Highway in East Malaysia, estimated to cost MYR 27 billion, which will be funded partly with proceeds from the issuance of *sukuk*.

Malaysia has also pioneered the issuance of green *sukuk*, a *Shari'ah*-compliant socially responsible investment ("**SRI**") instrument for renewable energy and other environmental sustainability projects. In July 2017, SC announced the debut of the world's first green *sukuk* under its SRI *sukuk* framework. The MYR 250 million Green SRI Sukuk Tadau, which is issued by Tadau Energy Sdn. Bhd., a Malaysian-based renewable energy and sustainable technology investment firm and structured on the Syariah principle of *Istisna'a* (manufacturing sale) and *Ijarah* (leasing), is used to finance the construction of large-scale solar (LSS) photovoltaic power plants in Kudat, Sabah, with a tenure of 2 to 16 years. Following the success of Green SRI Sukuk Tadau, Quantum Solar Park Malaysia Sdn. Bhd. launched the world's largest green SRI *sukuk* amounting to MYR 1 billion in October to fund the construction of Southeast Asia's largest solar photovoltaic plant project in 3 districts: Kedah; Melaka; and Terengganu.

The fund management industry could also potentially become another important source of infrastructure financing. The setting-up of an infrastructure fund provides an efficient investment channel for investors to capitalise on the infrastructure investment opportunities. In this regard, various funding models of fund structures could be utilised to accommodate the channelling of funds to finance infrastructure development and these include hybrid structures that combine state financial support and privately launched infrastructure funds. While not prevalent in mobilising capital for infrastructure project, the equity market does provide regulation for infrastructure project companies ("**IPC**") to raise funds through the issuance of new shares and the listing of such companies on the stock exchange.

In Malaysia, the listing of IPC is allowed under the Main Market of Bursa Malaysia, subject to meeting the listing requirements. Such company must demonstrate it has the right to build and operate an infrastructure project in or outside the country with a minimum of MYR 500 million in project cost, among others. As at the end of June 2016, there were 4 *Shari'ah*-compliant IPC listed on the Bursa Malaysia with total market capitalisation of MYR 45 billion. Growing financing needs in the infrastructure sector present a valuable opportunity for ICM to raise funding for the infrastructure-related projects.

**Islamic Finance**

When Islamic finance started in the 1970s, the initiative offered simple banking solutions that encouraged savings and financing. The products were structured in a manner that is in line with *Shari'ah* principles and easily understood by the public at large. In the 1980s, there was an increase in Islamic financial products, which were project finance and syndications. In the 1990s, *Ijarah* and equity were both also included, and in the 2000s, *sukuk*, structured and alternative assets, liquidity and management tools were also implemented.

Today, Islamic finance in Malaysia is a dynamic industry that is widely regarded as a competitive alternative to conventional financing solutions. There are now diverse local and foreign players in the market, showcasing their dynamism with a wide array of innovative financial products and services on offer. Islamic banking now comprises 20% of the total banking sector, complemented by a vibrant Islamic capital market, where 55% of outstanding domestic private debt papers are *sukuk*, representing the largest volume of *sukuk* issuances globally. The total Islamic finance assets increased by 9.5% to reach MYR 783 billion, which also represents 28.8% of the country's total banking assets for the first 7 months of the year 2017.

There is an increased amount of bank liquidity in the project finance market, and most Islamic banks are slowly moving towards socially responsible financing in support of the government's initiatives to pursue greater energy sustainability projects in Malaysia. For example, Affin Islamic is financing MYR 130 million or 60% of the total MYR 214 million cost by Gading Kencana Development Sdn. Bhd. to build a large-scale solar photovoltaic project in Bidor, Perak. Malaysia Building Society Berhad is also providing MYR 247 million to Solar Management (Seremban) Sdn. Bhd. for the company to build its first solar farm in Rembau, Negeri Sembilan. The *Shari'ah*-compliant financing comprises MYR 19 million of performance guarantee under the *Kafalah* concept and MYR 228 million of term financing with a sub-limit or MYR 137 million under the *Tawarruq* and *Kafalah* concepts, respectively.

**Infrastructure Development Under the Eleventh Malaysia Plan (2016–2020)**

The Eleventh Malaysia Plan ("**11MP**") will build on the achievements of the Tenth Malaysia Plan ("**10MP**"). The 5 focus areas are:

1) building an integrated need-based transport system;
2) unleashing growth of logistics and enhancing trade facilitation;
3) improving coverage, quality and affordability of digital infrastructure;
4) continuing the transition to a new water services industry framework; and
5) encouraging sustainable energy use to support growth.

The 11MP listed many infrastructure projects under each of the focus areas. The government intends to achieve balanced economic development for the whole country, and has stated its intention to focus highway developments outside the Klang Valley. The 11MP will thus focus on rural and rural-urban connectivity. Several projects were mentioned in the 11MP: the Pan Borneo Highway; the Central Spine Road; Kota Bharu-Kuala Krai Highway; and the Lebuh Raya Pantai Timur. The completion of the West Coast Expressway in 2019 will also provide better access to the West Coast of Perak and Selangor.

The government has placed emphasis on increasing the usage of public transport in urban areas. To this end, continual emphasis is placed on completing the Klang Valley Mass Rapid Transit ("**KVMRT**") system. The KVMRT system will become operational during the 11MP. The KVMRT Line 1 traverses 51 km between Sungai Buloh and Kajang, through 31 stations serving about 1.2 million people with a daily expected ridership of 400,000. Construction on KVMRT Line 2 started in 2016 and is expected to become operational by 2022. Additionally, construction on a Light Rail Transit ("**LRT**") Line 3 connecting Bandar Utama to Klang, running over 36 km and serving 25 stations, KVMRT 2 (estimated at over MYR 5 billion), Pan Borneo Sarawak Highway (MYR 11 billion) and West Coast Expressway (MYR 2 billion) started in 2017, with expected completion in 2020.

Several of these projects in the 11MP have already commenced construction. Infrastructure job awards in the first half of 2016 came to MYR 30 billion, per statistics by the Construction Industry Development Board. This has exceeded the MYR 26 billion awarded for the whole of 2015. The MYR 30 billion should include MYR 23 billion worth of KVMRT 2 jobs. It is estimated that the total infrastructure award value for 2016 exceeded MYR 40 billion including the Sungai Besi-Ulu Kelang Elevated Expressway ("**SUKE**") and Damansara-Shah Alam Elevated Expressway ("**DASH**").

Beyond 2017, the Kuala Lumpur to Singapore High Speed Rail ("**HSR**"), estimated at more than MYR 50 billion, will be the single largest infrastructure project. A study on the KVMRT 3 (Circle Line) has also started positively. Other rail-related commitments are the Gemas-Johor Baru double track rail (MYR 7 billion) and East Coast Rail (estimated at MYR 55 billion), the latter will help support the development of Kuantan Port.

In addition to these, are many projects that have been announced as part of Chinese investments into Malaysia. Many of these projects are claimed to be part of China's "Maritime Silk Road Initiative" ("**MSRI**") even though they may not be. Some of these projects are described further below.

**Financing Infrastructure Development the Chinese Way**

Though Chinese investments in Malaysia have gained more prominence over the last 2 years, with many of the proposed projects being declared part of the MSRI, the Chinese invested in Malaysia even before the One Belt, One Road Initiative was announced by Xi Jinping in 2013. Most of these projects are either FDIs or Public-Private Partnership ("**PPP**") with no obligations from, or liabilities to, the government. Some of these projects are deemed to be publicly funded projects, financed through soft loans to Malaysia; for example, the East Coast Rail project ("**ECRL**"). One of the earliest high-profile investments was the property play in Iskandar Malaysia where Chinese developers partnered with local developers to launch massive property developments. These include Country Garden, R&F Properties and Greenland Group which bought large strategic land banks. Chinese funding and investments into Malaysia are likely to continue especially given the deepening of ties between the 2 countries.

Recent Chinese investments into Malaysia include:

- the setting up of the Malaysian campus of Xiamen University;
- the MYR 7 billion Gemas-Johor Baru electrified double track rail project;
- the Malaysia-China Kuantan Industrial park, owned jointly by Chinese investors and Malaysian companies, and which saw investments of more than MYR 6 billion to build a steel mill, upgrading of the port and other facilities;
- the USD 10 billion deep sea port in the Melaka Gateway Project;
- the MYR 18 billion acquisition of 1Malaysia Development Berhad's power assets; and
- the Bandar Malaysia property development and HSR terminal at Bandar Malaysia.

There are also several proposed mega projects that have been attributed to MSRI. Though some projects do not seem to relate to maritime projects, they have been promoted as part of MSRI; for example, the Bandar Malaysia project. Each of them will have a significant impact on the Malaysian economy and will help the country to maintain or increase the National Transformation Programme ("**NTP**") momentum. However, like most of the signed MSRI-related projects, each of them will have a political-economic impact on Malaysia.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

**The MYR 55 billion East Coast Rail Line ("ECRL") Project**

In the 2017 budget, the Malaysian Prime Minister announced the intention of the government to build the ECRL. This mega project would help Malaysia maintain its NTP momentum. The proposed 600 km, MYR 55 billion project will cut through 4 states, linking Klang Valley, Pahang, Terengganu and Kelantan. It will also link Kuantan Port and the Malaysia-China Kuantan Industrial Park to the West Coast. Both projects are deemed to be part of MSRI, and hence the ECRL project is also, by association, deemed to be part of MSRI. ECRL will connect many rural townships such as Port Klang, Integrated Transport Terminal Gombak, Bentong, Mentakab, Kuantan, Kemaman, Kerteh, Kuala Terengganu, Kota Bharu and Tumpat, and is part of the larger plan to connect rural areas. The government has said that the railway link will lower transportation costs between the West and East coasts of Peninsular Malaysia, bring down prices of goods and reduce travelling time. The project, which is part of the East Coast Economic Region, will be developed in several phases over a 5-year period.

The government sees this project as crucial to Malaysia and have said that this project should not be delayed as it would not only spur the country's transportation industry development, but also help to speed up growth of small towns along the way. The project would also assist in the transfer of technology in the railway industry. Malaysia is currently in negotiation with China to sign the Framework Financing Agreement and Engineering, Procurement, Construction ("**EPC**") Contract for the ECRL project. The Prime Minister paid a 6-day visit to China last year during which 16 bilateral Memorandums of Understanding were signed. This was the third visit by the Malaysian Prime Minster to China and emphasised the economic and financing importance of China to Malaysia. It was reported that China was set to build and finance the ECRL project with the signing of the Framework Financing Agreement and EPC Contract for the project. China is expected to provide soft loans with very favourable terms, a 20-year repayment period with a 7-year no repayment period.

**Kuala Lumpur – Singapore HSR**

On 15 December 2016, Malaysia and Singapore signed a bilateral agreement to jointly develop the 350 km HSR. This project will reduce the travelling time between the 2 cities by 2 hours, to approximately 90 minutes. The HSR serves as an alternative mode of public transport between Kuala Lumpur and Singapore. It is seen to be in line with the transformation of Malaysia by linking the 2 capital cities to meet growing demand, catalysing economic growth and enhancing long-term economic competitiveness while improving the quality of life of its people. It will also help to open and rejuvenate smaller cities in Peninsular Malaysia. The project is expected to cost more than MYR 50 billion. There are already many companies which have expressed an interest in bidding for some of the works on this project. Like the ECRL project, Chinese companies and agencies may offer soft loans as part of their bidding strategies.

**Bandar Malaysia and HSR Terminal**

The Bandar Malaysia project is a property development project that sits on 500 acres of prime land just 10 minutes from the capital city's centre. This used to be the Malaysian Air Force airfield. Its link to MSRI is that it will also be the Kuala Lumpur Terminal for the proposed HSR project that will link Kuala Lumpur to Singapore, connecting ports in Malaysia and Singapore. This project has been attributed to be part of MSRI. The government has recently divested 60% of the shares of the state-owned company that holds the development rights to the land to a consortium comprising China Railway Engineering Corp ("**CREC**") and Iskandar Waterfront Holdings, the master developer of Danga Bay in the southern state of Johor (CREC Consortium). CREC is a listed company on the Hong Kong Stock Exchange. The company has built a large proportion of the HSR projects in China. To date, China has more than 20,000 km of HSR tracks. Bandar Malaysia's expected gross development value is MYR 160 billion. It is a huge development and will feature the world's largest underground city, shopping malls, indoor theme parks, a financial centre as well as the MYR 8.3 billion regional headquarters of CREC. When completed, it will turn the Malaysian capital into a most impressive railway terminal along the so-called Iron Silk Route linking Beijing with Singapore via Thailand. The CREC Consortium is likely to use this development to support its bid to secure the construction work of the HSR project. China has already won the bid for the Medium Speed Rail ("**MSR**") link between Jakarta and Bandung, and is likely to provide loans for the Thailand section linking China to the Malaysian border.

**Chinese Investments in Malaysian Ports**

There are already significant Chinese investments or joint ventures in Malaysian ports. For example, Gaungxi Beibu Gulf International Port Group has a 40% stake in Kuantan Port Consortium and a 49% stake in Malaysia-China Kuantan Industrial Park. SM International Wholesale (China) is operating the Port Klang International Trade and Halal Industry Centre, and Guangdong province announced that it will invest USD 10 billion in a deep-sea port in the Malacca Gateway project. Discussions are also ongoing with the Chinese to build another port in Port Klang. Malaysia and China have also signed a Port Alliance agreement in 2016 which laid down the foundation for cooperation between 10 Chinese ports (Dalian, Shanghai, Ningbo, Qinzhou, Guangzhou, Fuzhou, Xiamen, Shenzhen, Hainan and Taicang) and six Malaysian ports (Port Klang, Malacca, Penang, Johor, Kuantan and Bintulu). This alliance is part of MSRI.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In Malaysia, a floating charge or general security over the overall assets of an entity is accepted. The security is usually in the form of a debenture having a fixed charge and a floating charge on all the available assets of the company. When a fixed charge is created, the chargor cannot deal with the assets that are the subject matter of the fixed charge. A floating charge is one which is created by a company generally over all its assets and can be dealt with and disposed of in the ordinary course of business. When a floating charge crystallises into a fixed charge, the chargor then can no longer deal in those assets. The usual events that trigger crystallisation are events such as default in payment of principal or interest, breach of covenant, appointment of receiver and the winding-up of the company.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes. Security over real property (land) can be created by way of a legal charge or a deed of assignment. In the case of a real property with an individual or separate issue document of title, security over such real property must be created by way of a legal land charge under the Malaysian National Land Code 1965 ("**NLC**") (for property situated in West Malaysia), or the Sarawak Land Code 1958 ("**SLC**") (for property situated in Sarawak) or the Sabah Land Ordinance 1930 ("**SLO**") (for property situated in Sabah). Note that second and subsequent charges over the same piece of real property are possible with the prior consent of the existing chargees.

In the case of a real property without individual or separate issue document of title, security over such real property may be created by way of a legal assignment over the relevant instrument of title (typically, the sale and purchase agreement in respect of such real property) under the Civil Law Act 1956 ("**CLA**").

In addition, security over plant and machinery can be taken by way of a fixed charge. Please note that the general perfection requirements discussed in question 2.6 will apply.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

No. Security is created over receivables by an assignment by way of security. By law, a legal assignment by way of security must be perfected by the security provider serving a notice of assignment on the debtor, trustee or other relevant counterparty. Assignments of rights and benefits in and to receivables are effected in writing and created when the security provider enter into the assignment. The assignment must be stamped. A power of attorney in favour of the security holder is usually included in the security document. The power of attorney must also be stamped and particulars of the security must be registered with the Companies Commission of Malaysia ("**CCM**") within 30 days of the creation of the security.

The following conditions must be fulfilled for the perfection of a legal assignment:

- the assignment must be for a debt or other legal chose in action;
- the assignment must be in writing and signed/executed by the security provider;
- express notice in writing of the assignment must be given to the debtor, trustee or other person from whom the security provider would have been entitled to claim the debt or chose of action; and
- the assignment must be absolute and not purporting to be by way of charge only.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, it is common to grant security over cash deposits by charging and assigning the bank accounts that contain the deposit in favour of the lender/security holder. Security over bank accounts can be created by way of a legal assignment or charge over the bank accounts and all credit balances in the bank accounts.

Under the CLA, a legal assignment must be an absolute assignment of all rights made in writing and an express notice of the assignment must be served on the counterparty from whom the assignor would have been entitled to enforce a right, or receive or claim a debt. In the case of an assignment over bank accounts, the contractual counterparty is the bank of the account assigned for the security. No separate acknowledgment by the contractual counterparty is required, but it is commonly procured in Malaysia to ensure that the contractual counterparty has full knowledge of such assignment and charge. Where the deposit is in the form of a fixed deposit, the security holder usually takes possession of the fixed deposit certificates.

The other general perfection requirements discussed in question 2.6 will apply.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes, security can be granted over the security provider's rights in shares, both certificated (for example, unlisted share in private companies) and non-certificated (for example, shares in listed companies), owned by the security provider. It is in writing and created by both the security provider and security holder entering onto a document evidencing the fixed charge cum assignment.

For the certificated shares, the security holder usually requires custody of the original share certificates and an executed but undated share transfer form (in prescribed form) from the security provider with the transferee details left blank. When the security is enforced, the security holder can transfer the title of the shares to itself or a nominee by exercising powers of attorney granted by virtue of the charge instrument.

Besides, for the non-certificated shares, the shares are transferred from the securities account of the security provider to the securities account of the security holder. This account is established to receive the charged shares and designated a "pledge securities account" in accordance with the Securities Industry (Central Depositories) Act 1991 ("**SICDA**").

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

If a security is created by a company incorporated under the Companies Act 2016 ("**CA**"), and if the security is a registrable charge under the CA, that charge must be registered with the CCM. This is done by filing a Form 34 (Statement of Particulars to be lodged with Charge) as prescribed by the CA with the CCM within 30 days of its creation.

A failure to register a registrable charge with the CCM within the prescribed timeframe will result in the charge being void against the liquidator and any other creditors of that company. In this case, during the liquidation of that company, the liquidator can deal with the charged property in total disregard of any interest that the charge purports to give to the chargee. In addition, non-registration of a registrable charge may affect the priority of the chargee.

A Form 34 must be signed by a director or the company secretary. It must be duly completed, signed and physically presented at the CCM. A filing fee of MYR 300 is payable to the CCM.

A similar requirement applies to a company incorporated under the Malaysian Labuan Companies Act 1990 ("**MLCA**"), whereby a Form 21 (Statement of Particulars in respect of Charge) as prescribed by the MLCA must be lodged with the Labuan Financial Services Authority ("**LFSA**") within 30 days of creation of the security. The lodgement of a Form 21 is done online at the LFSA official website and a filing fee of MYR 50 is payable to the LFSA.

If a power of attorney clause is included in the security document, a stamp duty of MYR 10 should be paid on such power of attorney clause. Under the Power of Attorney Act 1949 ("**PoAA**"), the powers of attorney contained in any security document are required to be lodged at the High Court of Malaya for the powers granted to be exercisable in West Malaysia. There is no statutory timeframe for such lodgement. A filing fee of MYR 35 plus MYR 2 for each page of the security document in question is payable to the High Court of Malaya.

The PoAA also requires the execution of the document containing a power of attorney clause to be witnessed and attested by the approved category of persons, which include advocates and solicitors practising at the High Court of Malaya, and a notary public and commissioner for oath officiating in the jurisdiction in which the document is signed.

In the case of a legal land charge created under the relevant land codes, the legal land charge must be registered with the relevant land registries. Registration of the land charge is done by presenting the original completed, signed, dated and stamped statutory instrument of charge as prescribed under the relevant land codes (charge forms). In practice, parties also attach an annexure to the charge forms setting out the terms and conditions governing the security. The registration fees payable to the land registries vary from one state to another.

The legal land charge document must be stamped appropriately before it can be accepted for registration at the relevant land registries. The land charge must be presented for registration at the relevant land registry within 3 months from the date of the land charge document, failing which a penalty will be imposed.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The fees payable for the perfection of security interest are generally insubstantial. However, in certain states, the fees payable to obtain state authority consent for the charge are calculated based on the value of the loan amount.

Charge instruments are subject to *ad valorem* stamp duty. The rate of the duty for principal instrument securing indebtedness in MYR is 0.5% of the secured amount and for principal instrument securing indebtedness in other currencies, 0.5% of the secured amount with a capped amount of MYR 500. Stamp duty payable for each secondary instrument is MYR 10.

Under an exemption order issued by the Minister of Finance, all instruments relating to the issuance of debt securities as approved by SC are exempt from the payment of stamp duty.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Common regulatory or governmental approvals which may need to be considered are state authority approval and approval of the CBM.

Prior approval from the relevant state authority is required for real property that is subject to certain restrictions in interest against the creation of charges over that real property.

Under the Financial Services Act 2013 ("**FSA**"), prior approval from the CBM or registration with the CBM may be required in some circumstances for the creation of security and giving of a guarantee. Making of loans in foreign currency by foreign lenders or granting of security for that purposes generally are subject to certain qualifications and restrictions set out in relevant Notices regulated by the CBM.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

A trustee or security agent can be used in the Malaysian jurisdiction for the purpose of holding and administering the security. For example, within the *sukuk* structure, a trustee is appointed by the trust deed to hold the benefit of various rights and covenants on behalf of *sukuk*-holders. The trustee may also act as security trustee to hold the benefit of any security, on behalf of the *sukuk*-holders (and other transaction parties whose interests are secured).

The trustees in *sukuk* may generally be divided into three categories, based on their functions: *sukuk*-holder trustee; security trustee; and share trustee. Security trustee is required when the issue of *sukuk* involves the creation of a charge or security, and it is the duty of the security trustee to hold the legal charges or the assignment of assets (by way of security) for the benefit of the *sukuk*-holders.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

Yes. By a creditors' petition where the creditors will commence bankruptcy proceedings against an individual by serving them with a bankruptcy notice for debts exceeding MYR 50,000. The bankruptcy process begins with a petition to the court for a bankruptcy order. It is important to note that in Malaysia the person presenting the petition will usually be 1 or more of the debtor's creditors. The High Court makes a Receiving Order and Adjudication Order after a bankruptcy petition has been presented. Section 6(1) of the Insolvency Act 1967 ("**IA**") provides that a creditors petition shall be verified by the affidavit of the creditor or of some person on his behalf having knowledge of the facts and shall be served.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

A security over real estate can be enforced by obtaining an order of sale either from the High Court (if it is a Registry title) or the Land Administrator (if it is Land Office title) and this may impact the timing. Generally, where the security involves a land charge under the NLC, foreclosure is typically carried out through a judicial sale in accordance with the provisions of the NLC. Distinction is to be made between Land Registry titles and Land Office titles as different procedures are used depending on the type of land titles involved. In certain circumstances, it is permissible to foreclose the real property through private treaty sale (without a court order) by a receiver and manager, as agent/attorney of the charger, in accordance with the powers and provisions under a debenture where a fixed charge is created on the real property. Where the security is a lien holder's caveat, sale of the real property is by way of execution proceedings after obtaining a court judgment.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

Yes. A judgment obtained from the courts of certain jurisdictions (permitted jurisdictions) listed in the Reciprocal Enforcement of Judgments Act 1958 ("**REJA**"), subject to certain qualifications, may be enforced in Malaysia once it has been registered under the REJA and no separate action needs to be commenced for the enforcement of such foreign judgment. A Malaysian court may, subject to certain conditions being fulfilled (for instance, the judgment is not obtained by fraud), register a judgment obtained from those courts of the permitted jurisdictions. A judgment obtained from a court of a jurisdiction which is not a permitted jurisdiction (for instance, New York courts) will not be recognised by the Malaysian courts. An action may, however, be commenced in the Malaysian courts for an amount due under a judgment given by the court of foreign jurisdiction. Note that certain conditions and qualifications do apply in this circumstance.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

The following provisions may affect the ability of a project lender to enforce its rights over the collateral/security:

(a) a floating charge on the undertaking or property of a company created within six months of the commencement of the winding-up will be invalid, unless it is proven that the company was solvent immediately after the creation of the charge;

(b) a charge created within six months before the date of the presentation of the winding-up petition or the date on which a resolution to wind up a Malaysian company has been passed, whichever is earlier, will be deemed fraudulent and void, unless made or incurred in good faith and for valuable consideration; and

(c) an assignment of existing or future book debts shall be void as against the director-general of insolvency for any book debts that had not been paid at the date of an available act of bankruptcy.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

Yes. Please refer to our answer to question 5.1 above.

Further, so far as the assets of the project company available for payment of general creditors are insufficient to meet any preferential debts (wages or salary of employees, remuneration of vacation leave, contribution to provident fund and any amount payable in priority on account of wages salary or vacation leave) those debts will have priority over the claims of a debenture holder under any floating charge.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Although all companies are subject to the insolvency provisions under the CA, there are provisions in industry-specific legislation imposed on the insolvency of certain entities. These include:

1) electricity licensees provided in the Electricity Supply Act 1990 ("**ESA**");
2) banks provided in the FSA;
3) licensed investment banks provided in FSA;
4) licensed insurers provided in the FSA;
5) trust companies provided in the Trust Companies Act 1949 ("**TCA**");
6) the Stock Exchange provided in the Capital Markets and Services Act 2007 ("**CMSA**"); and
7) business trusts provided in CMSA.

If assets of the company are subject to security (for example, assets subject to a charge), these would be excluded from the winding-up process unless the secured creditor surrenders the security.

As for reorganisation proceedings, the provisions on company voluntary arrangement ("**CVA**") and judicial management contain certain companies that are excluded from resorting to such proceedings. For CVA, public companies, licensed institutions and operators of designated payment systems regulated by the CBM, companies subject to the CMSA and companies that create a charge over their property or any of its undertaking are excluded.

For judicial management, licensed institutions and operators of designated payment systems regulated by the CBM, and companies subject to the CMSA, are excluded.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Save for charges over lands under the relevant land codes and certain types of mortgages, a project financier may generally enforce security, including appointing a receiver, without court proceedings.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Yes, there are two voluntary reorganisation methods: the scheme of arrangement; and the CVA.

**1) Scheme of arrangement**

A voluntary reorganisation in Malaysia may be carried out by way of a scheme of arrangement under Section 366 of the CA. A scheme of arrangement is a court-approved compromise or arrangement between a company and its creditors (or any class of creditors).

One of the key objectives of a scheme of arrangement is to provide a mechanism to effect a formal compromise to bind dissenting creditors, so long as the statutory majority of votes has been achieved. The scheme will be subject to the approval of the court. It is sometimes common to have an external administrator, known as a scheme administrator, to assist in the scheme of arrangement procedure.

To initiate a scheme of arrangement, either the company, a creditor or a member would have to apply to the court for an order for meeting of the creditors or members to be held. The applicant has the flexibility in deciding which creditors or members to include in the proposed scheme of arrangement. When initiating a scheme of arrangement, the applicant can also seek a moratorium order known as a restraining order. The restraining order will restrain all further proceedings in any action or proceeding against the company, except by leave of the court. Note that Section 368(6) of the CA makes it clear that such a restraining order will not apply to any proceeding taken by the Registrar of Companies or SC.

At the meeting, the creditors or members will vote on the proposed compromise or arrangement. If a 75% majority in value of the creditors or members agrees to the proposed compromise or arrangement, an application must be made to the court to obtain the approval of the court for the proposed compromise or arrangement. The court may grant its approval subject to such alterations or conditions as it thinks just.

Further, Section 367 of the CA further allows the court to appoint an approved liquidator to assess the viability of the scheme. This provision was introduced in order to safeguard the interests of the creditors.

Once approved by the court, the compromise or arrangement is binding on all the creditors or members of the company expressly included in the scheme, and will be implemented according to its terms. Where the company is in the course of being wound-up, the compromise or arrangement is binding on the liquidator and contributories of the company.

**2) Corporate voluntary arrangement**

Once the relevant provisions on the CVA come into force, a debtor company will be able to put up a proposal to its creditors for a voluntary arrangement via the CVA under Section 396 of the CA. The implementation of the proposal is supervised by an independent insolvency practitioner. There is minimal court intervention in the process.

To initiate a CVA, the directors would have to submit to the nominee, being the insolvency practitioner, a document setting out the terms of the proposed voluntary arrangement and a statement of the company's affairs.

Under Section 397(2) of the CA, the nominee shall then submit to the directors a statement indicating whether or not in his or her opinion:

a) the proposed CVA has a reasonable prospect of being approved and implemented;
b) the company is likely to have sufficient funds available for it during the proposed moratorium to enable to the company to carry on its business; and
c) that meetings of the company and creditors should be summoned to consider the proposed CVA.

Under Section 398 of the CA, once the directors have received a positive statement from the nominee, they can then file this statement with the court together with the other necessary documents, such as the nominee's consent to act and the document setting out the terms of the proposed CVA.

Upon the filing of the relevant documents pursuant to Section 398 of the CA, a moratorium commences automatically and remains in force for 28 days during which no legal proceedings can be taken against the company. It is meant to give some breathing room for the company from the creditors' legal proceedings.

Upon the moratorium coming into force, Section 399 of the CA requires the nominee to summon a meeting of the company and its creditors within 28 days of the date of the filing of the documents in court.

At the company's meeting, a simple majority is required to approve the proposed CVA while at the creditors' meeting, the required majority is 75% of the total value of the creditors present and voting. With such approval, the CVA takes effect and binds all creditors. The aim of the CVA is that it should apply only to the restructuring of unsecured debts of a company and cannot affect the right of a secured creditor to enforce its security.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

The duties and responsibilities of the directors and officers change when the company becomes insolvent. There is an evolving common law duty requiring directors to exercise their powers in the interests of creditors once a company is insolvent or is near insolvent, on the ground that it is the creditors that have the residual interest in the remaining assets of the company, and not the shareholders or third parties. Therefore, the director would be liable if he continues to trade where the nature is not favourable to the creditors. This is not a duty that has so far been held to be directly exercisable by the creditors. Instead, it is owed to the company, and the liquidator of the company can enforce this duty against one or more directors for the benefit of creditors.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Following the liberalisation of Malaysia's equity policy, foreign investors can hold 100% of the equity in all investments in new projects.

However, equity restrictions remain in several sectors, including high-technology manufacturing, energy, information technology, telecommunications and other sectors of strategic importance to Malaysia. For instance, a foreign company that wishes to participate in tender and works in the upstream sector of the oil and gas industry is required to either appoint a local company as an exclusive agent or form a joint venture company with a local company – there are Bumiputera (Malays and natives of any of the states of Sarawak and Sabah) participation requirements for equity, board of directors, management and employees in these companies.

The acquisition of lands in Peninsular Malaysia by foreign interests is subject to the prior approval of the relevant state authority. The fees involved in obtaining approvals for foreign investment in Malaysia vary depending on the sector or industry and the nature of the project.

Generally, all companies in Malaysia are liable for income tax on income or profits derived from Malaysia. Withholding tax is payable on certain payments to non-residents, such as interest, royalties and technical assistance fees. Certain activities attract additional taxes; for example, any person carrying on petroleum operations in Malaysia is also subject to petroleum income tax.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Malaysia has signed bilateral investment treaties, protecting investor rights, with around 71 countries.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

By virtue of Article 13 of the Federal Constitution 1957 ("**FC**"), the Government of Malaysia theoretically guarantees against expropriation of property without compensation. As this is a constitutional provision it should be interpreted in the broadest terms and no parliamentary statutes ought to contravene the intention of the said provision. Historically, there have been no cases of nationalisation of foreign entities in Malaysia. Furthermore, Malaysia has also concluded Investment Guarantee Agreements with several countries under Asia-Pacific Economic Cooperation ("**APEC 2000**") and, in general, these include the following features:

1) a guarantee against expropriation or nationalisation, except for the reason of national security. In the event of doing so, there must be fair and equitable compensation;
2) the right to remit or repatriate – in any usable convertible currency capital – profits and dividend royalties on investment; and
3) the validity of property rights and freedom of commerce.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The relevant government agencies or departments with authority in the typical project sectors are separated according to the field of projects as below:

**(a) Oil and Gas**

Under the Petroleum Development Act 1974, Petroleum Nasional Berhad ("**PETRONAS**"), a national oil and gas company wholly owned by the government, has been vested with the entire ownership in, and the exclusive rights of exploring and obtaining petroleum, whether onshore or offshore of Malaysia. PETRONAS is responsible for the issuance of licences with regards to upstream activities.

Additionally, under the Gas Supply Act 1993, the Energy Commission ("**EC**"), established under the Energy Commission Act 2001 ("**ECA**"), is the primary regulator of the gas supply in Malaysia. The EC shall have all the functions imposed on it under the laws and shall also have, *inter alia*, the functions as provided by Section 14 of the ECA.

**(b) Energy**

The energy sector in Malaysia was formerly a state monopoly. Tenaga Nasional Berhad ("**TNB**") held the exclusive rights to generate, transmit and distribute electricity in Peninsular Malaysia and Sabah. The regulation of energy and electricity in the state of Sarawak is under the purview of Sarawak Energy Berhad, known as the Sarawak Electricity Supply Corporation, prior to privatisation.

**(c) Minerals**

Under the Mineral Development Act 1994 ("**MDA**"), the Federal Government is responsible for the inspection and regulation of mineral exploration, mining and other related issues. The MDA delineates the powers of the Federal Government on matters pertaining to the inspection and regulation of mineral exploration, mining and other related issues. The legislation is enforced by the Department of Minerals and Geoscience of Malaysia.

Meanwhile, mineral prospecting and exploration licences are issued by each state government according to its own state mineral enactment. The state mineral enactment grants the respective state with powers to issue mineral prospecting and exploration licences and mining leases. The State Director of Land and Mines ("**SDLM**") is responsible for administering these powers. Foreign investors will have to negotiate with the SDLM for the respective state for the relevant licences or leases.

**(d) Telecommunications**

The provision of network facilities or network services in Malaysia is regulated under the Communications and Multimedia Act 1998, and requires an individual licence and class licences issued by the Malaysian Communications and Multimedia Commission.

**(e) Manufacturing**

The Malaysian Investment Development Authority ("**MIDA**") is the government's principal agency responsible for the promotion of the manufacturing and services sectors in Malaysia. MIDA evaluates and processes various applications for projects in the manufacturing and its related services sectors, including manufacturing licences, tax incentives, expatriate posts and duty exemptions on raw materials, components, machinery and equipment.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Generally, no. However, Section 292 of the NLC provides the list of instruments capable of being registered at the land office, as follows:

(a) any transfer of land, of an undivided share in land, or of any lease, sub-lease or charge;

(b) any lease, sub-lease or surrender;

(c) any charge, discharge or instrument of postponement;

(d) any certificate of sale; and

(e) any instrument granting or releasing any easement.

Apart from the above, documents that contain a power of attorney clause must be registered or filed with the relevant government authority.

If a security is created by a company incorporated under the CA, it must be registered with the CCM. See question 2.6 above.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Section 433B of the NLC provides that the acquisition of lands in Peninsular Malaysia by foreign interests is subject to the prior approval of the relevant state authority. The fees involved in obtaining approvals for foreign investment in Malaysia vary depending on the sector or industry and the nature of the project.

Meanwhile, natural resources are generally state-owned. Private parties may apply for licences to acquire these resources, and will be bound by the conditions imposed. There are restrictions for foreign parties to acquire such rights. The Ministry of Natural Resources & Environment is responsible for natural resources management in Malaysia.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Royalties and taxes payable on the extraction of natural resources are largely revenue-based. Royalties payable in respect of petroleum are based on the volume or value of petroleum extracted. Generally, the royalties payable are 10% of the gross production for petroleum.

Apart from paying corporate tax to the Federal Government, mine operators also pay value-based royalty to the state where their mining operation is located. The royalty rate, in general, is 5% of the value of the mineral extracted but may vary depending on the mineral commodity, and as assessed by each of the individual states.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Foreign exchange transactions in Malaysia were governed under the Exchange Control Act 1953. It was repealed by the FSA. In the exercise of the powers conferred under the FSA, the CBM, as the controller of the foreign exchange in Malaysia, has issued the Foreign Exchange Administration Rules ("**FEA Rules**"). Generally, both residents and non-residents are free to buy or sell MYR against foreign currency with licensed onshore banks. There is a general prohibition to undertake or engage with any person in any dealing or transaction using the currency of Israel.

The Notices on the foreign exchange administration set out transactions that are allowed by CBM which otherwise are prohibited under FSA and Islamic Financial Services Act 2013 ("**IFSA**"). A person must obtain CBM approval to undertake or engage in any transactions that are not provided or allowed by CBM under the Notices. Approval given under the Notices shall not relieve any person from complying with other laws which require such person to obtain approval or authorisation from other relevant authorities before any transaction can be carried out.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Non-residents are free to remit out divestment proceeds, profits, dividends or any income arising from investments in Malaysia, provided that the repatriation is made in foreign currency.

The payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions shall be made in foreign currency and are permitted other than for certain types of derivative transactions stipulated under the FEA Rules.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Resident entities and individuals are free to open foreign currency accounts with licensed onshore banks and non-resident banks.

There are no restrictions on the source of foreign currency funds to be credited in foreign currency accounts maintained with licensed onshore banks.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

No. However, payment of dividends can only be paid out of available profits only if the company is solvent as provided under Section 131(1) of the CA. Section 132(3) of the CA introduces a trading solvency test and defines solvency as the company's ability to pay its debts as and when it becomes due within 12 months immediately after the distribution of profits to shareholders is made. Although dividends must be declared before the distribution, this must first be authorised by the company's directors. Additionally, payment of dividend should be made as agreed contractually among the parties.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

The Department of Occupational Safety and Health ("**DOSH**") is a department under the Ministry of Human Resources. DOSH is responsible for ensuring the safety, health and welfare of people at work as well as protecting other people from the safety and health hazards arising from the activities sectors. As a government agency, DOSH is responsible for the administration and enforcement of legislations related to occupational safety and health of the country, with a vision of becoming an organisation which leads the nation in creating a safe and healthy work culture that contributes towards enhancing the quality of working life. There are several guidelines and code of practices issued by DOSH that must be complied with.

The Occupational Safety and Health Act 1994 came into force to secure the safety, health and welfare of persons at work, for protecting others against risks to safety or health in connection with the activities of persons at work, to establish the National Council for Occupational Safety and Health, and for matters connected therewith.

In addition, a person or a company who has suffered loss as a result of environmental or health and safety issues, such as noise, odour or other pollution, may be entitled to bring a civil claim under the common law of nuisance, negligence and trespass.

The National Policy on the Environment ("**DASN**") has been established for continuous economic, social and cultural progress and enhancement of the quality of life of Malaysians through environmentally sound and sustainable development. The objectives of DASN are to achieve: (1) a clean, safe, healthy and productive environment for present and future generations; (2) conservation of the country's unique and diverse cultural and natural heritage, with effective participation by all sectors of society; and (3) sustainable lifestyles and patterns of consumption and production. In addition, the Environmental Quality Act 1974 has been enacted to prevent, abate and control pollution, and for the enhancement of the environment.

Apart from that, industrial activities in Malaysia are required to obtain the following approvals from the director general of environmental quality prior to project implementation for the following details:

(a) environmental impact assessment for certain prescribed activities;
(b) site suitability evaluation;
(c) written notification or permission to construct;
(d) written approval for installation of incinerator, fuel burning equipment and chimney; and
(e) licence to occupy and operate certain prescribed premises and prescribed conveyances.

There are fees payable for licences issued for palm oil and raw natural rubber processing mills and facilities for the treatment and disposal of scheduled wastes and prescribed conveyances.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

The Malaysian procurement laws are applicable to project companies. The principles on which government procurement is based on are public accountability, transparency, value for money, open and fair competition as well as fair dealing.

The main framework for Public Procurement in Malaysia comprises of:

**1) Financial Authority**

The Federal Government financial authority is vested with the Minister of Finance and the Secretary-General of the Ministry of Finance with directions from the Minister. In the case of State Governments, the financial authority is vested with the respective Chief Ministers, and the respective State Financial Officers with directions from the respective Chief Ministers. The financial authority in Local Authorities and Statutory Bodies is vested with the respective Chairpersons and the Councils or the Board of Directors.

**2) Financial Procedure Act 1957 (Revised 1972)**

The Financial Procedure Act 1957 (Revised 1972) provides for the control and management of the public finances of Malaysia and outlines financial and accounting procedures. It includes procedures for the collection, custody and payment of the public monies of Malaysia and of the states, and also the purchase, custody and disposal of public property and related matters.

**3) Treasury Instructions**

The Treasury Instructions detail out financial and accounting procedures and encompass the regulations that need to be adhered to in the management of government funds, including procurement.

**4) Government Contract Act 1949**

The Government Contract Act 1949 empowers the respective Ministers in the respective ministries to enter into contracts and also empowers the respective ministers to delegate powers to Government Officers to enter into contracts on behalf of the government.

**5) Treasury Circular Letters**

Treasury Circulars are issued from time to time to inform, clarify, implement, improve and amend certain policies, rules and procedures whenever required by the government and financial authorities.

**6) Federal Central Contract Circulars**

Federal Central Contract Circulars are issued to inform the users on the availability of common user items which are centrally purchased. The Central Contract Circulars normally contain details such as items, name of suppliers, areas of supply and time of delivery. Apart from procurement principles and objectives, most often, the Central Contracts objectives are to promote local products and develop vendors.

Apart from the above, foreign companies are required to establish a local subsidiary company for the purposes of registration with the

Ministry of Finance in order to be eligible to participate in Public Procurement Processes. However, a branch office of a consultant firm may be registered (save where it is in the field of asset valuation) to participate in a public procurement process. Individual foreign consultants may also be directly appointed where the costs of services do not exceed MYR 500,000.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

The CBM regulates entities which carry on insurance business, insurance broking, adjusting and financial advisory. Insurers are licensed by the Minister of Finance on the recommendation of the CBM. Schedule 5 to the FSA sets out the factors in which the Minister and the CBM would consider in assessing the application for licence or approval sought under the FSA. Section 127 of the FSA provides that:

"*(1) Except with the prior written approval of the Bank, no person shall enter into or cause to be entered into, a contract of general insurance of such description as may be prescribed by the Bank with an insurer other than a licensed general insurer.*

*(2) The Bank may grant an approval under subsection (1) after consultation with the Minister.*

*(3) A person shall provide to the Bank such information on any contract of general insurance entered into, or caused to be entered into with an insurer other than a licensed general insurer, as the Bank may require by notice in writing within such period as may be specified in the notice.*"

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Insurance policies over project assets can be payable to foreign (secured) creditors.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

No. However, there are laws that should be adhered to. The law in relation to the foreign workers is governed by the Immigration Act 1959/63. Foreign workers from certain specified countries can be employed in the manufacturing, construction, plantation, agricultural, services and domestic help sectors. There are certain quotas of foreign workers that must be obtained by employers.

While the government wishes to have Malaysians employed at all levels of employment, where there is a shortage of trained Malaysians, companies are allowed to bring in expatriate personnel to fill up either key posts (posts that are permanently filled by foreigners) or time posts (posts that are filled for a specified time only subject to certain conditions).

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

The importation of project equipment may be subjected to import duty under Customs Act 1967. Import permit licences, or approved permits, are usually required when importing heavy construction equipment into the country as provided under Customs (Prohibition of Imports) Order 2017. In addition to import duties, a Goods and Services Tax ("**GST**") of 6% is levied on goods imported into Malaysia. The excise import duties varies according to the category of goods imported.

### 10.2 If so, what import duties are payable and are exceptions available?

Customs Duties (Exemption) Order 2013 provides the list of persons and goods exempted from paying duty. Among the conditions are that the goods are: imported for supply to any Federal or State Government Department; used solely by the government department concerned; and not sold or otherwise disposed of except as sanctioned by the head of department concerned.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Under Malaysian law, there is no generally applicable concept of "*force majeure*". However, there is nothing in Malaysian law that prohibits parties from providing for *force majeure* events. The question of what events will qualify depend on a construction of the *force majeure* provisions read in light of the contract provisions as a whole.

Separately, Section 57(2) of the Contracts Act 1950 ("**Contracts Act**") recognises the concept of frustration of contract, in providing that "*a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful*". In the case of *APT Associates Sdn Bhd v. Adnan Ishak & Ors* [2016] 4 CLJ 277, it was suggested that the concept of impossibility in the subsection extends to circumstances where performance is radically different from that contracted for. However, Section 15 of the CLA provides for the adjustment of the parties' rights and liabilities upon the frustration of a contract. This extends (but is not limited) to the potential recoverability of monies paid under the contract prior to discharge.

If the risk of the supervening event is contracted for (whether expressly or impliedly), this would preclude the application of the doctrine. Section 57(3) of the Contracts Act provides that "*where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise*".

Other than that as provided, there is no concept of severability of promises in the application of the doctrine of frustration under Section 57(2) of the Contracts Act.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Malaysian Anti-Corruption Commission Act 2009 ("**MACC Act**") received Royal Assent in January 2009 and came into force on 8 January 2009. The MACC Act is to provide for the establishment of the Malaysian Anti-Corruption Commission ("**MACC**"), to make further and better provisions for the prevention of corruption, and for matters necessary thereto and connected therewith. The MACC was established under the MACC Act. The MACC Act was aimed as a catalyst to improve corruption prevention in Malaysia.

The offences of corruption under the MACC Act revolve around the act of giving or accepting gratification. "Gratification" is indeed the defining word and is extensively defined under Section 2 of the MACC Act as follows:

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage;

(b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's worth or valuable thing;

(f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f) above.

Section 20 of the MACC Act provides that a person commits an offence if he, with the intent of obtaining any contract for the supply of product or services from any public body, offers any gratification to any person who has made a tender for the same contract as an inducement or reward for him to withdraw the tender. It is also an offence for a person to solicit for or receive any gratification for withdrawing his tender.

According to Section 24(1) of the MACC Act, the offences mentioned above carry, upon conviction, a term of imprisonment not exceeding 20 years and a fine of not less than 5 times the sum or value of the gratification which is the subject matter of the offence, if it can be valued, or MYR 10,000, whichever is the higher.

In proceedings related to any of the offences described above, any gratification received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered, by or to an accused is presumed to have been done so corruptly, unless the contrary is proved.

Accepting gratification is also an offence under the Malaysian Penal Code. Any public servant who accepts, agrees to accept or attempts to obtain any gratification as a motive or reward for doing any official act shall be punished with imprisonment for a term which may extend to 3 years or with a fine, or both.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements relating to projects located in Malaysia are generally governed by the laws of Malaysia.

### 13.2 What law typically governs financing agreements?

The financing agreements are generally governed by the laws of Malaysia. Among the relevant regulations are Central Bank of Malaysia Act 2009 ("**CBA**"), FSA and IFSA.

The FSA is the key statute governing the conventional finance industry. It replaced the Banking and Financial Services Act 1989, the Insurance Act 1996, the Payment Systems Act 2003 and the Exchange Control Act 1953. The IFSA is the FSA's counterpart for the Islamic finance sector, and replaced statutes such as the Islamic Banking Act 1983 and the Takaful Act 1984.

### 13.3 What matters are typically governed by domestic law?

Land-related agreements and application of permits or licences are normally governed by the law where the project is located.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Parties to a contract are free to choose the governing law and forum for disputes relating to their contract, provided that the choice is made in good faith, and is not contrary to public policy in Malaysia.

It is possible for the government to waive its immunity. However, under the Rules of Court 2012, an application for summary judgment will not be made against the government, and no judgment in default of appearance or pleading will be entered against the government except with the leave of the court. Further, an order for the attachment of debts or for the appointment of a receiver shall not be made or have effect against the government.

Additionally, it is possible for a foreign state to waive immunity from enforcement in Malaysia, but there should be an agreement between the parties to waive such immunity in order for it to be legally binding and enforceable.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

An award made in respect of a domestic arbitration or an award from a foreign state is recognised as binding and enforceable. The Arbitration Act 2005 ("**Arbitration Act**") defines foreign state as a state that is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Therefore, only awards that are from states that are parties to the New York Convention can be recognised and enforced in Malaysia.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Malaysia has been a contracting state to the New York Convention since November 1985.

### 15.3 Are any types of disputes not arbitrable under local law?

The majority of disputes can be referred to arbitration in Malaysia. However, Section 4(1) of the Arbitration Act specifically provides that a dispute cannot be referred to arbitration if the arbitration agreement is contrary to public policy. Therefore, disputes that may not be arbitrable include those involving a criminal issue, prosecution, a family matter, issue of public interest and aspects of insolvency law. Any agreement against public policy is void by virtue of Section 24(e) of the Contracts Act. No stay would be available in the case of an arbitration agreement that is void.

There have not been many decisions on the arbitrability of particular subject matters in Malaysia. The Court of Appeal in *Renault SA v. Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 held tortious disputes to be arbitrable.

Some of the disputes which have been found to be non-arbitrable are as follows:

- Disputes relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers: see *Pendaftar Pertubuhan Malaysia v. Establishment Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.
- Matters which fall under the scope of the summary determination procedure for defaults on a registered charge (a charge registered under the NLC gives the chargee an interest in the land with a statutory right to enforce his security by way of a sale of land under Section 253 of the NLC or by taking possession thereof under Section 271 in the event of the chargor's default). The legal title in the land remains vested in the registered proprietor on land: see *Arch Reinsurance Ltd v. Akay Holdings Sdn Bhd* (Civil Appeal No. 02(F)-9-03/2016(W)).

According to the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 5 MLJ 417, where a stay of proceedings pending reference to arbitration is opposed on the basis of non-arbitrability of the subject matter, the matter should be determined by the arbitral tribunal at first instance. Any party aggrieved by the tribunal's jurisdictional finding may then appeal to the High Court against the decision of the tribunal under Section 18(6) of the Arbitration Act. The court may decide on an issue of arbitrability if an award is challenged under Section 37 of the Arbitration Act, or if recognition and enforcement is sought to be refused under Section 39 of the Arbitration Act. There has been no Malaysian decision on whether non-arbitrability is a matter of jurisdiction or admissibility.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

There is nothing mentioned in the Arbitration Act on the mandatory domestic arbitration proceeding. Section 4(1) of the Arbitration Act provides that "*any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy*".

If the matter is arbitrable pursuant to the agreement by the parties, then it is subject to the relevant dispute resolution and jurisdiction clause in an agreement.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Not in recent years. Direct agreements are commonly entered into between the lenders and the parties involved in the project. This is to set out in the offtaker's acknowledgment of the security interest granted by the project company to the lenders with respect to the project company's rights and interests under the power purchase agreement, and the lenders' rights to take remedial action in a default situation.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

A company is tax resident in Malaysia if its management and control are exercised in Malaysia. Management and control are normally considered to be exercised at the place where the directors' meetings concerning management and control of the company are held. Resident companies are taxed at the rate of 24%, while those with paid-up capital of MYR 2.5 million or less are taxed at the rate of first MYR 500,000 for 19% and in excess of MYR 500,000 for 24%.

Meanwhile, non-resident companies are taxed based on the following: business income at the rate of 24%; royalties at the rate of 10%; rental of moveable properties at the rate of 10%; technical or management service fees at the rate of 10%; interest at the rate of 15%, dividends are exempted; and other income at the rate of 10% .

Generally, tax deduction is allowed for all outgoings and expenses wholly and exclusively incurred in the production of income. Certain expenses are specifically disallowed; for example, domestic, private or capital expenditure and interest, royalty, contract payment, technical fee, rental of movable property, payment to a non-resident, public entertainer or other payments made to non-residents which are subject to Malaysian withholding tax but where the withholding tax was not paid.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Companies which are accorded the MSC Malaysia, formerly the Multimedia Super Corridor status (recognition for information and communication technology ("**ICT**") and ICT-facilitated businesses that develop or use multimedia technologies to produce and enhance their products and services), by the Multimedia Development Corporation are given a number of incentives (financial and non-financial), including income tax exemption and investment tax allowance.

There are also a number of tax incentives given to companies investing in the manufacturing sector, agricultural sector and tourism sector. Applications are made to MIDA, and are considered on a case-by-case basis.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

There are no specific public authorities or laws that regulate the project finance industry in Malaysia. All relevant public law aspects of the project (permits, concessions, approvals, supervision, etc.) are handled by the public authorities competent for the applicable subject matter. Accordingly, a variety of laws and authorities may have to be considered or dealt with when participating in project financing.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

In July 2000, SC took the function as the sole authority to approve all corporate bond issues. SC is responsible for the formulation of policies aimed at developing the bond market, ensuring it is vibrant and efficient. SC will process applications for the issuance of private debt securities in Malaysia, which requires the approval of SC under Section 32 of the Securities Commission Act 1993 ("**SCA**"). However, SC's approval is not required if the transaction is exempt under Schedule 1 of the SCA or if the instrument or transaction is exempted from the definition of "debenture" under Section 2(1) of the SCA.

Corporations may now undertake private debt securities issues without a rigorous prior assessment of the issues' merits by SC, as long as the transparent requirements set out in the Private Debt Securities Guidelines are complied with.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

***Istina'a***

*Istina'a* contracts refer to an agreement to sell to or buy from a customer a non-existent asset which is to be manufactured or built based on the specifications outlined by the ultimate buyers at an agreed predetermined selling price and to be delivered on a specific future date. These transactions are based on a procurement agreement (or *Istina'a*) between a special purpose vehicle ("**SPV**") (owned by the Islamic financiers), as the purchaser, and the project company (the borrower), as the procurer. The procurement agreement operates for the construction phase of the project. Under the procurement agreement, the project company agrees to procure assets on behalf of the SPV by a certain date. On delivery of the assets, title to and possession of the assets passes to the SPV. An important element of this structure is the use of the SPV to act (on behalf of the Islamic financiers) as the purchaser under the procurement agreement.

***Ijarah***

This is a form of lease contract between a bank and its customer where the bank leases out equipment to the customer to use. The customer pays the bank for the use of the equipment but would not own the asset; hence, the asset risks remains with the bank. But it is important to note that most banks do not just purchase the item and wait for them to be rented, it is a request from a bank's client that triggers such a contract. However, the amounts to be paid in rental charges are crafted such that they cover the cost of the asset and a fair return to the bank. Perhaps the most important point which differentiates this leasing contract from conventional leasing contracts is that the rentals could be flexible and be made to reflect the changing economic and business conditions prevailing in real terms.

***Wakala***

A *Wakala* arrangement involves the appointment of the project company as *Wakeel* or agent of the financiers to enter into the Engineering, Procurement and Construction contracts on their behalf for the relevant project. Importantly, the assets being financed under the *Wakala* arrangement must be expressly identified and must be predominantly financed by the "*Wakala* participants". Whilst the above structures describe how payments are made to the project company during the construction period, it is also important to look at the mechanism through which repayments to the project financiers are made.

***Murabaha***

Another fairly common form of Islamic finance structure is the use of forward payment obligations under *Murabaha* contracts. This structure involves a contract between the Islamic financier and the client for the sale of goods at a price that includes an agreed profit margin, either a percentage of the purchase price or a lump sum. The Islamic financier will purchase the goods as requested by its client and will sell them to the client with an agreed mark-up. The profit mark-up must be agreed to before the deal closes and cannot be changed. A more versatile variation of the *Murabaha* contract is the *Tawarruq* structure. Under a *Tawarruq*, following its acquisition of the goods from the Islamic financiers, the client will appoint an agent (usually the same Islamic financier) to sell the goods to a third party and thereby receive the cash.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Not all principles of *Shari'ah* law can be chosen as governing laws of a contract. Only the principles of *Shari'ah* law that have been regulated in the form of Malaysian law and regulations can be chosen as the governing law of a contract. The IFSA was enacted to reinforce the CBM's mandate to safeguard financial stability as well as to statutorily monitor and enforce *Shari'ah* compliance. The IFSA provides a legal platform for the development of Islamic finance in Malaysia, which is reflected upon a comprehensive regulatory framework on the specificities of the various Islamic financial contracts and supports on the effective application of *Shari'ah* financial contracts in the offering of Islamic financial products and services.

The issue on the jurisdiction of the courts in adjudicating Islamic financial disputes was for the first time brought up in the unreported case of *Bank Islam Malaysia Bhd v. Adnan Bin Omar* (Civil Suit No: S3-22-101-91), whereby a preliminary objection was raised by the defendant challenging the jurisdiction of the civil court in hearing this Islamic finance case. The judge in the said case, in dismissing the preliminary objection, ruled that the civil courts shall have the jurisdiction to hear Islamic banking disputes and Islamic commercial cases, considering Islamic banking matters fall under the List I of Ninth Schedule of the Federal Constitution.

In *Mohd Alias Ibrahim v. RHB Bank Berhad & Anor* [2011] 4 CLJ 654, the judge re-affirmed the position as follows: "*In Malaysia, Islamic law falls under the jurisdiction of the Syariah Courts which derive its power under a State law enacted pursuant to art. 74(2) of the Federal Constitution following para. 1, List II, Ninth Schedule to the Constitution (State List). However, in cases involving banking transactions based on Islamic principles, it is the civil courts that will have jurisdiction to hear these matters. The reason is that the law relating to finance, trade, commerce and industry falls within the ambit of the Federal List in List I, Ninth Schedule to the Federal Constitution.*"

On 6 February 2003, the Chief Judge of Malaya issued a Practice Direction No. 1 of 2003 whereby a Muamalat Court was set up under the Commercial Division of the Kuala Lumpur High Court to hear Islamic banking cases. This Muamalat Court consists of one High Court judge, one deputy registrar and one senior assistant registrar.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Generally, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability in Malaysia, unless the loan agreement is based on Islamic financing principles. There are 3 distinctive features of Islamic financing as follows:

(a) *Riba* (interest) is prohibited. Instead of charging interest, in Islamic financing, profits and rewards can be charged or made;

(b) *Gharar* (uncertainty or ambiguity) in a transaction is not allowed. Hence, in all Islamic financing, the profits of the banks is predetermined and there is no uncertainty on the part of the customer in his repayments to the bank; and

(c) *Halal* (that which is allowed according to Islam). The purpose, goods and services must be *Halal*. For example, financing to a business in alcohol, pork, drugs, gaming and products or services related to any of them which is not *Halal* is prohibited.

The special feature in Islamic financing documents is that the word "interest" is never used, as interest is forbidden under the religion of Islam. The word "profit" is commonly used in Islamic financing and is defined as an amount of money added on top of the cost price of a good or a service.


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Mohamad Nazran Basirun advises foreign and local companies in respect of various corporate and commercial matters of listed and non-listed entities, including mergers and acquisitions, listings of public companies, joint ventures and project-related matters with specialisation in oil and gas contracts. He also advises foreign and local companies in matters relating to offshore business activities, especially through Labuan, which include advising clients on the setting up of public or private funds, advising on offshore leasing, offshore trusts, etc. Prior to joining the Firm, Nazran was with Messrs Zaid Ibrahim & Co ("**ZICO**") where he was a senior associate in the corporate and commercial division. He was seconded to ZI Labuan Trust Company Ltd, a sister company of ZICO, from 2003 to 2004. During his stint in Labuan, he passed the interview conducted by the Labuan Offshore Financial Services Authority and qualified to become a trust officer. Before joining ZICO, he was a legal officer at SAMP Sdn Bhd. where he assisted in the drafting of various legal documentations, advised the management and the board of the company on legal and company secretarial matters and liaised with external lawyers, etc. He is now a partner at the Firm.

Mohamed Ridza & Co
Advocates & Solicitors

Mohamed Ridza & Co. was established in June 2005. The lawyers at Mohamed Ridza & Co. specialise in a wide spectrum of law which includes, *inter alia*, Aviation, Banking & Finance, Capital Markets, Construction, Corporate & Commercial Law, Foreign Investment, Mergers & Acquisitions, Oil & Gas, Privatisation, Private equity, Projects and Real Estate, Restructuring, Shipping and Telecommunications. The Firm has been involved in some of Malaysia's largest and most complicated corporate and financing transactions, and it enjoys a very close working relationship with many large financial institutions (both local and international) and public listed companies as well as multinational corporations. Mohamed Ridza & Co is also a member of LaWorld. LaWorld is a network of independent law firms ranging across several continents globally. Being part of the international network, we are able to provide you with up-to-date legal advice covering a wide range of issues. LaWorld has member firms in 24 countries, and our Firm is the only Member Firm in Malaysia.

# Mexico

Jorge Cervantes

Gonzalez Calvillo, S.C.

Diego Hernández Schmidt-Tophoff

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Project finance has been well established in Mexico for the past decade. Although, with the recent Energy Reform, the sectors involving electricity and oil and gas have been increasingly active. The electric power industry is focusing on increasing the production of electrical power to supply Mexican demand, along with harnessing clean energies in order to match the standards of the industry internationally.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Trends during the past several years have remained consistent, but the construction and operation of energy related infrastructure projects has seen more activity recently. One of the most significant projects was the construction and operation of the Norte III 950 MW CC 38 Power Plant in Juárez, Chihuahua.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Pursuant to Mexican law, there are several security granting agreements that may be executed for perfecting security interest on real estate and/or moveable assets (property and goods), such as Guarantee Trust ("Security Trust"), Non-Possessory Pledge Agreement (which creates a floating lien over assets) ("NPPA"), Pledge Agreement ("Pledge Agreement"), mortgage ("Mortgage") and industrial mortgage (available for financial institutions only).

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Subject to obtaining authorisations by third parties and/or government entities, as applicable, security may be granted over real property (including site, pipeline and moveable assets permanently attached to it, among others) by means of either: (i) a Mortgage, which is regulated by local law; and/or (ii) a Security Trust in which property over the real estate (including site, pipeline and moveable assets permanently attached to it, among others) is transferred to the corpus (trust estate) of the Security Trust.

Both the Mortgage and Security Trust can be formalised by a notary public through public deed and are subject to registration in the Public Registry of the Property of the corresponding state of Mexico in which same is located. Besides the formalities previously mentioned, in case of the Security Trust, a financial institution will be required to act as trustee and shall execute the corresponding Security Trust agreement.

Security over machinery and other equipment may be granted, typically, by means of a NPPA, in which the pledgor holds the possession of the assets, which allows the pledgor to continue utilising such assets in the regular course of business. Additionally, a Pledge may be granted through a Pledge Agreement, but it is not customary, since the pledgor will lose possession of the pledged assets.

To create a first-ranking priority lien, both the Pledge and NPPA shall be formalised before the notary public and registered on the Sole Registry of Movable Securities (*Registro Único de Garantías Mobiliarias*) ("RUG").

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A security interest may be created to collect receivables by means of either a (i) NPPA, or (ii) a Security Trust.

In case of the NPPA, the debtors will not need to be notified of the security (generally speaking, unless otherwise provided in the specific agreement). Whereas, for the Security Trust, debtors will need to be notified, since collection rights will need to be transferred to the corpus of the Security Trust.

For the procedure to formalise, please refer to question 2.2 above.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A security interest may be created over bank accounts and monies deposited therein, by means of either a (i) NPPA, or (ii) a Security Trust.

For the procedure to formalise, please refer to question 2.2 above.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Security interest may be granted over shares/equity quotas for companies incorporated in Mexico. Typically, the vast majority of the shares/issued by a Mexican incorporated company will be transferred to the corpus of a Security Trust and the *de minimis* portion of the issued shares/equity quotas will be covered by a Pledge Agreement. The aforementioned is carried out to comply with the requirement under Mexican law of having at least two shareholders, since transfer of shares to the Security Trust is considered a transfer in property.

The shares must be endorsed (i) in favour of the lender under the Pledge, and (ii) in favour of the trustee in terms of the Security Trust. All endorsements shall be registered in the applicable corporate ledgers.

For further reference, equity quotas (for Mexican Limited Liability Companies) are not endorsed, since the same are not physically issued, and only require recording in the applicable corporate ledgers.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Notarial and registration fees related to security granting agreements (Pledges, Mortgages, NPPA and Security Trust) vary from state to state. Usually, Public Notaries in Mexico have an established maximum for fees which varies from state to state, although states may offer discounts depending on the project that is being carried out and for which the Security Granting Agreements are being executed.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The recording in the RUG can be completed on the same day it is filed.

For securities that must be registered in local public registries, recording time varies depending on how effective the local registry office is.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Governmental approval might have to be requested for assets related to governmental property (i.e., rights of way on federal land, water supply agreements, etc.).

Additionally, depending the nature of the project (energy, telecommunications, etc.) authorisation from the relevant authority might be required (i.e., PPAs executed with CFE require that consent be obtained before creating a lien over the project assets).

## 3 Security Trustee

### 3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The trustee of a Security Trust in Mexico may be granted sufficient powers and authority to carry out an enforcement procedure, in the event of an occurrence of an event of default, and distribute proceeds, taking into account the enforcement waterfall established in the Security Trust. It is typical to include provisions in the Security Trust, whereas, upon the occurrence of an event of default, the Collateral Agent (the beneficiary in the first place) will request the trustee to carry out the enforcement procedure established in the Security Trust.

### 3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in our jurisdiction.

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

There are no significant restrictions that may impact the timing and value of enforcement. Although, in the specific case of government-sponsored projects, lender step-in rights must be authorised (usually by proving financial and technical capacity to operate the project).

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Restrictions may only apply for restricted sectors that limit the participation of foreign ownership.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

The Mexican Federal Bankruptcy Law is the applicable law governing reorganisation and bankruptcy procedures in Mexico. A bankruptcy/reorganisation procedure in Mexico may directly impact the enforcement of security for a lender.

The Mexican Federal Bankruptcy Law (subject to exemptions and rights) will treat a secured lender as a secured creditor, which is important, since such capacity grants a secured creditor, among others, priority in ranking, loan currency protection, continued accrual of interests and the ability to participate in the eventual creditor agreement (which concludes the reorganisation proceeding). In the event the aforementioned creditor agreement is not reached, a bankruptcy proceeding shall take place and the company's assets will be liquidated to carry out the payment of debts owed to the acknowledged creditors.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

The creditors which hold an *in rem* security over assets, which may be foreclosed for the payment of the corresponding debt, have a priority position in the bankruptcy proceeding's payment waterfall.

In cases where multiple secured creditors exist, the date of registration of the security interests will dictate the priority of payment to the relevant creditors.

When the security interests are not duly registered, the corresponding creditors will be considered as unsecured creditors and will be paid after the secured creditors, if the remaining assets allow the payment of the amounts owed to the unsecured creditors.

Creditors who have expressly permitted to be considered as such, affiliates of the debtor without secured debt, and debtor officers and board members without secured debt, will be considered subordinated debtors and will hold a priority level below unsecured creditors.

Additionally, pursuant to the Commercial Insolvency Law, the issuance of the insolvency resolution entails the acknowledgment and effectiveness of a general retroactive claw-back period of 270 calendar days (or 540 for other transactions with affiliates, directors or senior officers of the company, or their relatives) from such issuance; the appointed conciliator for the procedure or acknowledged creditors may request the district court to extend the claw-back period in justified circumstances, which shall not exceed three years. Certain acts or transfer of assets may be considered fraudulent and in prejudice of creditors and their rights, if such acts are unjustified and adversely affect the project company's financial position.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Pursuant to the Commercial Insolvency Law, Mexican insurance and bonding companies will be excluded from bankruptcy proceedings; all other commercial entities will be subject to bankruptcy proceedings.

For governmental entities, only commercial entities with government participation may be subject to bankruptcy proceedings; other than those mentioned, no governmental agencies or public entities may be subject to bankruptcy proceedings, and their assets may not be seized or intervened.

The possibility of having state productive companies, such as Pemex and CFE, subject to bankruptcy proceedings is questionable.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Pursuant to Mexican law, seizing assets outside of court proceedings is not allowed. Such acts or actions to seize assets from an individual or company shall be approved and carried out by the relevant courts following the procedural rules.

While a bankruptcy procedure is underway, the seizure of assets is forbidden, except for the court-approved preventive measures in order to guarantee the payment of credits in certain cases.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Foreign creditors are equal to local creditors regarding bankruptcy proceedings. Additionally, Mexican law allows the acknowledgment of procedures carried out abroad and assistance requests by a foreign authority in connection with a procedure being carried out in Mexico. In such cases, the procedures provided in the Commercial Insolvency Law are applicable, unless otherwise provided by international treaties or if there is not international reciprocity.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

There are not any. Notwithstanding the aforementioned, directors of publicly held companies have duty of care and duty of loyalty.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Ownership restrictions may only apply for restricted sectors, which either: (i) reject participation of foreign investors over specific sectors (i.e., transmission and distribution of electricity as public services, nuclear energy); or (ii) limit participation of foreign investors over specific sectors (i.e., ports).

Mexican law does not currently contemplate restrictions, controls, fees and/or taxes on foreign ownership.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

There are multiple bilateral investment treaties and free-trade agreements to which Mexico is a party to, which protect foreign investment (i.e., the North American Free Trade Agreement).

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Nationalisation and expropriation are contemplated by the Mexican constitution, the Expropriation Law and other administrative laws.

Expropriation is permitted to the extent that the same is carried out for public purposes only and an indemnification be granted to the affected party, which shall be on market value terms. Furthermore, bilateral treaties and agreements executed by Mexico with foreign nations protect foreign investment from arbitrary national actions.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Generally speaking, the main investment projects in Mexico will require the authorisation of certain entities which are in charge of supervising general aspects of the market or the public interest, such as: (i) The Ministry of Economy; (ii) The Federal Antitrust Commission; (iii) the Ministry of Environment and Natural Resources; and (iv) The National Water Commission.

The energy practice, which has seen a recent boost in its activity, requires the participation of the following government agencies or departments: (i) The Ministry of Energy; (ii) The Energy Regulatory Commission; and (iii) The Federal Commission of Electricity, which shall oversee the performance of the power-generating agreements, power transformation, distribution, and the granting of the relevant authorisations related to such agreements, among others.

Other sectors, such as communications infrastructure, toll roads, among others, are regulated by The Ministry of Communications and Transportation.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

As in our answer to question 7.1 above, depending on the regulation for the relevant project, the filings and authorisations must be requested to the corresponding governmental entities.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

A private party interested in exploiting natural resources shall request the right to do so, and may be granted such right by means of a permit or concession (depending on the activity). As a general rule, licences and permits are only granted to Mexican entities.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Fees depend on the activity that is being carried out, for instance: (i) regarding the extraction of water, the private party shall pay the fees established in relation to the volume extracted; (ii) for hydrocarbons, private parties carrying out the exploration are subject to paying a percentage depending on the gross value of hydrocarbons produced; and (iii) for the extraction of minerals, fees are determined taking into consideration the surface of the property, which shall be multiplied by a specific factor.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Mexican law does not currently provide for any restrictions on foreign currency exchange.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions or controls for the repatriation of investments. Notwithstanding the foregoing, remittances by foreigners may be subject to tax withholdings at the current applicable rates determined in the Mexican Income Tax Law (*Ley del Impuesto sobre la Renta*).

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

There are no restrictions for the payment of dividends pursuant to Mexican law; however, taxes or other concepts may apply depending on the jurisdiction of the parent company.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

As mentioned before, the Ministry of Environment and Natural Resources is in charge of reviewing the risk and environmental impact statements, which are regulated by the General Law of Ecologic Balance and Environment Protection.

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

The main framework for projects related to government entities is provided by the following regulations:

- Public Works and Services Law (*Ley de Obras Públicas y Servicios Relacionados con las mismas*), which regulates the public works for improvement, development, construction and maintenance of public services and infrastructure.
- Public Acquisitions, Leases and Services Law *(Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), which regulates the acquisitions, leases and services agreements which the Federal Government will enter into with private parties through public bids and direct awards, among others.
- Public-Private Associations Law (*Ley de Asociaciones Publico Privadas*), which regulates the creation of associations, joint ventures and other types of joint relations between private and government parties.

Additionally, there are other regulations which contain the relevant framework for the procurement of projects on specific sectors (i.e., Hydrocarbons Law (*Ley de Hidrocarburos*) and the Electric Industry Law (*Ley de la Industria Eléctrica*).

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

As a general rule, contracting foreign insurance coverage for risks in Mexico is forbidden under the Insurance and Securities Institutions Law *(Ley de Instituciones de Seguros y Fianzas*). Therefore, a Mexican authorised company would be required to issue insurance in Mexico.

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Insurance policies over project assets may be payable to foreign creditors, provided the foreign creditor is the beneficiary and/or loss payee of such insurance. Otherwise, the applicable Collateral Agent shall be named as the beneficiary and loss payee, and the same shall be instructed by the creditors to transfer funds accordingly.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Pursuant to the Federal Labor Law (*Ley Federal del Trabajo*), 90% of the employees of any given entity must be Mexican nationals. 10% of the employees of any given entity may be foreigners, in the event that certain position requires a given specialty and no Mexican nationals are available to take such positions.

The aforementioned restriction will not apply to administrators, directors and general managers.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Even though Mexico is a party to several free-trade agreements, limitations to control import volumes of specific merchandise and equipment may apply.

### 10.2 If so, what import duties are payable and are exceptions available?

Please see the answer to question 10.1 above.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Pursuant to Mexican law, such provisions are included in the Federal Civil Code (*Código Civil Federal*) and its analogue dispositions for the states of Mexico.

*Force Majeure* is traditionally contemplated in the relevant project agreements when dealing with public bids.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Mexican law provides for certain prohibitions, liabilities and criminal responsibility in respect of corrupt practices. The laws which regulate such conducts are:

- The Federal Law of Public Servant's Liabilities (*Ley Federal de Responsabilidades de los Servidores Públicos*), which contains the impeachment proceeding in order to determine the liability of the public servant.
- The Federal Criminal Code (*Código Penal Federal*), which contains a series of criminal offences in which public servants may incur in the exercise of such faculties. Also, the local criminal codes contain their respective criminal offences.
- The General Law of the National Anticorruption System (*Ley General del Sistema Nacional Anticorrupción*), which oversees the creation of a National Anticorruption System in order to prevent and punish administrative misdemeanours and acts of corruption.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Due to the nature of the projects and the number of agreements entered into, the applicable laws may vary in respect of the different agreements. Normally, the main laws which regulate the project agreements are the Public Works and Services Law (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*) and the Public Acquisitions, Leases and Services Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*).

Also, the main legal framework for the various agreements of the project will be the Federal Civil Code (*Código Civil Federal*) and the Commercial Code (*Código de Comercio*), although pursuant to Mexican law, for certain agreements, the parties may agree to submit such agreements to a different jurisdiction and applicable law.

### 13.2 What law typically governs financing agreements?

Pursuant to Mexican law, the financing agreements are governed by the Commercial Code (*Código de Comercio*), General Negotiable Instruments and Credit Transactions Law (*Ley General de Títulos y Operaciones de Crédito*), and the Federal Civil Code (*Código Civil Federal*), among others.

Please note that, in some cases, the parties agree for the financing agreements to be governed by New York or other foreign legislation and subject to such jurisdiction, which is an acceptable and common practice.

### 13.3 What matters are typically governed by domestic law?

All agreements by means of which a security is created in Mexico over assets located in Mexico and agreements related to regulated activities or regulated assets.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

A party may submit itself to a foreign jurisdiction and waive its corresponding jurisdiction.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Local courts recognise the submission to arbitration procedures, national and international. Among the requirements for the arbitral resolution to be enforceable are, among others, that: (i) the arbitration must be agreed by the parties on the relevant agreement; (ii) the legal capacity of the parties of the agreement must be sufficient at the time of the execution of the agreement; and (iii) the resolution and the arbitration must comply with all the agreed formalities.

**15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?**

Mexico is a member to the New York Convention. Additionally, Mexico has subscribed the Inter-American Convention on International Commercial Arbitration, and just recently (as of January 2018) entered the International Centre for Settlement of Investment Disputes.

**15.3 Are any types of disputes not arbitrable under local law?**

Disputes arising from antitrust, bankruptcy, property law, labour and criminal law, tax and administrative law are not arbitrable.

**15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?**

There are no disputes that require a mandatory domestic arbitration.

## 16 Change of Law / Political Risk

**16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?**

Even though not a common practice, parties may contract insurance coverage for political risk.

## 17 Tax

**17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Generally, withholding taxes apply to interest payable to foreign lenders, as well as proceeds resulting from a claim. The rate at which withholding shall be carried out depends on the underlying transaction.

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

Mexico has entered into treaties for avoiding double taxation (more than 50 countries), which have specific characteristics, privileges and restrictions.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

In general, the material issues are those outlined in this chapter.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Entities participating as issuers of bonds or similar capital instruments shall comply with the applicable Securities Market Law and the Sole Issuers Circular (*Circular Única de Emisoras*). Investment will be subject to the oversight of the CNBV.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

This is not applicable in our jurisdiction.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

This is not applicable in our jurisdiction.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

No, its validity would stand.

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Chapter 23

# Mozambique


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Despite the significant legislative reforms aimed at stimulating banking activity (in particular, with respect to capital ratios and limits and foreign exchange operations), Mozambique has not witnessed relevant developments in its project finance market. Its international partners (specifically the IMF) have maintained their position regarding the suspension of financial assistance to Mozambique, which has had a major impact on the economy, leading to the country being unable to initiate its recovery process. The metical has kept a very fragile position against the dollar and interest rates maintained the very high levels already experienced in 2016, considerably aggravating the indebtedness capacity of companies. A weak economy and the inexistence of relevant public investment have also led to a decrease in foreign direct investment; in particular, with regard to new projects. On the positive side, there is a focus on achieving consensus at the military-political level, which is essential for creating the right conditions for investment.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The most significant project financings in Mozambique in recent years are the Nacala Corridor Railway and Port Project (the Nacala Project), the Coral South Floating LNG Project (the Coral Project) and the Moatize-Macuse Railway and Port Project (the Moatize Railway and Port Project).

The Nacala Project was signed in November 2017 by and between the Japanese Mizuho Bank, Ltd. alongside the Japan Bank for International Cooperation, the African Development Bank and nine other private financial institutions and the four project companies established in Mozambique and Malawi by Vale S.A. and Mitsui & Co, Ltd. in connection with project finance loans in the total amount of USD 2.73 billion. The project connects the Moatize coal mine developed by Vale S.A. and Mitsui & Co, Ltd. in the northern Mozambican province of Tete to the port of Nacala through a part of Malawi and will enable rail and ship transport of produced coal up to a volume of 18 million tonnes *per annum* (MTPA).

The Coral Project is the first project to reach final investment decision (FID) in the development of the gas resources discovered in the Rovuma Basin. The USD 4.675 billion financing of the Coral South Floating Liquefied Natural Gas (FLNG) project in offshore Mozambique to be developed by Italian oil & gas firm Eni and its partners closed in May 2017. The FLNG unit will have a capacity of around 3.4 MTPA and will be the first FLNG in Africa. The construction of the FLNG facilities will be financed under a project finance structure covering around 60% of its entire cost. The financing agreement has been subscribed by 15 major international banks and guaranteed by five export credit agencies.

The Moatize Railway and Port Project was awarded to Thai Moçambique Logística, a joint venture between Thailand-based Italian-Thai Development Company with a 60% share, the local State-owned ports and railways company Portos e Caminhos de Ferro de Moçambique (better known as CFM) with a 20% share and a local private-sector consortium Corredor do Desenvolvimento Integrado do Zambeze (Zambeze Integrated Development Corridor, generally known by the acronym CODIZA) with a 20% share. The project, which would originally connect Moatize and Macuse and would run for 500 kilometres, was amended in November 2017 to extend the railway for a further 120 kilometres west of Moatize to Chitima. The Macuse port will be designed to accommodate ships of up to 80,000 tonnes, and annual exports are expected to start at 25 MTPA, eventually increasing to 100 MTPA.

The projected cost of the project is around USD 2.7 billion (USD 810 million for the port and the remainder for the railway) and the financing package is expected to complete during the course of 2018.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Mortgages and pledges are the most common security interests created under the laws of Mozambique, and their terms and formalities vary depending on the type of assets at stake. Assignments of receivables or of future credit rights by way of security are also quasi-security interests commonly used.

Immovable property (other than land) and movable assets subject to registration (vehicles, vessels and aircrafts), including the rights relating thereto, may be subject to mortgage, whilst movable assets not subject to registration may be pledged.

Pledges may be created through a written agreement between the debtor and creditor, and generally require transfer of possession over such assets to a pledgee or to a third party.

Note that, as ruled by Decree-Law no. 29 833, of 17 August 1939, in the case of mercantile pledge (*penhor mercantil*) granted as security of banking credit facilities, the physical possession of the pledged goods is not required in order for the pledge to be fully valid and effective.

Moreover, and although not expressly established in the law, the concept of "rotative pledge" is accepted by the doctrine and may apply to a mercantile pledge. For that purpose, the parties agree that the stock is dynamic and every time a new item becomes part of the stock and enters the pledge, it will replace the used stock under the pledge by means of sub-rogation. The pledge granted in the above terms should, in our view, be treated as a single pledge, therefore not triggering stamp tax, other than the stamp tax due in connection with withdrawals under the financing or on the pledge as at the signing date, if not ancillary and simultaneous with the financing.

Regarding the pledge, it is important to note that the Government of Mozambique prepared, in 2016, a draft law on the creation of security interests over moveable assets, which unfortunately has not been approved yet.

Mortgages must be granted by public deed signed before a notary and must be registered with the competent registration office.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Under the laws of Mozambique, land cannot be privately owned and, accordingly, cannot be mortgaged. Land and its associated resources are the property of the State.

The Land Law (Law 19/97 of 1 October), however, grants private persons the right to use and benefit from the land known as D*ireito do Uso e Aproveitamento da Terra* (DUAT). Although the land itself cannot be owned, all assets built on the land in association with the DUAT can be owned and consequently mortgaged (in case of immovable assets) and pledged (movable assets), including any machinery or equipment.

Even though Mozambican law does not expressly provide for the possibility of creation of factory mortgages, there are precedents of factory mortgages having been successfully created and registered in Mozambique, covering project facilities and all movable property located therein.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

According to Mozambican law, receivables can be pledged by the respective owner, provided the latter is entitled to transfer such receivables.

A pledge over receivables can be created through a written agreement between the parties and it qualifies as a pledge of credits. The effectiveness of a pledge of credits is subject to the pledgor's counterparty being served notice thereof or accepting the pledge.

After the debtor is notified or has accepted the pledge, payment of the receivables must be made jointly to the pledgor and the pledgee. As a means of circumventing practical difficulties arising from the joint payment requirement, it is common for the pledgee to authorise the third-party debtor to continue to carry out the relevant payments to the pledgor until notice to the contrary.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over cash deposited in bank accounts is considered a pledge of credits which is subject to the same procedure for creation and perfection as the pledge of receivables (see above).

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

In a limited liability company by shares (*sociedade anónima*), the creation of security requires the endorsement of the share certificates by the pledgor, the registration of the pledge in the company's share register book and the delivery of the share certificates to the pledgee (creditor). If the shares are bearer shares, the creation and perfection of security is made by delivery of the shares to the pledgee.

In a limited liability company by quotas, where the shareholding is not materialised in share certificates (*sociedade por quotas*), security is created through the execution of a pledge agreement between the pledgor and the creditor, as the prior notification or consent of the company, as applicable, and registration of the pledge with the Commercial Registry Office is required.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The costs of public notary and registration fees, if and when applicable, vary according to the secured amount and number of pages of the deed or private document.

Stamp duty on mortgages and pledges is charged at 0.6% of the total amount secured, unless those security interests are ancillary and created simultaneously with a loan, and the loan has already been subject to a similar taxation (no duplication of tax applies).

The stamp duty rate on loans vary, as follows: 0.04% for loans with a maturity of less than a year; 0.5% for loans with a maturity of more than a year; and 0.6% for loans with a maturity equivalent to or more than five years.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Filing, notification and registration procedures before the competent authorities normally do not take more than 20 days.

Expenses vary in accordance with the value of the asset but, in any event, the amount is not significant.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Generally, the creation of security over assets which are in the private domain does not require any regulatory or similar consent. Conversely, the creation of security over assets in the public domain is prohibited.

It should be noted that restrictions may be imposed regarding the creation of security over concession or regulated assets, notably through specific regulations or the relevant concession agreements.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

The concept of a "trust" is not recognised in Mozambique. It is, however, common to have security being granted to a security agent on behalf of the lenders; in which case, even if the relevant agreements expressly spell out that the security agent holds security for the benefit of a given lending syndicate, the security agent shall appear as the sole beneficiary of the security entitlements and shall be the sole entity with the authority to file enforcement procedures in respect thereof (unless all lenders are disclosed as holders thereof). Hence, in the context of the enforcement procedures, the security agent may be required to prove before a court that it holds title to the secured obligations.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

The only way to have all the lenders recognised as beneficiaries of a given security interest is to name them as holders of the secured obligations and corresponding security. However, this makes it necessary to amend the relevant agreement (or execute a new notarial deed) each time the lenders assign, buy or sell part of the loans, which may not be a practical solution. Alternatives may be put in place, as is the case where the security agent is made the registered beneficiary of the security and either benefits from a parallel debt or is made contractually bound to assign the secured obligations to all the lenders prior to enforcement of the security. Other alternatives include having the entire lending syndicate registered as secured creditors but with proper intercreditor arrangements in place (setting up the rules for action by individual creditors and for allocation of the proceeds of security enforcement).

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

The enforcement of a mortgage by the creditor can only be achieved through a judicial proceeding. As for pledges, the sale can be completed judicially or, if previously agreed by the parties, through a private sale.

Appropriation or foreclosure of the asset is generally not available to the beneficiaries of mortgages or pledges.

It is common practice to grant an irrevocable power of attorney to the creditor pursuant to which the creditor is authorised to sell the secured asset on behalf of the pledgor/debtor and be paid from the proceeds of the referred sale.

Court procedures usually take several months or in certain cases more than a year. That period may be further extended if the complexity of the legal arguments at stake leads to court appeals.

Please refer to section 5 below for restrictions concerning insolvency/bankruptcy and restructuring proceedings.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

All transactions with and/or between Mozambican and non-Mozambican persons or legal entities is subject to either registration or prior authorisation with the Bank of Mozambique or both, depending on the transaction at stake. In case of foreclosure, the re-exportation of the invested capital is subject to authorisation by the Bank of Mozambique.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

The insolvency law (Decree-Law no. 1/2013, of 4 July 2013) in Mozambique establishes a "stay period" regarding all ongoing claims against the debtor, following the opening of an insolvency proceeding. That period is 180 days. This means that all proceedings that were ongoing are suspended when the insolvency/judicial recovery is declared.

It is possible to file new claims against the debtor after the insolvency is declared and those must be notified to the judge in the insolvency proceedings by either the judge in the new proceedings or by the debtor himself. However, those new proceedings can never be other insolvency proceedings, because the law prohibits the filing of new insolvency proceedings against the same debtor.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

The declaration of insolvency results in all debts being accelerated and all assets being collected and sold to pay creditors. The creditors are paid with the proceeds of the sale in the following order: (i) labour credits; (ii) secured credits; (iii) tax credits; (iv) ordinary credits; (v) contractual and tax penalties; and (vi) subordinated credits.

When different security interests are granted over the same asset, the first (older or higher ranking) creditor shall be paid first, except in the case of the right of retention which entitles creditors to hold certain assets in their possession until their credit is paid. Credits with a right of retention have preference over common credits secured by pledges and mortgages regardless if the pledges and mortgages were created first.

**5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

The insolvency regime is applicable to all persons or legal entities, except for public companies and entities, insurance companies, credit institutions, as well as financial corporations which are subject to specific insolvency rules and proceedings in the respective regimes.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

As referred to in the answer to question 5.2 above, a creditor may retain possession of the assets pertaining to a certain entity if it is in the possession of such assets and if the claim arises from expenses or damages caused by such assets.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Mozambican law also provides for the judicial and extrajudicial recovery processes (Decree-Law no. 1/2013, of 4 July 2013).

The judicial recovery can only be initiated by the debtor by filing a petition with the court. If accepted by the court, the debtor must submit a recovery plan to the court showing evidence of the viability of the business, a detailed description of the recovery process and the proposed recovery measures. If the plan is accepted by the court and not challenged by any creditor, the plan is approved and the restructured claims of the company (i.e. new rights and obligations set out in the plan, after sale of assets, if applicable) shall be binding on the debtor and creditors. If, on the other hand, the plan is challenged, a general meeting of creditors must be convened and the plan approved by more than 50% of all creditors to bind all creditors.

The extrajudicial recovery is also initiated by the debtor. This procedure is a special mediation procedure in which the recovery plan is negotiated with the creditors. If the plan is approved by creditors representing 3/5 or more of the total amount of credits, a recovery agreement is deposited in a judicial court and such agreement shall in effect constitute an enforcement order, subject to specific performance and grounds for declaring insolvency should the credits not be paid.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Directors may remain in office, supervised by the insolvency administrator, whilst the insolvency proceedings are pending. They may, however, be dismissed where they have contributed to the worsening of the economic situation of the company.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

As a general rule, Mozambican law does not require companies to reserve a percentage of their shareholdings to local partners.

Nevertheless, for the purposes of compliance with the rules on local content in certain sectors such as oil & gas and mining, with regard to hiring nationals, only companies with the majority of the share capital held by Mozambican persons or legal entities (i.e. 51% or more of the share capital) are considered Mozambican companies.

In addition, direct foreign investments are subject both to authorisation and registration with the Bank of Mozambique so that the investor can benefit from the non-application of restrictions on the transfer of capital (invested and exportable) and dividends abroad, provided certain requirements are met (e.g. compliance with tax duties).

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Even though Mozambique is a party to several bilateral investment treaties with other nations (South Africa, Germany, Algeria, Belgium, China, Cuba, Denmark, Egypt, USA, Finland, France, Indonesia, Italy, Mauritius, the Netherlands, Portugal, Sweden, the United Kingdom, Vietnam, India, Switzerland, Spain and Zimbabwe), none of those treaties provide protection from foreign ownership restrictions imposed under sector-specific legislation.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Nationalisation is governed by Decree-Law no. 5/76, of 5 February 1976, which determines the reversion to the State of all income buildings as well as those that were abandoned. With the implementation of this law, the Mozambican State began to provide housing to citizens for very low prices, as symbolic amounts. Even though this piece of legislation has not been revoked, it has only been applied immediately after the national independence, as it does not conform to the current reality in Mozambique.

The Constitution of Mozambique provides that any property right may be expropriated in case of public necessity, utility and interest, and compensation shall be payable to the property owner.

Also, the Land Law establishes that DUAT may be revoked on grounds of public interest, upon payment of a compensation to the DUAT holder. In those cases, all assets and improvements that exist on the land revert in favour of the State.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The governmental agencies or departments with authority over projects depend mainly on the relevant sector of activity of a project. In general terms, the respective Ministries (energy, infrastructure, transport, health, etc., and – when applicable – environment) are responsible for the launch, licensing and major regulation of the projects, either directly or through their governmental departments. In this context, the most relevant authorities with authority over projects are: the National Institute of Mining (INAMI); the National Institute of Petroleum (INP); the Ministry of Land, Environment and Rural Development; the Agency for the Promotion of Investments and Exports (APIEX); and the Bank of Mozambique.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Obligations set out in financing or project documents of a private nature are only enforceable before the courts after being authenticated or certified by a notary or by any competent authority.

Financing contracts entered into with foreign entities are subject to prior authorisation of the Bank of Mozambique.

Exception is made to finance contracts for amounts equivalent or less than USD 5 million and which satisfy the following conditions: (i) the interest rate is less than base lending rate for the relevant currency; (ii) the sum of relevant rate and margin is not more than the rate used in Mozambique; and (iii) the repayment period is at least three years or more. Those financings are treated as pre-authorised and subject only to registration.

Shareholder and intercompany loans made by non-residents to their resident subsidiaries or affiliates will also be treated as pre-authorised and subject only to registration if: (i) they are interest-free, the repayment period is at least three years and no fees and other charges apply; or (ii) the interest rate is lower than the base lending rate for the relevant currency, the repayment period is at least three years and the loan amount is a maximum of USD 5 million. Note that, in those cases, registration relates to each disbursement amount received by the entity in Mozambique within the pre-authorised finance contract and to each repayment of principal made thereunder. Payments of interest and fees or charges under or in connection with finance contracts qualify as current transactions and are not subject to registration.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

In general terms, the performance of economic activities in Mozambique is subject to licensing. Also, the granting of the right of use of an asset in the public domain is admissible through a concession regime.

It should be noted that certain activities in sectors such as oil & gas and mining are kept to companies in which the majority of the share capital is held by Mozambican persons or legal entities (i.e. 51% or more of the share capital).

Please note that there is no private ownership of land in Mozambique.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

The extraction or export of natural resources are subject to the payment of Corporate Income Tax, Valued-Added Tax and other taxes levied under the tax regime applicable to mining and oil & gas activities, as applicable.

Petroleum Production Tax is levied on oil & gas produced in each concession area and is due by corporate entities performing petroleum operations under a concession agreement. The tax rate is 10% for oil and 6% for gas, and is levied on the value of the oil & gas produced and may be paid in cash or in kind.

The following rules and taxes apply to mining activities: (i) Tax on Mining Production (IPM); (ii) Surface Tax (ISS); (iii) Tax on Income Deriving from Mineral Sources (IRRM); and (iv) special rules to determine the taxable income under Personal Income Tax and Corporate Income Tax.

IPM tax rates vary between 8% for diamonds, 6% for precious metals, precious and semi-precious stones and heavy sands, 3% for basic metals, charcoal, ornamental rocks, etc. and 1.5% for sand and stone, and are levied on the value of the extracted mineral product after treatment.

ISS is due annually and is levied on the mining area of exploration. The rate varies between MZN 17.50/ha (metical per hectare) and MZN 105,00.00/ha, depending on whether they relate to the first year of prospecting and research or the sixth year onwards of the mining concession, respectively, and are levied on the number of hectares of the area subject to a mining title (prospecting licence, research, mining concession or mining certificate).

The IRRM tax rate is 20% on the cash earnings accumulated during the year, determined according to specific rules.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

All transactions between resident and non-resident entities in Mozambique, which result or may result in payments or receipts from abroad, are subject to the exchange control legislation which may or not require prior authorisation of the Bank of Mozambique depending on the nature of the relevant transaction.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Approved foreign investment projects can remit and repatriate investment returns. Such remittances are concluded through the local banking system and upon obtaining tax clearance from the Ministry of Finance.

A 20% withholding tax is charged on both interest and fees paid to non-resident lenders. Where applicable, Valued-Added Tax is also due at the rate of 17% on the total income from services rendered for consideration in Mozambique.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

The opening and operation of onshore foreign currency and offshore bank accounts is authorised for exporters, companies or organisations, employees of international companies or organisations and all entities that generate or receive foreign currency. The opening of bank accounts by any other persons or legal entities require prior authorisation by the Bank of Mozambique.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Dividend payments are subject to a 20% withholding tax, unless said dividends concern shares listed on the Mozambique Stock Exchange, in which case the withholding tax is of 10%. These tax rates may be reduced by the application of a tax treaty and are not applied in the case of dividends paid to a Mozambican company that has held 25% or more of the share capital in an associated company in Mozambique for at least two years. Mozambique has tax treaties with Portugal, Mauritius, the United Arab Emirates, South Africa, India and others.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Pursuant to Decree 54/2015, of 31 December 2015, any activity which may affect the environment is subject to an evaluation of the potential impact (an environmental impact assessment) to determine its environmental feasibility, which concludes with the issuance of an Environmental Licence.

Occupational health and safety in Mozambique is governed, in general terms, by the Constitution and the Labour Law. To some activities considered specific there are special legislation, e.g. Legislative Diploma 120/71, of 13 November 1971 (for Civil Engineering), Legislative Diploma 48/73, of 5 July 1973, Provincial Decree 61/73 of 20 November 1973 (for Industrial Establishments), Decree 61/2006, of 26 December 2006 (for geological and mining activities), Decree 13/2015, of 3 July 2015 (for mining activities), and Decree 28/2016, of 18 July 2016 (for the production, transportation and commercialisation of cement).

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

Mozambique's general procurement terms stem from the Regulation on Contracting Public Works, and Procurement of Goods and Services by the State (Decree 5/2016, of 8 March 2016), applicable to all State bodies and institutions, including local government and companies owned by the State. The Regulation includes a general mechanism (public tender) and an exceptional contracting mechanism (limited call for tenders by prior qualification, limited call for tenders, two-stage tender, tender by auction, small tender, tenders by means of quotes and direct award).

Sector-specific legislation (mainly in natural resources) and the mega-projects legislation also include procurement rules and principles of mandatory application, generally accommodating similar procurement rules or contracting methods (public tender, restricted tender, two-stage tender and direct award).

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Mozambican law generally requires insurance to be provided by local insurers. Because of the small local insurance market, entities can obtain insurance with foreign insurers where it is not possible to insure with local insurance companies and provided that prior notice is given to the regulator – Instituto de Supervisão de Seguros de Moçambique (ISSM).

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Payment of insurance policies contracted offshore by the insured person requires presentation, by the interested parties, of evidence that the necessary approval has been obtained from the competent authority in the country in which the insurance has been taken out, in accordance with applicable legislation.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The regimes for employment of foreigners in Mozambique which generally apply are (i) the quota regime, (ii) the work permit regime, and (iii) investment projects approved by the government.

Under the quota regime, the allowed quotas for foreign employees are 5% of all workers in large companies, 8% of all workers in medium-sized companies, and 10% of all workers in small companies. In all cases, prior notice to the Minister of Labour is required.

Please note that in case of the exploration and production concession contracts for Rovuma Areas 1 and 4 under Decree-Law no. 2/2014, of 2 December 2014, the quota is the one established in the workforce plan.

The work permit regime (out of quota) will only apply, if there are no Mozambican workers who have the necessary academic or professional qualifications, or there are qualified but insufficient Mozambican workers.

In the case of investment projects approved by the government, the quota allowed for foreign workers is that approved for the project. The work permit is not required and notice given within 15 days of the date of entry of the foreign citizen in the country is sufficient.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Goods entering into Mozambique for use in the country must be cleared through the appropriate customs procedures such as (i) temporary importation, (ii) temporary exportation, (iii) re-importation, (iv) re-exportation, (v) customs transit, (vi) storage, (vii) industrial free zones, and (viii) customs warehousing.

Certain products are excluded from entry under some of these regimes. That is the case for the importation of left-hand drive vehicles used for commercial purposes in Mozambique which is prohibited. Other prohibitions and import restrictions apply based on health and moral grounds and in compliance with international conventions to which Mozambique is a party, including prohibitions under the multilateral environmental agreements to which Mozambique is a party.

### 10.2 If so, what import duties are payable and are exceptions available?

All goods imported into Mozambican territory are subject to the payment of customs duties set forth in the Customs Tariff Book, which include *ad valorem* charges, service charges, Specific Consumption Tax and Value-Added Tax. Specific rules can be applied to SADC countries. Authorised investment projects and activities under certain sector-specific legislation may benefit from exemption from import duties on the importation of capital assets (equipment and machinery).

Goods imported under the temporary importation regime benefit from a grace period on payment of the relevant customs duties and other import charges and require the delivery of a bond (the amount varies depending on the amount of the customs duties and charges suspended).

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Even though there is no specific legal provision on the issue, *force majeure* is accepted and enforceable in Mozambique under the Civil Code. In general, project contracts provide for detailed provisions in relation to *force majeure* events and the terms under which the parties have agreed to mitigate the effects of *force majeure*, and exclude liability for breach of contract resulting from a *force majeure* event. The terms agreed between the parties in this respect are generally accepted and enforceable in Mozambique.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

No specific rules apply on corruption and bribery activities in the projects sector. Nevertheless, entities are subject to general criminal law. According to the Mozambican Criminal Code and Law 6/2004, extortion, attempted corruption and bribery are prohibited. The penalties for bribery and corruption are: imprisonment for up to eight years; and payment of pecuniary fines.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

The Mozambican Civil Code establishes that contracts are governed by the law elected by the parties, if such election has a connection with the contract or is supported by an interest in good faith of the parties. However, a foreign law elected in accordance with those rules will not be acceptable if it violates fundamental principles of Mozambican public policy, and certain Mozambican principles and rules that are mandatory for the project sector. Concession contracts and other project agreements entered with public entities are typically governed by Mozambican law.

Construction contracts relating to works to be carried out in Mozambique must always be governed by Mozambican law.

### 13.2 What law typically governs financing agreements?

Financing agreements are typically governed by English law.

### 13.3 What matters are typically governed by domestic law?

The Mozambican conflict-of-laws rules regulate that rights regarding possession, ownership and other related rights over movable or immovable assets are governed by the law of where the property is located. This includes the creation of security over those assets.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Submission to a foreign jurisdiction and waiver of immunity are valid and enforceable in Mozambique to the extent permitted by law. Submission to a foreign jurisdiction is prohibited, regardless of contractual provisions, if, in accordance with the Mozambican mandatory procedural rules, the Mozambican courts have jurisdiction to decide on a certain matter.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Arbitral awards are recognised by local courts subject to the requirements and procedures for enforcement of arbitration awards stated in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and provided that they are issued in the territory of another contracting State.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Mozambique is a contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1998. The Constitution states that international conventions are recognised in the internal judicial system and have the same force as internal legislation. Also, the Arbitration Law states that the international conventions do prevail over the Law and other internal provisions.

Mozambique is also a contracting State to the Washington Convention regarding the Settlement of Investment Disputes between States and Nationals of Other States and the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), as well as to the Additional Facility Rules of ICSID approved on 27 September 1978, and is a member of the International Chamber of Commerce.

### 15.3 Are any types of disputes not arbitrable under local law?

Mozambican law establishes that all disputes are arbitrable, except disputes of a personal nature (e.g. family matters) or disputes that are expressly subject to the exclusive jurisdiction of a judicial court.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Disputes about labour rights and disputes arising out or in connection with administrative agreements are subject to domestic arbitration.

## 16 Change of Law / Political Risk

**16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?**

While direct agreements with the government (in its capacity as grantor in a concession contract) are common, those agreements do not offer any particular political risk protections.

Change-in-law risk is normally addressed by contract in the standard terms for international project finance deals.

## 17 Tax

**17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

A 20% withholding tax is levied on both interest and fees paid to non-resident lenders, except where there is double taxation treaty in force between Mozambique and the lender's home country. The enforcement of security, in general terms, does not trigger any taxes. However, this must be analysed on a case-by-case basis (e.g. the enforcement of a mortgage, with the subsequent transfer of ownership over real estate property may trigger a 2% Property Transfer Tax – SISA).

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

Mozambique has an attractive regime for foreign investors established in the Mozambican Investment Law, its regulation and the Tax Benefits Code. These laws provide a wide range of tax incentives to attract foreign investment to the country and for which foreign investors may be eligible, such as deductions from the amount of tax assessed, accelerated depreciation, tax credits, exemption from tax and the reduction in tax rate and other tax payments, the deferment of the payment of taxes and other special tax measures.

For the costs and taxes to create any type of securities, please see question 2.6 above.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

We believe that the most relevant issues have been addressed.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

The capital market in Mozambique covers a primary market (the market for new issues of securities) and a secondary market (the trading market for previously issued securities between third parties). Other concepts within this framework include the stock market and over-the-counter market, the latter being a market in which supply and demand are dealt with outside the stock market, with the involvement of authorised financial intermediaries.

A limited liability company by shares (*sociedade anónimas*) may issue bonds (designated as corporate bonds) up to the value of their share capital inscribed in the most recent balance sheet and income statement, subject to authorisation by general meeting or the board of directors, as stipulated in the articles of association.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

To the best of our knowledge, there is no experience of Islamic project finance in Mozambique, nor are there any finance instruments structured in accordance with Islamic law.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

See question 19.1 above.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

The inclusion of interest payment obligations in a loan agreement is valid and enforceable in Mozambique.


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Since 2016, Teresa has been a partner in the Projects – Infrastructures, Energy & Natural Resources practice group. Before joining VdA in 2008, Teresa was an associate with the project department at Allen & Overy (London) where she acquired expertise in the financing of projects in various jurisdictions. From 2011 to 2014 she acquired reputation as deputy at the Cabinet of the Secretary of State for Infrastructure, Transports and Communications, being responsible for drafting and reviewing legislation concerning these sectors as well as leading negotiation teams in the context of the infrastructure PPP review requested by the bail-out arrangements applying in Portugal between 2011–2014. Teresa is frequently sought for leading-edge national and international transactions on project finance transactions and capital markets, mainly focused on the infrastructure and energy sectors, due to her high expertise. She has extensive experience in overseas markets, particularly in Portuguese-speaking African countries, namely Mozambique.


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Founded Guilherme Daniel & Associados in 2016. As the founder, he is actively involved in several matters, mainly in corporate, energy and natural resources (particularly, oil & gas) and infrastructure.

Before founding Guilherme Daniel & Associados, Guilherme was the General Counsel and Secretary of the Board of Directors and Executive Commission at Petromoc – Petróleos de Moçambique, S.A.

Provided support to the Ministry of Energy; participated in the drafting of key legal instruments in the downstream petroleum sector regulation (since 2006).

He works actively with IGEPE on several corporate and corporate governance matters.

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# Netherlands

Ploum

Tom Ensink

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

The project finance market remains very liquid with recent transactions in infrastructure public-private partnerships (PPPs) and renewables, as well as refinancings. New assets including geothermic assets have been added to the range of project financings. Over the course of 2017, financing conditions for borrowers have improved even further and are very favourable.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

In 2017 alone, we have seen numerous closings dominated by refinancings and smaller renewables transactions. Some significant examples include:

- Eurofiber Refinancing.
- Gemini Offshore Refinancing.
- Krammer Onshore Wind.
- Ooltgensplaat Solar.
- Trias Geothermic Greenfield.
- Eefde Lock PPP.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

We do not have a general security agreement in the Netherlands. This means that each (type of) asset has to be pledged (in case of moveable property or rights) or mortgaged (in case of real estate or registered property) individually. Under Dutch law, the formalities to be taken into account by creating a security right differ according to the type of asset.

It is, however, common to combine various types of pledged assets in one deed which is then sometimes referred to as an "omnibus pledge deed".

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security over real property located in the Netherlands is created pursuant to a notarial deed of mortgage (*hypotheek*) executed before a Dutch civil law notary. The notarial deed must be registered with the Dutch Land Registry Office (*Kadaster*).

The ownership of cables and pipelines can be established by way of a right of *superficies* (underground or overground) or as the registration of a network/grid (underground), followed by registration with the Dutch Land Registry Office (*Kadaster*). Both the right of *superficies* and the ownership of a registered network/grid are real rights and can be encumbered with a mortgage.

Security over moveable assets (such as plant, machinery and equipment) located in the Netherlands can be created as (i) a possessory pledge (*vuistpand*), or (ii) a non-possessory pledge (*bezitloos pandrecht*).

Possessory pledges are rarely created, as they require the pledgee to take possession of the pledged moveable asset. A non-possessory pledge is created pursuant to a private deed of pledge. A non-possessory pledge can be created in two different ways: (i) by a notarial deed; or (ii) by a private deed of pledge which must be registered with the Dutch Tax Authorities (for date stamping purposes only). It is common practice to create a non-possessory in the latter form, i.e. as a private deed of pledge to be subsequently registered.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security over receivables can be created as (i) a disclosed pledge (*openbaar pandrecht*), or (ii) an undisclosed pledge (*stil pandrecht*).

A disclosed pledge of receivables is created by a private deed of pledge and notice of the right of pledge to the debtor of the pledged receivables. An undisclosed pledge of receivables can be created in two different ways: (i) by a notarial deed; or (ii) by a private deed of pledge which must be registered with the Dutch Tax Authorities (for date stamping purposes only). It is common practice to create an undisclosed pledge in the latter form, i.e. as a private deed of pledge to be subsequently registered.

An important limitation of an undisclosed pledge is that, unlike a disclosed pledge, an undisclosed pledge can only be created over existing receivables and future receivables which directly derive from a legal relationship existing at the time of the execution of the pledge deed. In order to ensure that these future receivables are also covered under an undisclosed pledge, it is necessary to periodically execute supplemental deeds to be registered with the Dutch Tax Authorities. In practice, many Dutch banks have now introduced the concept that only a "master pledge document" is created, in which the pledgor empowers the bank to register supplemental deeds. The bank subsequently registers one supplemental deed on behalf of all of its customers.

**2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

It is common practice to create a disclosed pledge over bank (credit) accounts, with the co-operation of the account bank. Pursuant to the Dutch general banking conditions, a Dutch account bank has certain security interests in the bank account, such as a right of pledge and a right of set-off. It would therefore only make sense to pledge the cash if the account bank would co-operate with the creation of such a disclosed pledge.

**2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?**

A distinction should be made between registered shares in a Dutch private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid* or *BV*) and a Dutch public company with limited liability (*naamloze vennootschap* or *NV*) that can have registered or bearer shares (*aandelen aan toonder*).

A pledge of registered shares in a Dutch BV or NV is created by a notarial deed executed before a Dutch civil law notary. However, the articles of association may prohibit or restrict the creation of a right of pledge over shares and/or the transfer of voting rights attached to the shares, in which case the articles of association have to be amended.

In general, the notarial deed of shares will provide that the shareholder remains entitled to collect dividends and to exercise its voting rights until the occurrence of an event of default and notice given thereof by the pledgee.

The (registered) shares are not in certificated form, but registered in the shareholders' register of the BV or NV.

The procedure set out under question 2.2 above with respect to moveable assets applies *mutatis mutandis* to a pledge of bearer shares held or deposited in the Netherlands.

Shares can also be deposited in a securities account and pledged in this form. A right of pledge over securities which are transferable through book entries under the Dutch Securities (Bank Giro Transactions) Act (*Wet giraal effectenverkeer*) is created by a book entry in the name of the pledgee by the custodian bank.

**2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?**

Notarial fees are involved in relation to a mortgage or a pledge of registered shares, which must be laid down in a notarial deed that will be executed before a Dutch civil law notary. Notarial fees are not regulated and not dependent upon, e.g., the deal value. It is possible to make an individual agreement with a Dutch civil law notary. The notarial fees in the Netherlands are regarded as reasonable, especially in comparison with other jurisdictions in which the fee amount is based on the deal value.

The mortgage of real estate must also be laid down in a notarial deed for which a notarial fee is charged. Furthermore, the Dutch Land Registry Office (*Kadaster*) will charge a (nominal) fee for the mandatory registration of the mortgage with the Dutch Land Registry Office (*Kadaster*).

There are no stamp duties on security rights over assets. For the sake of completeness, the only stamp-duty-type taxes are real estate transfer tax (not for mortgages or transfer of grids) and insurance premium tax.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

No, they do not.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

There might be consents required for the mortgage over real property, especially when it concerns real rights that are to be encumbered with a mortgage. Depending on the specific conditions under which the real rights are established, it is possible that the landowner will have to give its consent. Furthermore, should the real property already be encumbered with another right of mortgage, this mortgage-holder shall have to consent as well.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

Dutch law does not recognise the concept of a "trust", but it will recognise the role of a security trustee/agent if duly established and existing under the laws of another jurisdiction. However, pursuant to Dutch law, security can only be created in favour of the creditor of the claim (see question 3.2 below).

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

To allow a trustee or agent to hold and enforce security rights on behalf of the lenders, it is common practice to insert a "parallel debt" in the finance documentation (preferably the loan agreement or intercreditor agreement). A parallel debt constitutes a separate (but not double) claim from the borrower and/or guarantor to the security trustee or agent for an amount equal to the amount owed to the syndicated lenders. Any payment by the borrower to the security trustee or agent (or proceed recovered from security) in respect of the parallel debt equally discharges the borrower's debt to the lenders.

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

There are no significant restrictions which may impact the timing or value of enforcement in the Netherlands.

The general rule under Dutch law is that a Dutch security right is enforced by way of public sale. Enforcement by way of private sale requires prior authorisation from the competent Dutch court. A right of pledge may also be enforced by way of private sale if agreed upon between the pledgor (or trustee in bankruptcy) and the pledgee, after the payment default has occurred.

In general, there are no regulatory consents required for the enforcement of security, except for the sale of shares in a Dutch entity, which may require the prior approval of the Netherlands Authority for Consumers and Markets (ACM).

For the enforcement of inventory, see the rights of the Dutch Tax Authorities in question 5.2 below.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

No particular restrictions apply to foreign investors or creditors in the event of foreclosure on the project or related companies.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

The Dutch Bankruptcy Act provides that, as a general rule, secured creditors can enforce their rights as if there were no bankruptcy. They have so-called "separatist" status. Nevertheless, the enforcement of moveable and immoveable assets may be affected by the standstill period, which the administrator may request the court to render applicable for two months, and which can be prolonged for another two months. Furthermore, the administrator may subject the pledgee or mortgagee to a term within which it must enforce its security rights. If it fails to do so, the administrator can enforce the secured assets. The proceeds will then fall into the bankruptcy estate. The secured creditor must file its claim with the bankruptcy estate. It will have a preference right on the proceeds, but has to share in the general bankruptcy costs, just as other ordinary creditors, and will only receive the proceeds upon distribution of all the proceeds to the creditors of the estate.

The administrator is obliged to co-operate by providing necessary data to enforce (collect) the pledged receivables, but is entitled to reasonable remuneration.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

Yes. The most important is that the Dutch Tax Authorities have a preferential right on all assets (rights and goods) of a taxpayer. With respect to certain moveable goods (most notably inventory, but not e.g. stored supplies) that are present in the premises of the taxpayer, the preferential right of the Dutch Tax Authorities even supersedes the rights of the holders of a non-possessory pledge (*bezitloos pandrecht*) for the collection of wage tax, VAT, custom duties and certain duties and taxes.

The enforcement of secured rights on such assets requires pre-notification of the Dutch Tax Authorities. After notification, the Tax Authorities have four weeks to announce whether they will enforce their rights to the abovementioned moveable goods. If they do not enforce their rights, the secured creditor may proceed with the enforcement without the risk of having to hand over the proceeds to the Dutch Tax Authorities.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No private entities are excluded from bankruptcy proceedings.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Secured creditors have the right of immediate execution without proceedings on the merits, or a court decision, being necessary.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Some courts have co-operated with requests to appoint a "silent administrator" to prepare for a "pre-pack" style bankruptcy, but without any legal basis being present. A legislative proposal has been made, but has not been accepted yet. However, since the judgment of the ECJ of June 22nd, 2017 (*Estro*) a pre-pack style bankruptcy no longer provides the general certainty that the entire staff will not be transferred to the party that continues the operations of the bankrupt company.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

A director may be personally liable on the basis of tort towards a creditor if, at the time of entering into the transaction, this director knew or should have known that the company was not able to comply with its obligations arising out of this transaction, and the director knew or should have known that the company did not have sufficient assets for recovery by the creditor for such obligations (*Beklamel*). On various occasions, (lower) courts have held that a director may continue running a company in financial trouble for as long as there is still a realistic likelihood of survival. The director may, in such circumstances, selectively pay its creditors who are necessary for the continuation of the company (i.e. no payment of affiliates). However, after a certain transition point, where there is no realistic prospect of survival, a director risks being personally liable if he continues to trade.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

No general restriction on foreign ownership of a project company applies.

No extra taxes apply on foreign ownership of a project company compared to domestic owners. A 15% withholding tax applies on dividends. Furthermore, a foreign party holding a substantial interest in a Dutch company may be subject to non-resident income tax on dividend, interest and capital gains derived from investment in shares and shareholder loans.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Bilateral investment treaties do not deal with tax as such. The Netherlands has concluded tax treaties or similar arrangements with around 90 countries and territories, which tax treaties limit the power of the Netherlands to apply the withholding tax and non-resident tax as mentioned in question 6.1 above.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

No laws exist specifically in respect of nationalisation or expropriation of project companies or assets. The Intervention Act (*Interventiewet*) provides for far-reaching possibilities for the government to secure (and expropriate) assets or shares, but this only applies to financial companies in distress. Investment protection on a retail level is dealt with in general securities laws.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

This depends on the sort of project. The government at various levels may be active in project finance.

The Minister of Economic Affairs and Climate Policy has authority over licences for natural resources and handles the issuance of permits for the exploration, production and storage of minerals or terrestrial heat.

The Netherlands Enterprise Agency (RVO) is executing the SDE+ offshore wind energy subsidy and permit tenders on behalf of the Ministry of Economic Affairs and Climate Policy. The Ministry of Infrastructure and Water Management is the main "driver" for national infrastructural projects on waterways and public works. The provinces or local municipalities may also be very active in realising projects, e.g. projects for distribution of heat, and also deal with the issuance of certain permits such as the integrated environmental permit (*omgevingsvergunning)* for onshore wind farms.

Furthermore, the Netherlands Authority for Consumers and Markets (ACM), an autonomous administrative authority under Dutch law, supervises the energy, telecommunication, healthcare, transport and postal services industries, and, more generally, oversees competition and consumer protection law. The ACM can also provide certain permits and has the authority to impose fines for certain violations.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

See question 2.2 above on security over assets.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Ownership of land or a pipeline by itself does not require a government licence. For the undertaking of the business or operation of such assets, a licence may be required. This depends on the sort of activities undertaken.

In general, all natural resources are owned by the state, and exploration, production and storage thereof will require a licence granted by the state. As mentioned under question 7.1 above, in accordance with the Mining Act (*Mijnbouwwet*), a licence from the Minister of Economic Affairs and Climate Policy is required for the exploration, production and storage of minerals and terrestrial heat. Furthermore, an integrated environmental permit (*omgevingsvergunning*) pursuant to the Environmental Permitting General Provisions Act (WABO) is required for various activities with regard to, e.g., construction work or building in certain nature areas. The application for an integrated environmental permit can be done at the local municipality. In general, such a licence or integrated environmental permit (as described above) is held by the company that develops the project, carries out exploration and production, and provides storage (this can also be a foreign entity).

The Dutch Gas Act (*Gaswet*) and the Dutch Electricity Act (*Elektriciteitswet*) contain (more specific) regulation for owners of a gas transmission grid or an electricity transmission grid. For example, owners of a gas or an electricity transmission grid are (apart from exceptions) obliged to appoint a public limited company or private limited company as grid operator (*netbeheerder*) to operate the grid. Please note that the legislative proposal on the progress of the energy transition (*Wet Voortgang Energietransitie*) provides for the amendment and modernisation of the Dutch Gas Act and the Dutch Electricity Act.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Yes, such as state profit share (*staatswinstaandeel*), which is levied instead of corporate income tax on the profit of companies exploring and extracting natural resources such as oil and gas, surface duties (*oppervlakterechten*) for offshore activities and royalties relating to the production of natural gas. Regulation on state profit share are set out in the Mining Act. The main difference with corporate income tax is the rate: state profit share at 50%; and corporate income tax at 20%–25%.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

There are no specific taxes in relation to foreign currency exchange.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no specific taxes in relation to the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions. However, interest on long-term subordinated profit-sharing loans may be treated as a dividend. If so, a 15% withholding tax may apply. Furthermore, a foreign party holding a substantial interest in a Dutch company may be subject to non-resident income tax on dividend, interest and capital gains derived from investment in shares and shareholder loans.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

In relation to the distribution of dividends by a Dutch public limited liability company to its shareholder(s), such company may make distributions to the shareholders and other persons entitled to distributable profits, only to the extent that its net assets exceed the sum of the amount of the paid and called up part of the capital and the reserves which have to be maintained by virtue of law or pursuant to the articles of association.

In relation to the distribution (of dividends or other distributions) by a Dutch private limited liability company to its shareholder(s), the amount thereof is limited to the extent that the equity (total assets minus liability) exceeds the reserves which have to be maintained by virtue of law or pursuant to the articles of association. In addition, the management board of the private limited company must declare that the company will be able to continue the payment of its due and collectable debts after the distribution.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

The Netherlands has various acts and regulations in place that deal with health and safety, environment, hazardous substances, best available techniques, etc. Project documentation will have detailed provisions, warranties, covenants and CPs ensuring that the broad spectrum of rules and regulations is complied with. The main governmental authorities to administer these laws and regulations are: the Municipal Executive (*college van burgemeester en wethouders*) (municipality); the Provincial Executive (*college van Gedeputeerde Staten*) (province); the Minister of Infrastructure and Water management (*Minister van Infrastructuur en Waterstaat*); and the Minister of Social Affairs and Employment (*Minister van Sociale Zaken en Werkgelegenheid*) (central government).

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

Under Dutch law, the European rules for procurement under three different Directives apply. These are: Directive 2014/23 (on the award of concession contracts); Directive 2014/24 (on public procurement); and Directive 2014/25 (on procurement by entities operating in the water, energy, transport and postal services sectors). These Directives are implemented by the Dutch Procurement Act (*Aanbestedingswet*).

This means that if a project company can be qualified as a "contracting authority" or as a "body governed by public law", the contracts qualify as a concession or a supply, works or service contract and the contracts concerned exceed the applicable thresholds, this entity is obliged to tender the contract in question. Depending on the facts and the circumstances, there are certain entities and contracts which do not fall within the scope of the Dutch Procurement Act.

If a project company decides to voluntarily tender contracts, such company needs to realise that if it does not exclude the applicability of the Dutch Procurement Act, it can be bound to these rules as well.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

There are no special taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies. However, premiums for damage insurance are generally subject to a 21% stamp duty (instead of VAT).

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes, this possibility exists.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

There are no restrictions apart from the fact that foreign workers, technicians, etc. should have a valid residence status.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

In principle, no. Exceptions may apply to imports from certain countries on whom the Netherlands has levied sanctions, or certain types of equipment (e.g. dual-use goods or technologies).

The Netherlands is a Member State of the European Union. As a result, imports from other EU Member States into the Netherlands are free of taxes (import duties). Imported goods from outside the EU are subject to the Integrated Tariff of the European Communities.

### 10.2 If so, what import duties are payable and are exceptions available?

The goods to which import duties apply, as well as the rate, may be found online via http://ec.europa.eu/taxation_customs/general-information-customs_en.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Parties are free to determine by contract when *force majeure* is applicable. Article 6:75 of the Dutch Civil Code provides that a party is not responsible for a failure (*tekortkoming*) if this follows from the law, contract or generally accepted principles (*verkeersopvattingen*).

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Corruption and bribery are both criminal offences under the Dutch Penal Code. The courts have seen various cases where companies and people have been prosecuted for bribery of government employees (article 177 of the Penal Code and/or article 363 of the Penal Code) and/or for bribery of non-government employees (article 328*ter* of the Penal Code). The Dutch Criminal Code makes a distinction between active and passive bribery, as well as a distinction between bribery in public industry and bribery in private industry.

Also, in these cases, subjects have been indicted for money laundering (article 420*bis*/420*ter* of the Penal Code), as well as for forgery (article 225 of the Penal Code), theft (310/311 of the Penal Code), other malversation (321/322 of the Penal Code) and even for membership of a criminal organisation (article 140 of the Penal Code).

Maximum penalties vary from four to 12 years of imprisonment or even, in a combination of sentences, 16 years of imprisonment. Also, fines with a maximum of EUR 82,000 or EUR 820,000 (for legal entities), or even up to 10% of the annual turnover (for legal entities) can be imposed.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

In national projects, the governing law is usually Dutch law.

### 13.2 What law typically governs financing agreements?

*Idem*. In international projects, the governing law is sometimes English law.

### 13.3 What matters are typically governed by domestic law?

Domestic law governs security arrangements, equity subscription agreements, subordination agreements, intercreditor agreements (under certain circumstances) and direct agreements.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

A submission to a foreign jurisdiction is valid and legally binding upon a Dutch entity under the laws of the Netherlands, as long as there is an international element to the transaction.

Notwithstanding a valid submission to a foreign jurisdiction, Dutch courts may assume jurisdiction if a plaintiff seeks provisional measures in preliminary relief proceedings, a preliminary decision or if a plaintiff files a request for the levy of a pre-trial attachment. Furthermore, it should be noted that a valid submission to a foreign jurisdiction will not restrict the application of certain overriding provisions of the laws of the Netherlands, designed for safeguarding its public interests.

Finally, it should be noted that certain proceedings, such as proceedings related to real estate or the governance of companies, have exclusive jurisdiction.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

A Dutch company may submit disputes to international arbitration and such submission is generally recognised in the Netherlands. The recognition and enforcement in the Netherlands of arbitration awards rendered in countries that are a party to the New York Convention are subject to the provisions of the New York Convention.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

The Netherlands has been a contracting state to the New York Convention since April 1964.

### 15.3 Are any types of disputes not arbitrable under local law?

Arbitral proceedings in the Netherlands may not lead to the determination of legal consequences that are not at the free disposal of the parties, such as certain intellectual property disputes, the granting of a liquidation order, certain family law disputes and the annulment of a decision of a legal person.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No, there are not.

## 16 Change of Law / Political Risk

**16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?**

No, there has not.

## 17 Tax

**17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

There is generally no withholding tax on (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security. However, interest on long-term subordinated profit-sharing loans may be treated as a dividend. If so, a 15% withholding tax may apply.

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There are no formal incentives that apply specifically to foreign investors or creditors. However, it is important to know that foreign investors can discuss their Dutch tax position in advance with the Dutch Tax Authorities and obtain a binding tax ruling. A government agency, the Netherlands Foreign Investment Agency (http://www.nfia.nl), can provide information on this subject.

Foreign investors are subject to Dutch (corporate) income tax on income from Dutch sources. Except for wage withholding tax (on wages, salaries and certain other remunerations for labour of individuals) and dividend withholding tax, no withholding taxes apply on payments to non-residents.

Dutch investors are subject to Dutch income tax on their worldwide income. However, foreign source income generally may benefit from an exemption or credit to avoid international double taxation. The most important exemptions are income and gains from qualifying subsidiaries (participation exemption), foreign enterprises (permanent establishment exemption) and foreign real properties.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

Investors and lenders should take into account the possibility that companies employing more than 50 persons have to institute a works council with advisory powers on matters such as important finance transactions, the granting of security for debts of third parties, important co-operations, transfer of control, etc.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Subject to (national implementation of) the EU Prospectus Directive and the EU Prospectus Regulation, an offer to the public or admission to trade on a regulated market of securities (including transferable bonds) requires a prospectus, which shall be approved by the Dutch supervisory authorities (AFM) or other EU competent authorities.

There are several exemptions available, e.g. (i) offerings to <150 persons, (ii) offerings to qualified investors only, (iii) nominal value of security/total counter value per investor >EUR 100,000, (iv) total amount offered in European Economic Area (within the issuer's group) per 12 months <EUR 5 million. For exemptions (i), (iii) and (iv) an additional requirement is imposed in that any related advertisement or information relating to the offering must explicitly and visibly mention that there is (a) no approved prospectus required, and (b) no AFM supervision required (format provided for in the exemption regulation to the Dutch Financial Supervision Act (Exemption Regulation)). In addition, in respect of the exemption under (iv), the offer must be notified with the AFM in advance by the issuer and a "mini prospectus" is required as well pursuant to a template provided for under the Exemption Regulation.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

Each of the *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments can be applied under Dutch law. For *Wakala*, it should be noted that each power of attorney (*volmacht*) or mandate (*lastgeving*), whether or not irrevocable, granted by the company will terminate by force of law, without notice, upon bankruptcy (*faillissement*) of the grantor and will cease to be effective in case of suspension of payments (*surseance van betaling*).

There are no specific tax rules applicable to these instruments. Generally speaking, the remuneration of such instrument will be treated as interest. If an instrument, even labelled as debt for civil law purposes, is perpetual or with a maturity of over 50 years, subordinated and profit-sharing, the remuneration is considered a non-deductible dividend that is subject to a 15% withholding tax.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

*Shari'ah* law will be regarded by the (ordinary) Dutch courts as a non-national system of law. Also, the Rome I EC Regulation that is applicable in the Netherlands will most probably not recognise *Shari'ah* law for this reason. The parties to an international Islamic finance contract with the jurisdiction of the ordinary Dutch courts, may choose *Shari'ah* as the governing law but preferably combined with any other national law (which can be a country that applies *Shari'ah* law). We are not aware of any Dutch cases involving *Shari'ah* law as governing law (such as the *Shamil Bank* case in the UK).

If, however, parties opt for arbitration, it is possible to give the instruction to the arbitrators to apply *Shari'ah* law. Article 1054 of the Code of Civil Procedure provides that the arbitrators must apply "applicable law" (*regelen des rechts*). According to the legislative history of said article 1054, "applicable law" also includes non-national systems of law, such as the *lex mercantoria*. It is also possible to instruct the arbitrators to act as "amiable compositeurs" (*goede mannen naar billijkheid*) and apply the equitable principles under *Shari'ah* law.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

This is not applicable in the Netherlands.

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# Nigeria

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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Given the country's dependence on revenue from the exploitation of hydrocarbon resources and the global dip in crude oil prices, the macroeconomic challenges witnessed by Nigeria, when it found itself in recession in 2016, were more pronounced. While the country emerged from recession in 2017, some of these challenges persist. This caused the Federal Government of Nigeria ("FGN") to adopt more decisive policies aimed at accelerating a much-needed expansion and turnaround of the economy. In this regard, the FGN developed the Nigeria Economic Recovery and Growth Plan ("ERGP") to put Nigeria on the path of economic recovery and sustained growth. The objectives of the ERGP include achieving macroeconomic stability and economic diversification and tackling obstacles which hinder the competitiveness of Nigerian businesses. Notably, the ERGP emphasises investment in infrastructure, especially in power, roads, rail, ports and broadband networks; and also focuses on investments in oil, agriculture, manufacturing, trade and finance.

The power sector, surprisingly, continues to attract phenomenal interest from the private sector despite perceived challenges. For example, the FGN, in conjunction with the World Bank Group ("WBG"), developed the Power Sector Recovery Programme ("PSRP") with a view to attain financial viability in the power sector. Investments in renewable energy are also at the forefront of regulatory initiatives.

On account of the recent recession in Nigeria, there has been a decline in loan syndications. There remains, however, sustained interests in investment in projects in the agriculture, power, manufacturing, transportation, solid minerals, healthcare, housing and services sectors. There has also been remarkable interest in the development of Nigeria's transportation networks including road, rail, airports and sea ports. The private sector has shown an increased appetite for investment in real estate. The continuing expansion of Nigeria's middle class has made investments in condominiums and shopping malls a popular choice for private capital.

Current projects in the development and financing phases include: (a) the Oma Power 500MW Independent Power Project in Abia State; (b) the Qua Iboe Power Project in Akwa Ibom State; (c) the Lekki Deep Sea Port; (d) the Dangote Oil integrated refinery and petrochemical complex; and (e) the concession of the Lagos-Kano railway lines.

Funding of recent projects has been by a syndicate of foreign banks, development finance institutions and local commercial banks.

A number of recent projects are being developed by Chinese construction firms, while funding by Chinese banks appear to have increased in the last few years.

There are increasing requests by project developers for government support, in the form of payment assurances and guarantees, in relation to the financing of utility projects.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

These include the financing for the construction of the gas central processing facility and 128km pipeline by Accugas Limited, a subsidiary of Seven Energy, in Akwa Ibom State, and the financing for the development and construction of the 500MW Azura Edo Power Plant in Edo State.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to create security over different classes of assets under a general security agreement commonly referred to as an "All Asset Debenture". The only types of assets that may not be documented in the aforementioned document are assets that belong to a third party and not the borrower – such as shares in the project company.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security can be created over real estate either by way of a legal or equitable mortgage, or a charge. Security is usually taken over real property by a legal mortgage involving the transfer of the legal estate to the lender/mortgagee/security trustee. The major steps include: (a) creation of the mortgage by deed; (b) stamping the mortgage instrument at the Stamp Duties Office of the Federal Inland Revenue Service ("FIRS"); (c) obtaining the consent of the Governor of the state where the land is located to the creation of the mortgage; (d) registering the mortgage at the state lands' registry; and (e) registering the mortgage at the Corporate Affairs Commission ("CAC"), if the mortgagor is a company.

With respect to plant, machinery and equipment, security can be created over these tangible movable assets by way of a mortgage, charge or pledge.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security over receivables is usually created by an assignment by way of security. If notice of security is not given to the chargor's counterparty, the assignment would take effect as an equitable assignment; this is not very common in this jurisdiction. In most cases, this security interest is often documented in the "All Asset Debenture" (referred to in our response to question 2.1 above), which will include an obligation on the project company/chargor to issue a notice to the chargor's counterparty under the relevant contract in respect of which a security interest has been created.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. In a project finance context, this would either be documented in the "All Asset Debenture" (referred to in our response to question 2.1 above) or in a separate instrument typically referred to as an account charge. A fixed or floating charge can be created over funds in a bank account and what distinguishes one form of security from the other is the ability of the chargor to deal freely with the funds. Where the nature of the security is a fixed charge, the notice will include a request to the account bank to restrict any payment from the account, save in accordance with instructions from the lenders or their agent.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Security can be created over shares by way of legal or equitable mortgages, or charges. Shares in a private company are in certificated form.

A legal mortgage is created over shares when the mortgagor (usually a shareholder of the borrower) transfers its shares, by way of security, to the lender or its nominee, and the mortgagee's interest is noted in the company's register of members.

Lenders, more often than not, create security over shares by way of an equitable mortgage. If the shares are in a private company, the lender will usually require the chargor shareholder to deposit its share certificates, execute a blank share transfer form and a dividend mandate form, and to give notice of the security to the company.

Where the shares have been dematerialised (for example, shares in a listed company), notice of the charge must also be given to the central depositary for listed shares which is known as the Central Securities Clearing System ("CSCS") in order for the CSCS to note the mortgagee's security interest. In this case, both the lender and borrower must execute a joint memorandum for lien confirming a lien over the shares and submit the executed document to the CSCS, together with the following documents: (a) a letter issued by the chargor/shareholder to the CSCS authorising the CSCS to place a lien on the shares; (b) a letter issued by the chargor to the CSCS authorising the CSCS to transfer the shares to a specified person upon the occurrence of an event of default; and (c) a letter from the stockbrokers of the chargor/shareholder consenting to the placement of a lien on the shares.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Perfection of security entails payment of the following costs:

(a) **Stamp duty**: Stamp duty on security documents range from 0.375% to 1.5% of the sum secured by the charge.

(b) **CAC registration fee**: If the chargor is a private company, the registration fee payable to the CAC in connection with the registration of a charge is 1% of the sum secured, while a fee of 2% is payable if the chargor is a public company.

(c) Where the security is over real estate, certain fees are payable in connection with obtaining the Governor's consent and registering the mortgage or charge at the Lands' Registry. These fees vary from state to state.

(d) **Lien fee**: A fee of 0.25% (calculated on the total market value of the charged shares) is payable in connection with the creation of a lien over shares of listed companies. The lien fee subsists for a two-year period from the date the lien is created and there is an obligation to pay an annual renewal fee of 20% of the lien fee thereafter.

No notarisation fee is payable on security documents in Nigeria.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Cost of registering security is significant as can be garnered from the response to question 2.6 above.

Regarding timing, stamping and registration of security documents at the CAC can be completed in a few weeks. Obtaining the Governor's consent and registering security over land, however, may take several months to complete.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Yes; please refer to the response to question 2.2 above. In some instances, regulatory consent is required to be obtained in order to effectively create security over certain assets in certain sectors.

## 3 Security Trustee

### 3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Nigerian law recognises the concept of a "trust" whereby security is granted in favour of a trustee for the benefit of a changing pool of beneficiaries. A security trustee can enforce the security it holds, on behalf of the secured parties, in accordance with the terms of the security documents.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

The security trust concept is recognised in Nigeria.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?**

Generally, an auction is not required to enforce a security interest.

In many cases, however, debtors who are aware of any imminent plans of a mortgagee to enforce security institute litigation and/ or seek an injunction restraining the mortgagee from enforcing the security. It is in this situation that the process of enforcement is protracted, as court cases are often subject to delays due to congestion in courts.

In certain sectors, such as oil and gas and telecommunications, regulatory consent is required to complete enforcement and this may be delayed depending on the circumstances of the case.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

No, there are no restrictions.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

The commencement of an insolvency proceeding would, typically, constitute an event of default under the finance documents. Under section 413 of the Companies and Allied Matters Act, Chapter C20, LFN 2004 ("CAMA"), any disposition of a company's property, including things in action and shares, made after the commencement of insolvency proceedings shall be void unless the court otherwise orders. Furthermore, section 414 of the CAMA provides that where a company is being wound up, any attachment, sequestration or execution against the effects of the company shall be void.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

The creation of security over the assets of a company that is insolvent at the time of its creation, and which takes place within three months of the filing of a winding-up petition, or of the passing of a members' resolution to wind up the company, will be at risk of being deemed a fraudulent preference and clawed back by the liquidator.

Preferential payments, payable on the insolvency of a company, are: contributions due under the Employees Compensation Act 2010; local rates; charges; taxes (including land and property tax); pay-as-you-earn deductions; deductions under the Nigerian Social Insurance Trust Fund; unpaid wages and salaries; and accrued holiday remuneration.

**5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

The insolvency regime set out under the CAMA is applicable to all incorporated companies.

**5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?**

Yes. If the security document gives a creditor the power of sale, and the nature of the security is a legal mortgage, then such a creditor can sell the secured assets without recourse to the court.

**5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?**

Yes. A project company may implement a scheme of arrangement, restructuring or compromise with its creditors under sections 539 and 540 of the CAMA.

**5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.**

Directors may be liable for fraudulent trading if it appears that the directors carried on the business of the company recklessly, with an intent to defraud creditors or for any fraudulent purpose. In this instance, directors may be personally liable for all the debts or other liabilities of the company as the court may direct.

## 6 Foreign Investment and Ownership Restrictions

**6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?**

Under Nigerian law, a foreigner may invest and participate in the operation of any enterprise in Nigeria, other than anything set out in what is termed the "negative list". The areas of business that are prohibited under Nigerian law include production of arms and ammunition, narcotic drugs and psychotropic substances, military/ paramilitary clothing and accoutrements.

There also exists a local content regime which gives preference to Nigerian Companies (locally incorporated companies which have Nigerian majority shareholding) in the oil and gas, maritime and advertising sectors.

Withholding tax is payable on dividends distributed by a Nigerian company to a foreign investor.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No, there are none.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Section 25 of the Nigerian Investment Promotion Commission Act, Chapter NI17, LFN 2004, guarantees that no enterprise will be expropriated by the Federal Government of Nigeria except the acquisition is in national interest and for public purposes and upon the payment of fair compensation.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

These include:

a. Department of Petroleum Resources.

b. Nigerian Electricity Regulatory Commission.

c. Nigerian Communications Commission.

d. Ministry of Works, Power and Housing.

e. Infrastructure Concession Regulatory Commission.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Please see our responses to questions 2.2 to 2.6 above.

In addition, if a mortgage is created over a ship, registration at the Ships' Registry is required while consent of the regulators may be required in order to create effective security over licences in the oil and gas, telecommunication and electric power sectors.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Ownership of any of the above assets requires a local licence.

In relation to land, the project company must either obtain a Certificate of Occupancy from the Governor of the Nigerian state within which the land is situated or obtain the consent of the Governor to its acquisition of the title to the land from the previous owner. By virtue of the provisions of the Land Use Act, title to land in Nigeria is vested in the Governor of the respective states, who holds it in trust for the benefit of Nigerians.

Various states of the Federation, including Lagos State, have passed laws regulating ownership of real estate by non-Nigerians. The Lagos State law is known as the Acquisition of Land by Aliens Law, Chapter A2, Laws of Lagos State of Nigeria, 2003 ("Aliens Law"), and it prescribes that the prior written approval of the Governor is required for the acquisition of any interest or right in or over land by an alien which is defined to include foreign companies.

For mining activities, a project company will obtain the mining lease from the Minister of Mines and Steel Development in Nigeria, and this lease is only issued to locally incorporated entities.

With respect to natural resources and pipelines, the project company must obtain an Oil Pipeline Licence or an Oil Mining Lease, which must be approved by the Minister of Petroleum Resources. These licences are issued to locally incorporated companies.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Yes. Royalties, Companies Income Tax, Education Tax, Petroleum Profits Tax and Licence Fees are payable by entities involved in the extraction and exportation of natural resources. Other levies include payments under the industrial training fund, employee compensation fund and other state and government levies.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Foreign currency may be purchased from the official foreign exchange market for transactions regarded as Eligible Transactions under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Chapter F34, LFN 2004. A project company cannot fund non-Eligible Transactions from the official foreign exchange market. The shareholders of, and debt providers to, the project company cannot access the official foreign exchange market to purchase foreign currency required for the repayment of their loans or returns on investment (such as dividends) unless a Certificate of Capital Importation ("CCI") was obtained at the time of the debt or equity investment. A CCI serves as evidence that an inflow of foreign currency was made into Nigeria, in the form of an equity or debt investment, and that the inflowed funds were converted into Nigerian Naira. An investor is guaranteed unconditional repatriation of capital and return on investment from the official foreign exchange market if it obtained a CCI at the time of inflow.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Please refer to our response to question 7.5 above.

Regarding taxes, dividends and interest payments on loans are subject to withholding tax at the rate of 10% or a reduced rate of 7.5% if the payment is to investors from countries with double taxation agreements with Nigeria.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes; however, proceeds of exports must be repatriated to Nigeria within 180 days for non-oil exports and 90 days for oil exports.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Under section 381 of the CAMA, a company shall not declare dividends where there are reasonable grounds for believing that the company is or would be unable to pay its liabilities as they become due, after the payment of such dividends.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

Under the Environmental Impact Assessment Act, Chapter E12, LFN 2004, any person that wishes to embark on any projects or activities is required to consider the environmental effects of such projects and to undertake an environmental impact assessment. Furthermore, various states in Nigeria have enacted environmental protection laws, such as the Lagos State Environmental Protection Agency Law (Chapter L27), Laws of Lagos State of Nigeria, 2015. This law establishes the Lagos State Environmental Protection Agency ("LASEPA") and vests it with powers to make regulations and prescribe acceptable standards to control the pollution, level of water, air, noise and land in conformity with the Federal Government guidelines, policies and criteria on the environment, and to advise the State Government on all environmental management policies.

Another primary environmental protection legislation is the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (the "NESREA Act"). This law prohibits the discharge of any hazardous substance in harmful quantities into the air, land and waters of Nigeria or at the joining shorelines unless such discharge is permitted or authorised by any law in force in Nigeria.

The NESREA Act established the National Environmental Standards and Regulations Enforcement Agency (the "NESREA"), as a parastatal in the Federal Ministry of Environment and grants it wide-ranging powers to enforce compliance with environmental standards, laws and guidelines.

Under the Factories Act, Chapter F1, LFN 2004, any premises used or to be used as a factory must be registered with the Director of Factories.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

While procurement by private companies are not subject to these laws, procurement by public companies are subject to the Public Procurement Act (No. 14) 2007 and the Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act 2005.

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Under section 72 of the Insurance Act, Chapter I18, LFN 2004, the following insurance or reinsurance services may only be provided by a local insurance provider: fire; motor; liability; life and accident; or such other insurance and reinsurance business as the National Insurance Commission may from time to time prescribe.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Yes; however, the assignment of reinsurance policies is prohibited under the National Insurance Commission Prudential Guidelines 2015.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

If a project company wishes to employ expatriates, it must apply to the Federal Minister of Interior for expatriate quota positions for the relevant number of expatriate personnel it intends to employ. An expatriate quota is the authorisation that establishes the maximum number of expatriates that a Nigerian company may employ; it permits a company to employ expatriates to specifically approved job designations, and also specifies the duration of such employment. The company must justify the number of positions applied for and explain why these positions cannot be taken by Nigerians. Once the approval is granted, the employee must obtain a Combined Expatriate Residence Permit and Aliens' Card, which is the authorisation that enables an expatriate to reside and to work in Nigeria.

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

Import duties are payable on imported project equipment in accordance with the Common External Tariff of the Nigeria Custom Service.

**10.2 If so, what import duties are payable and are exceptions available?**

The rate of the duty payable on imported equipment are specified in the Common External Tariff of the Nigeria Custom Services. Plant and machinery imported for utilisation of gas in downstream petroleum operations and certain agricultural equipment are exempt from Value-Added Tax. Equipment imported in connection with projects in the power sector also enjoy zero import duty.

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

Yes, they are. Parties to project contracts typically agree the inclusion of provisions that define the responsibilities of the parties, upon the occurrence of events or circumstances that are not within the reasonable control of the parties and that could have a material adverse effect on their ability to perform their respective obligations.

## 12 Corrupt Practices

**12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?**

Bribery and corruption are, generally, prohibited in Nigeria under the Constitution and several other enactments including the Corrupt Practices and other Related Offences Act, the Criminal Code Act and the Economic and Financial Crimes Commission (Establishment) Act.

These laws impose penalties for several offences and, notably, under the Corrupt Practices Act, any person that offers any consideration to a public official, in the course of its bidding for a contract, with a view to influencing that official in the performance of his duties shall, upon conviction, be liable to an imprisonment term of seven years or to a fine of =N=1,000,000.00 (one million Naira).

In addition to local laws, some foreign anti-corruption and anti-bribery laws (such as the US Foreign Corrupt Practices Act and the United Kingdom Bribery Act, 2010) have extra-territorial effect and may apply to certain categories of persons in relation to actions that are connected with Nigeria.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

While parties are generally free to choose the governing law for their contracts, most project agreements are typically governed by English Law.

### 13.2 What law typically governs financing agreements?

Most finance documents are governed by English Law or New York Law.

### 13.3 What matters are typically governed by domestic law?

Security documents are typically governed by domestic law being the law of the location of the secured assets.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes. Contractual provisions confirming a party's submission to foreign jurisdiction and waiving any immunity which the party is entitled to are enforceable in Nigeria.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, such contractual provisions may be enforced in local courts.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Nigeria is a signatory to the New York Convention and has ratified the International Centre for Settlement of Investment Dispute Convention.

### 15.3 Are any types of disputes not arbitrable under local law?

Taxation disputes or disputes relating to the revenue of the government, criminal matters, matrimonial causes and insolvency disputes are not arbitrable.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

There are none.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Yes; direct agreements are common in infrastructure project financing.

In the power sector, there is an increasing call for political risk insurance and guarantees from the World Bank Group. In a few power projects, the FGN provided support to the project in the event of an early termination of the power purchase agreement ("PPA") and this has been documented under an agreement referred to as a "Put and Call Option Agreement" which: (a) permits the project company to "put" the power plant (or its shares) to the FGN in circumstances where the PPA is terminated early; and (b) obliges the FGN to pay a "purchase price" which, at a minimum, covers the outstanding debt.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

The Companies Income Tax Act, Chapter C21, LFN 2004 (as amended), requires every borrower/person making interest payments to a lender/creditor (excluding interest payments that are exempt from the withholding of tax) to withhold tax at the rate of 10% and to remit the tax withheld to the FIRS. The withholding tax is reduced to 7.5% if the interest payment is to lenders from countries with double taxation agreements with Nigeria.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Depending on the manner in which it is structured, interest payments on a foreign loan can be completely exempt from tax by virtue of the Companies Income Tax Act, Chapter C21, LFN (as amended) ("CITA"). A "foreign loan", for purposes of the CITA, is one that is granted in a currency other than the Nigerian Naira by a foreign company to a Nigerian company using funds that the foreign company inflows into Nigeria from any territory outside Nigeria or any loan granted to a Nigerian company by that foreign institution in any territory outside Nigeria.

The tax exemptions applicable to foreign loans are set out below:

| Repayment Period (including moratorium) | Grace Period (applicable to both principal and interest) | Tax Exemption Allowed |
|---|---|---|
| Above 7 years | Not less than 2 years | 100% |
| 5–7 years | Not less than 18 months | 70% |
| 2–4 years | Not less than 12 months | 40% |
| Below 2 years | None | None |

There are no tax incentives on the registration of mortgages or other security documents to which a foreign entity is a party.

If the lender or security trustee is exempt from tax, however, certain taxes will not be payable in connection with the perfection of the transaction documents. By way of an example, the International Finance Corporation is, by virtue of Nigerian law, exempt from the payment of taxes, customs duties, property tax and from the liability for the collection or payment of any tax or duty.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

Investors should consider whether the state party to the project (if any) has obtained the relevant authorisations before committing to the project.

Please refer to our response to question 17.2 above for tax exemptions on interest payments on foreign loans.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

In order for a company to issue bonds or capital market instruments, it must be a public company, and the approval of the Securities and Exchange Commission and the listing authority for the listing of the bonds must be obtained.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

Islamic finance is still at its developing phase in Nigeria and, therefore, these instruments are not commonly seen in project finance transactions in this jurisdiction.

Having said this, however, these instruments may be utilised in structuring an Islamic project financing in the same way it would be used in other jurisdictions subject to the views of the Advisory Committee of Experts or the Shariah Advisory Committee of the financial institutions and the nature of the underlying asset. For example, an infrastructure project can be structured using an *Istisna'a*, which is a transaction based on a procurement agreement between a special purpose vehicle ("SPV") (owned by an Islamic financial institution), as the purchaser, and a project company which acts as the procurer. In this structure, the project company would agree to procure assets on behalf of the SPV at a certain date pursuant to the terms of the procurement agreement which is typically operational during the construction phase of the project. Upon delivery of the asset(s) which is the subject matter of the *Istisna'a*, title to the assets and possession passes to the SPV. The SPV, as lessor, and the project company will also enter into an *Ijarah* (i.e. a forward lease agreement) which provides a framework for the payment of lease rentals by the project company. The *Ijarah* is effective during the operational phase of the project; this is the period that follows the delivery of the asset to the SPV in accordance with the terms stipulated under the procurement agreement.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Parties to a contract may choose *Shari'ah* law as its governing law even though this is not commonly adopted in project finance contracts in Nigeria. We are not aware of any reported cases relating to conflicts between *Shari'ah* law and local law relating to the finance sector.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Interest payment obligations are not permitted in Islamic finance transactions.

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UDO UDOMA &
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Founded in 1983, Udo Udoma & Belo-Osagie (UUBO) is a full-service corporate and commercial law firm with offices in Nigeria's major commercial centres and an affiliate in Ghana. UUBO has been described in international rankings as one of Nigeria's "Magic Triangle" law firms.

We are privileged to work with diverse local and international clients to create and implement innovative and practical solutions that are designed to facilitate business in Nigeria and beyond. We aim to structure timely, practical and creative legal solutions founded on a philosophy of providing bespoke legal advice that is of the highest possible standard, accessible, commercially-oriented and consistently sound on principle.

The firm maintains a policy of actively seeking to develop fresh skills and acquire new expertise in our niche areas, thus enabling us to respond quickly to the rapid changes that occur in the markets in which we and our clients operate and do business. Our "hands-on" and collaborative approach across the diverse sectors in which our clients operate, enables us to achieve our objective of finding solutions and providing tailored advice that is accessible, commercially-oriented and consistently sound on principle. The firm embraces diversity, which is seen in the backgrounds, range of experience and "hands-on" collaborative approach of our team. This has contributed to recurring high rankings underscored by what is currently one of the highest ratios of internationally-recognised partners per firm in the Nigerian legal market.

Chapter 26

# Norway


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

There have been positive movements in the offshore market, and several projects have been awarded recently, *inter alia*, the 11 billion NOK contracts awarded by Statoil to Aibel, Aker Solutions and Kværner for the second phase of the construction of the Johan Sverdrup field.

The Norwegian Water Resources and Energy Directorate has also recently advised the government to open two areas for offshore wind power plants, of which one area is said to be suitable for floating wind turbines, and there is a clear ambition of the current political environment to realise both floating and non-floating offshore wind parks off the Norwegian coast.

There has also been an increase in the onshore construction of wind parks, with the construction of Tellenes, which completed last year, and Fosen, which will be completed, according to plan, in 2020/21. The production of wind power in Norway increased by 30% last year compared to 2016; this is, however, not more than the total of 3 TWh for 2017, which speaks to some of the difficulties experienced in the development of onshore wind power projects in Norway, including the lack of areas with good and constant wind conditions, and the uncertain future of the so-called green certificates.

The increasing activity in the offshore sector is good news for offshore shipowners who have been troubled with low rates and little work for several years. There are, however, still severe concerns in the offshore shipping market that rates are still falling and will continue to fall. In 2017, Norwegian offshore shipowners recorded a reduction of their total fleet value of more than 18 billion NOK over the last three years. As of 1 April 2018, more than 140 Norwegian offshore vessels are laid-up, according to the numbers available from www.maritime.no.

For onshore construction projects, it is particularly notable that three large PPP road projects have been announced. The first – a 5.5 billion NOK project for national road 3/25 – was awarded to Skanska in March. The next two projects – both in the range of 6–8.5 billion NOK – are expected to be awarded later this year and in 2019. PPP also continues to be a popular model for the financing of smaller projects, such as the construction of schools and sports facilities.

Project finance of real estate projects is also increasingly popular, and a number of projects have been completed with new actors emerging over the last couple of years.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

During 2016, the financings for the two biggest wind power projects in Norway were completed. The Tellenes project was financed by a bank club consisting of Rabobank, Dekabank and EKF, backed by EIB guarantees, while a 40% investment in the Fosen project, which is held together by state-owned Statkraft and partly publicly owned Trønder Energi, was financed by a syndicate led by SEB.

The state-owned airport owner Avinor also took initiative in 2017 to raise a total of 800 million NOK for the financing of the world's largest seafood centre and terminal at Gardermoen airport. The financing is being handled by Pareto.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Norwegian law does not contain any concept of a general floating charge. Certain groups of assets can, however, be pledged as a whole, including inventory, machinery and plant, receivables, fishery tools and farming products.

Security over the various assets and groups of assets is established through a single security agreement. However, to obtain legal perfection for the security, it is necessary to fill in and sign separate and particular forms for each of the pledges.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Pledge and mortgage can be established over real property, registered rights in real property, and over machinery and equipment.

A mortgage over real property will cover the land and constructions attached to it. The mortgage is perfected by registration with the Norwegian Land Registry (*Nw.*: *Statens kartverk*).

To obtain security over constructions which is not necessarily attached to the land, but is connected with the production or activity on the land, it is also possible to create a floating charge over the relevant company's operating assets (*Nw.*: *driftstilbehør*). This pledge will include machinery and plant, other equipment and certain intellectual property rights. Perfection is obtained by registration on the pledgor's name with the Norwegian Moveables Register (*Nw.*: *løsøreregisteret*).

Pipelines and rights to use pipelines, in connection with offshore activity, are pledged by pledging the licence which has been granted for exploration and exploitation of oil and gas. The pledge is subject to permission from the Norwegian Ministry of Petroleum and Energy. The pledge covers all rights that follow from the licence from time to time and other rights which the pledgor may have in connection with the activity carried out according to the licence. Perfection is obtained by registration in the Norwegian Petroleum Register (*Nw.*: *petroleumsregisteret*).

Ownership and pledge over high-voltage power lines can be established and perfected by registration with the Norwegian Power Lines Register (*Nw.*: *kraftledningsregisteret*). This register is, however, in many ways, out of date and pledge over these rights is often established only by a combination of mortgages over land and a charge over machinery and plant.

**2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?**

Receivables can be pledged separately or as a group of assets. Pledge can be established over claims which can be collected in the absence of default.

Pledge over an individual claim can be established if the claim exists against a named debtor or will be obtained against a named debtor in a specific legal relationship. Legal protection is obtained by notification to the debtor, and can therefore not be enforced unless the debtor has been notified of the pledge. Written acknowledgment from the debtor is not required for legal protection, but banks normally require such acknowledgment as a matter of evidence.

Receivables can also be pledged as a whole, often referred to as "factoring". Such floating charge covers all the pledgor's existing and future receivables deriving from the sales of goods or services in its business. Legal protection is obtained by registration in the pledgors's name with the Norwegian Moveables Register (*Nw.*: *løsøreregisteret*), and notification to the debtor is not required.

**2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

Pledge of a bank account is in reality a pledge over the claim for payment which the pledgee has against the account holding bank. Since the claim against the bank will not be a claim deriving from sales of goods or services, "account pledges" are not covered by a factoring pledge and must be established as a pledge over an individual claim. As set out in the answer to question 2.3, this pledge obtains legal perfection through notification to the bank.

If the account holding bank is also the pledgee, there is no need for notification. In these circumstances, the pledge is established and obtains legal protection by agreement between the parties only. If the pledgor is a consumer, the agreement must be in writing and only apply to the funds on a specified bank account established in connection with the agreement.

**2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?**

Shares in limited liability companies can be pledged unless the company's articles of association prohibits it. Legal perfection is obtained by notification to the company, or – if the company's shares are registered in the Norwegian Securities Register (*Nw.*: *verdipapirregisteret*) – by registration of the pledge in the register. In case of unregistered shares, banks normally require a transcript of the company's shareholder register reflecting the pledge, confirmed by a director or the company secretary, as a matter of evidence.

As regards companies other than limited companies, partnership shares can also be pledged. Legal perfection of such pledge requires, however, that the physical possession of the share is transferred to the pledgee. This is highly unpractical as most Norwegian companies do not issue physical share certificates. The issuance of physical share certificates requires that the partnership agreement allows it and will normally only be done in order to facilitate a pledge.

**2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?**

There is no stamp duty or similar tax or fee payable in connection with the establishment or legal perfection of security in Norway. However, a nominal fee will apply for the registration of a pledge or mortgage in the various registries. As of 1 April 2018, the fee for registration of a pledge or mortgage is 1,516 NOK in the Moveables Register, 2,384 NOK in the Ship Register and 525 NOK in the Land Register.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

No. Filing and notification are based on standardised forms, and in case of registration with a central registry, registration takes place within 3–5 days. The Moveables Register and the Land Register also offer digital registration solutions which can make the process even more effective.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

There is no requirement for regulatory or other similar consent to establish a pledge.

Establishment of a pledge may, however, require other forms of consent; for example, from the debtor of a pledged claim. The enforcement of a pledge and the subsequent use of the pledged assets may, in certain cases, also require that the acquirer obtains a licence to perform its activities (for example, in case of use of certain plants and certain forms of production).

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

In relation to legal perfection of the security, out-of-court enforcement of the claim and in the application of proceeds following payment or enforcement, Norwegian law allows enforcement through a security agent as a representative of the lenders.

In legal proceedings, however, the general rule is that the real creditors must initiate and be party to the proceedings. In case of bond trustees, the Supreme Court has held that the bond trustee can represent the creditors in court and when initiating a claim against the debtor. It has not been tested whether the same approach is applicable to security agents acting on behalf of a small or larger syndicate of lenders. Until this question has been resolved, such creditors should make sure they are listed as claimants in legal proceedings.

If the security agent is the registered holder of pledge or mortgage, the legal perfection of the pledge may not survive a bankruptcy or other liquidation of the pledgee. In case of change to the security agent, the secured creditors should make sure that the legal perfection of the pledge is not affected.

### 3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Alternative mechanisms are generally not considered necessary; see the answer to question 3.1 above.

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Enforceability must, as a general rule, take place in accordance with the Norwegian Enforcement Act (*Nw.*: *tvangsfullbyrdelsesloven*). A forced sale can either take place as a public auction or – which is the usual solution – by means of a third-party seller.

A forced sale is administrated by an enforcement officer, i.e. a part of the police. The enforcement officer shall make sure that the forced sale is carried out in a way which is likely to give the best return, but has generally wide powers to decide which way of enforcement would be best from case to case.

The timing of the sale will highly depend on the asset. In case of registerable assets, including real estate and ships, the sales price must be confirmed by the courts before the bid can be accepted. Sales processes lasting up to six months are not unusual if the asset is not immediately liquid and the sales price must be confirmed by the court.

The Financial Collateral Act (*Nw.*: *lov om finansiell sikkerhetsstillelse*) allows enforcement of security in accordance with agreement between the parties. This makes it possible for the pledgee to take direct control over the pledged asset and carry through a forced sale itself. The act applies to claims and accounts, shares and other securities, provided that one of the parties to the agreement is a financial institution, and only if legal protection for the pledge in question has been obtained.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

There are no restrictions on foreign investors or creditors in respect of foreclosure. General ownership restrictions may, however, apply; see section 6 below.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

The opening of bankruptcy proceedings will effectively stop the project company's business. Bankruptcy proceedings are a liquidation process.

At the opening of the bankruptcy, an administrator is appointed. The administrator's efforts and the possibilities for the company to continue business depend on the company's creditors and whether they are willing to finance more than the minimum work.

A project lender will often have first priority security over all the company's valuable assets, such as real estate or lease agreements, machinery and plant, vehicles and receivables, together with step in-rights in the most important contracts for the production and cash flow. Pledges and mortgages with legal protection will give the lender right to "first" priority coverage of its claim, meaning that the revenue after a forced sale will go to pay the secured lender's claim. This is, however, subject to mandatory costs such as the payment to the administrator, secured by a 5% statutory lien, being paid first. Even if the administrator is obliged to try to obtain the best price possible for the company's assets, it is possible that neither a joint sale of the company's business as a whole, nor a sale of separate assets, will give a price sufficient to cover the secured claim. In such case, the administrator may choose to abandon the company's assets in favour of the secured lender, leaving it to the secured lender to sell off the assets for the best possible price.

It should be noted that the administrator is not obliged to uphold the agreements to which the company is party, but has a right to choose to continue the contracts which the administrator finds favourable, and to cancel the other contracts.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

Regulations on preferred claims and clawback rights are included in the Creditors Recovery Act (*Nw.*: *dekningsloven*). The rules regarding preferred claims do not affect secured creditors. Secured debt will be recovered by proceeds from the sale of the pledged asset and the secured creditor has the right to be recovered first by the means of these proceeds.

Security can be set aside under certain circumstances; for example, if the security has been established for older debt and the security was established less than three months before the opening of bankruptcy proceedings. Improper dispositions made in bad faith can also be set aside for up to 10 years prior to the bankruptcy.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Municipal entities are not subject to bankruptcy proceedings, but are instead subject to an administration scheme.

Norwegian branches of foreign companies will normally be treated as a part of the foreign entity, and bankruptcy will thus be subject to the bankruptcy rules of that jurisdiction.

Banks, insurance companies and certain other financial institutions cannot go bankrupt, but are instead subject of public administration in accordance with section 21-8 of the Finance Enterprise Act (*Nw.*: *finansforetaksloven*).

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Yes, but only to the extent that the Financial Collateral Act applies; see the answer to question 4.1 above.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

The Bankruptcy Act (*Nw.*: *konkursloven*) has rules for voluntary and mandatory debt negotiations, which is a debt recovery process in which the debtor can initiate in certain circumstances. In practice, however, the distressed debtor normally negotiates directly with the secured or otherwise major lenders to find a solution to restructure the debt. There is not really any other legal framework for these negotiations other than the freedom of contract and the relationship with the debtor's other creditor and the bankruptcy regulations should the restructuring fail.

There have been several attempts in the last couple of years to restructure Norwegian companies in the US, under chapter 11 proceedings, due to the lack of an adequate Norwegian legal framework for such restructurings.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

The directors of a Norwegian company have a personal duty to monitor the company's financial situation, and to act if necessary given the company's equity and liquidity and risk of its business. Rescue operations are generally allowed as long as the directors' consideration had been careful and it was – objectively speaking – a fair chance for success.

Pursuant to section 407 of the Penal Code, a director may be held criminally liable if the company does not file for bankruptcy if it is insolvent and the continued business creates a loss on the creditors' hands, unless the company has acted in agreement with the creditors holding the majority of the debt as to both the amount and number of claims.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

There are no general restrictions on foreign ownership under Norwegian law, and foreign ownership is subject to the same tax regulations as Norwegian ownership.

For certain types of businesses, there are requirements to the nationality of the owners. This applies to certain large hydro-power companies, operators and licence holders on the Norwegian shelf, and the management of a shipping partnership.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Norway is party to the EEA agreement, which, on a general basis, prohibits different treatment of companies and persons residing in other EU/EEA countries.

Norway is also party to a number of trade agreements, including the WTO and EFTA agreements, and a number of bilateral agreements. Except for the EEA agreement, these trade agreements do not provide protection from the ownership restrictions referred to above.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Nationalisation or expropriation without full compensation is prohibited both by the Norwegian constitution and the European Convention on Human Rights. Expropriation is allowed only in accordance with law if deemed necessary in accordance with public interest and against full monetary compensation.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Hydro and wind power: The Norwegian Water Resources and Energy Directorate (*Nw.*: *Norges vassdrags- og energidirektorat*, NVE).

Petroleum and offshore activity: The Norwegian Petroleum Directorate (*Nw.*: *Oljedirektoratet*).

Road projects: The Norwegian Public Roads Administration (*Nw.*: *Statens vegvesen*).

Railway projects: Bane NOR SF and the Norwegian Railway Directorate (*Nw.*: *Jernbanedirektoratet*).

For all projects affecting real estate, the relevant municipalities must be involved.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

There is no general requirement to file documents with an authority to be valid. Enforceability of security rights will depend on legal perfection, which in certain cases requires filing with the relevant register; see section 2 above.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Acquisition of land will, in certain circumstances, require a licence (the Consession Act (*Nw.*: *konsesjonsloven*)).

Exploitation of natural resources or business related to such resources generally requires a licence from Norwegian authorities. A licence can be held by a foreign entity.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

A special tax regime applies to income from exploitation or business related to natural resources.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Foreign currency exchange provided by a financial institution is not subject to any other restrictions other than UN- or EU-based sanctions.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Yes. Dividend payments are subject to a 25% withholding tax. Corporate EU/EEA investors/shareholders are normally exempted from the withholding tax.

There is no tax applicable to the repayment of a loan. Tax may, however, apply to the payment of interest.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

There are no particular restrictions on dividend payments based on the fact that the parent company is a foreign entity. The rules are the same regardless of the state of incorporation.

Generally, however, there are various restrictions on payment of dividend. Limited liability companies cannot pay dividend in an amount exceeding – roughly speaking – the company's surplus from its business. There are also procedural rules in the corporate acts as to how the company shall proceed when making a decision on payment of dividend.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

EHS is an important focus for Norwegian authorities, including when contracting with project companies, and breaches of EHS regulations are often among the termination grounds which are subject to particularly high limitation levels when it comes to contractual liability.

The substantive rules are set out in the Working Environment Act (*Nw.*: *arbeidsmiljøloven*), which applies to most industries (provided that Norwegian law applies to the relevant employment contract(s)). The act is enforced by the Norwegian Labour Inspection Authority (*Nw.*: *arbeidstilsynet*). In addition the Pollution Act (*Nw.*: *forurensningsloven*), the Petroleum Act (*Nw.*: *petroleumsloven*) and the Water Resources Act (*Nw.*: *vannressursloven*) contains particular regulations for various types of industries. The latter acts are supervised by the Norwegian Environment Agency (*Nw.*: *miljødirektoratet*), the Petroleum Safety Authority (*Nw.*: *petroleumstilsynet*) and the Water Resources and Energy Directorate (*Nw.*: *Norges vassdrags- og energidirektorat*, NVE), respectively.

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

No, there are not.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

There are no restrictions, controls, fees or taxes related to foreign insurance policies covering project assets in Norway. However, the issuance of insurance policies in the Norwegian market may, under the circumstances, require a licence to carry out such activity in Norway, according to the Norwegian Insurance Business Act (*Nw.*: *forsikringsvirksomhetsloven*).

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Proceeds from insurance claims are typically pledged as security in favour of the creditors. It is also possible to note the creditor(s) as co-insured under the policy, or as loss payee in any loss-payable clauses. Such clauses will generally be legal and enforceable under Norwegian law.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

In order to employ a foreign worker in Norway, the employee must normally have a residence permit. Citizens of an EU, EEA or EFTA country must, however, only register with the police.

The legal framework regarding the employment of foreign workers is complex and differentiated. A guide prepared by the Norwegian authorities is available here: https://www.nav.no/workinnorway/en/Home.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Import and export of goods and services are subject to certain restrictions. The import restrictions mean that, for certain types of goods, it may be necessary to obtain permission. The lists may change from time to time. The permitting authority varies between the various types of goods subject to restrictions.

Customs and VAT will also normally be payable when importing equipment and goods to Norway. The applicable levels are decided by the parliament every year.

### 10.2 If so, what import duties are payable and are exceptions available?

Custom duties vary between various types of goods. Typically, the tariff would be based on the value of the goods.

The general VAT is 25% in Norway.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Yes, they are.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Sections 387 and 388 of the Norwegian Penal Code (*Nw.*: *straffeloven*) forbid (on behalf of himself/herself or another person): (i) demanding, receiving or accepting an offer of an improper advantage in connection with the conduct of a position, an office or performance of an assignment; and (ii) giving or offering any person an improper advantage in connection with the conduct of a position, an offer or performance of an assignment. Section 389 of the Penal Code also forbids so-called trading in influence. Corruption and trading in influence is punishable in both the public and private sectors. Aggravated corruption is punishable with imprisonment of up to 10 years.

In September 2017, the Supreme Court sentenced a previous director of the major Norwegian company Yara to seven years' imprisonment for corruption. Yara accepted a fine of 295 million NOK in the same case.

In addition to criminal liability, section 1-6 of the Torts Act (*Nw.*: *skadeserstatningsloven*) provides a special basis for civil claims for damages for loss caused by corruption.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements regarding projects in Norway are typically governed by Norwegian or English law.

### 13.2 What law typically governs financing agreements?

Financing agreements regarding Norwegian projects are typically governed by Norwegian or English law. Norwegian lenders usually prefer Norwegian law for the facility agreement.

Security arrangements involving security in Norway are typically governed by Norwegian law. For assets in Norway, such as inventory, machinery and plant, and shares issued by a Norwegian company, it follows from the *lex rei sitae* rule that all rights *in rem* are governed by the law of the place where the assets is. Since security agreements always contain a certain important element of rights *in rem*, one usually keeps the security agreement as a whole, subject to the same law. The Supreme Court recently confirmed this approach in respect of a claims pledge when the pledgee (typically, the project company or its parent) is Norwegian.

### 13.3 What matters are typically governed by domestic law?

Rights *in rem* relating to assets in Norway or claims owned by a Norwegian party will be governed by Norwegian law pursuant to the *lex rei sitae* rule. Norwegian corporate law will also apply to the authority and powers of a Norwegian company.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Norwegian jurisdictional regulations consist of two sets of rules. For EU/EEA-related cases, limited to certain civil and commercial claims, the Lugano convention applies. For other civil cases, the general set of rules in the Dispute Act (*Nw.*: *tvisteloven*) applies.

Under the general rules, there are no restrictions on professional parties' right to submit to a foreign jurisdiction. It is possible, however, that very unbalanced jurisdiction clauses may be revised or set aside as a whole by Norwegian courts, in line with certain European judgments in the same direction. In case of consumer cases, the courts will not recognise an agreement limiting the right to file a claim at the consumer's and/or the professional party's ordinary venue, unless the jurisdiction agreement is made in writing and is entered into after the dispute in question arose.

Further, under the general rules, a foreign judgment will be enforceable in Norway if the jurisdiction agreement is for a specific legal action or for legal actions that arise out of a particular legal relationship. To the extent the jurisdiction agreement limits or extends Norwegian courts' international jurisdiction, the agreement must be made in writing.

Under the Lugano convention, the jurisdiction agreement must comply with the requirements in article 23 to be binding on the parties. In practice, the agreement must be in writing or confirmed in writing, or it must follow from a well-established practice between the parties or be in a form which accords with a usage which the parties ought to have been aware of and which is widely known in the relevant kind of commerce.

A judgment rendered by a Lugano state, regarding a civil and commercial matter covered by the Lugano convention, is enforceable in Norway with no new assessment of the merits of the case. Enforcement of such judgment shall follow the procedure set out in the convention.

In relation to waiver of immunity, Norwegian courts will recognise a waiver to the extent permitted by international law. A general waiver of immunity may be held to be in conflict with international law. Norwegian courts will generally not enforce rights in conflict with diplomatic rights for immunity unless a specific waiver has been granted.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes. Disputes concerning legal relationships in respect of which the parties have an unrestricted right of disposition, including the private law effects of competition law, may be determined by arbitration. If the parties have validly agreed to arbitration, the ordinary courts shall refuse the case.

Arbitral awards are enforceable in accordance with the New York Convention, see question 15.2 below. This means that enforcement of a qualified arbitral award cannot be refused by Norwegian courts unless enforcement will violate Norwegian public policy, one of the parties lacked legal capacity or the arbitration agreement is void, the award was rendered despite one party's lack of appearance and that party was not given proper notice of the proceedings or certain other basic requirements to the arbitral tribunal's composition and jurisdiction, and the mandate has not been met.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Norway is party to the New York Convention.

### 15.3 Are any types of disputes not arbitrable under local law?

Only disputes concerning legal relationships in respect of which the parties have an unrestricted right of disposition, including the private law effects of competition law, may be determined by arbitration under Norwegian law. Public law matters and civil matters involving public considerations such as cases regarding a person's legal status, children's rights and administrative decisions are not subject to arbitration.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

There is no mandatory arbitration under Norwegian law.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

No, there has not.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

There are no such withholding tax obligations under Norwegian law.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives to foreign investors or creditors. No tax applies to foreign investments, loans, mortgages or other security in relation to effectiveness or registration.

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

No, there are not.

### 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

Bonds must be issued in accordance with the applicable securities regulations. If the company wishes to offer subscription or purchase of transferable securities made to 150 persons or more, involving an amount of at least 1 million EUR calculated over a one-year period, a prospectus must be prepared in accordance with the Norwegian Securities Trading Act (*Nw.*: *verdipapirhandelloven*).

Norwegian bond issues are to a large extent handled by the Nordic Trustee, which acts on behalf of the bondholders. There are, however, also a large number of private placement bond issuances in the Norwegian market, where there is no use of a trustee or agent.

Bonds may be listed on the Nordic ABM and on the Oslo Stock Exchange. In case of listing of bonds, the rules of the marketplaces will apply together with the Securities Trading Act.

## 19 Islamic Finance

### 19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

There is no particular regulation of Islamic finance in Norwegian law and any alternative structuring of finance must be done within the general legal framework.

Norwegian contract law is based on the principle of the parties' freedom of contract. It is, however, important to be aware that the Financial Agreement Act (*Nw.*: *finansavtaleloven*) contains several requirements to financial contracts entered into with a finance institution as lender or guarantee creditor, of which several requirements are mandatory, particularly if the debtor is a consumer. Norwegian law also requires that any security right must have a basis in law. If the parties seek to construct a security right *per se*, i.e. a right to recovery for debt at the expense of the debtor's other creditors, this must have authority in law. These requirements certainly limit the possibility to find new and creative financing structures.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

*Shari'ah* law may only become the governing law if: i) it is part of a national legal system, elected by the parties or otherwise being applicable pursuant to the general choice of law rules; or ii) it is agreed between the parties to apply *Shari'ah* law as a set of rules to the extent allowed under the limits of mandatory provisions in the national law applicable to the contract.

There have not been any cases in Norway where *Shari'ah* law has been referred to as a basis for commercial rights and obligations. In one case, a husband's attempt to enforce a Moroccan judgment approving a divorce based on *Shari'ah* law was refused by the Norwegian court, based on the result being in violation of Norwegian public policy.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Interest payment obligations are not only common in loan agreements between Norwegian parties or Norwegian law-governed loan agreements, but may be required for tax and corporate law reasons to procure that the agreement is on an arm's length basis. Extremely and unfairly high interest rates may, however, subject to circumstances, give a basis for contractual revision under section 36 of the Contract Act (*Nw.*: *avtaleloven*).


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Linn Hoel Ringvoll works with assignments within financing, corporate law and private international law. She has particular expertise and experience in international contracts and cross-border transactions, including setting up corporate and financial structures and drafting and negotiating loan agreements and establishing securities in Norway and abroad.

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Snorre has extensive experience in managing large-scale financing projects including syndicate loans to finance the operations of major corporations, project financing of development projects and acquisition financing. He also has extensive experience in negotiating and project management of cross-border transactions. He has for a number of years assisted private equity companies and industrial companies in such finance and corporate issues, and has as a consequence experience with ordinary secured (syndicated) bank loans, various guarantee models, bond loans and loan programmes, as well as with interest rate and currency hedging agreements (ISDA), and with the rules of internal financing of corporations.

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# Portugal


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

The Portuguese market continues to show signs of increasing confidence from investors as a significant number of greenfield projects are being discussed and planned for the near future, both in the infrastructure and the energy sectors.

Alongside a new wave of merchant solar power plants under development and the launch of a new public-private partnership ("PPP") in the health sector, the ports sector has also been attracting the attention of investors.

The activity in secondary market sales of participations in project companies in the road, ports, water and energy sectors continues, with construction companies and other original shareholders in those companies seeking to free up capital to invest in other geographies or to focus on their core businesses. Investment funds keep seeking to enhance their position in the market, replacing to a certain extent the traditional banking groups and the investors.

The maturity of the projects combined with an increase of liquidity in the financing market increased the number of refinancings of project debt transactions, some of which within the context of merger and acquisition deals, with recourse to bond issues by Portuguese issuers and registered with Interbolsa, the Portuguese clearing and settlement house. This type of structure has been favoured by both sponsors and lenders, as it has proven very efficient not only from a contractual perspective but also from a tax point of view.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The most relevant deals which have taken place in Portugal in recent years include greenfield and brownfield transactions, among which we would highlight the following:

- The sale of the shareholding stakes of the concessionaires of road shadow toll concessions in Madeira, financed under a project finance regime.
- The acquisition of the shareholding stakes of the concessionaires and operating companies of Beira Interior and Transmontana road shadow toll concessions, financed under a project finance regime.
- The sale of the shareholding stakes of a water and sewage concessionaire financed under a project finance regime.
- The financing of a 25 MW photovoltaic project, based on a corporate "PPA" logic. It was the first bank financing of a renewable energy project in the Iberian Peninsula with no guaranteed remuneration (feed-in tariff).
- The acquisition of the share capital of a Portuguese company, granted with a concession of 30 years for the management of the infrastructure of one the biggest hospitals in the Lisbon area. This company also laterally operates the concession for the provision of medical services at the facility which was granted to another Portuguese company.
- The financing (arranged under Portuguese law and secured by Portuguese law and Luxemburg law collateral) regarding the acquisition of the share capital of a significant Portuguese road concessionaire by a Portuguese subsidiary of a dominant company incorporated under the laws of Luxembourg.
- The financing of the construction of a new university campus in Lisbon under a project finance regime. This is an innovative project as far as project finance structures in Portugal are concerned, since the Borrower is a private law foundation and part of the financial flows financing the project arises from donations to be made to the Borrower.
- The financing of an innovative biomass energy production project, including all relevant phases, from construction to operation and maintenance, comprising two biomass power plants in the north of Portugal with a combined installed capacity of 30 MW, under a project finance regime.
- The acquisition and refinancing of a windfarm portfolio to be implemented through the issuance of bonds in the amount of €210,000,000.
- The acquisition of part of the former ENEOP portfolio (which had resulted from the ENEOP Split of Assets in 2015) and the subsequent refinancing under a project finance structure, of the current 322 MW windfarm portfolio owned by the purchaser – one of the most significant international groups operating in the energy sector.
- The project finance by issuance of two sets of bonds in an aggregate amount of €340,000,000 for the acquisition and refinancing of major companies operating in the gas sector.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

The concept of a fixed charge is the only form of security interest generally admissible in Portugal and the terms and formalities required for security creation vary depending on the type of assets at stake.

Despite the non-recognition of the "floating charge" concept under Portuguese law, there is the possibility of creating security over different assets through a single security agreement.

As an exception to the above principles, Portuguese law on financial collateral (which implemented the Directive on Financial Collateral Arrangements) allows for pledges similar to floating charges on money and securities in bank accounts.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security on immovable assets or rights relating thereto, or on movable assets subject to registration (such as automobiles, ships and planes), is created by means of mortgages, executed through notarial deeds and subject to registration as a condition for the validity thereof.

The creation of security interests over plant and machinery may be made by means of a specific type of mortgage which is called a "factory mortgage", which covers the factory's land, as well as the equipment and movable assets used in the factory's activity identified in an inventory attached to the mortgage deed.

Pledges may be created over movable (non-registered) assets or credits and shall be effected by written agreement, and require the transfer of possession over such assets to the pledgee or to a third party. Exceptions to this transfer of possession requirement are: the creation of a pledge having as its beneficiary a credit institution authorised to carry out business in Portugal, in which case specific rules apply; and the creation of financial pledges under the legislation for financial collateral arrangements.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

A pledge over receivables qualifies as a pledge of credits. The validity of a pledge of credits is subject to (i) the pledgor's counterparty being served notice thereof, and (ii) the pledgee coming into possession of the documents required to enforce the rights arising from the relevant contract directly against the pledgor's counterparty.

A pledge of credits covers all payments to be made under the contractual relationship underlying such credits. After the debtor is notified such payments must nevertheless be made jointly to the pledgor and the pledgee. As a means of circumventing practical difficulties arising from the joint payment requirement, it is common for the pledgee to authorise the third-party debtor to continue to carry out the relevant payments to the pledgor until notice to the contrary, and/or to construe the relevant pledge agreement as a financial collateral arrangement, in accordance with the Directive on Financial Collateral Arrangements.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

A pledge over cash deposited in bank accounts is deemed a pledge of credits (see above). Generally, the taking of security over bank accounts by financial institutions is made through financial pledges allowing the beneficiary to use and dispose of the deposited funds.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

In companies, the capital of which is represented by immaterial nominative participations ("quotas"), creation of security requires a written agreement and registration of the same with the relevant Commercial Registry Office.

On the other hand, in companies the capital of which is represented by shares, security is created by means of a pledge in accordance with the following formalities:

i. nominative shares represented by certificates a pledge declaration written by the chargor on the certificates and a request for registration of the pledge in the issuer's share ledger book; and

ii. dematerialised shares: by means of an entry as to the creation of the pledge in the chargor's bank account.

It is common practice to have a written contract governing the terms of the relevant pledge.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The creation of security interests over assets located in Portugal (including share pledges) attracts Stamp Duty, levied on the secured amount. Stamp Duty shall not be payable in the case of security interests that are ancillary and created simultaneously with a loan, provided that the loan has already been subject to a similar taxation (no duplication of tax applies).

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The registration before the local Registry Offices of the creation of pledges over quotas will involve a cost of €100 per quota, and for the creation of mortgages there will be a cost of €500 per item of real estate (regardless of the number of mortgages).

As for the time involved, the registration of pledges over quotas generally takes one business day to be completed, and that of mortgages up to 10 days (or, if an urgency fee is paid, one business day).

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

The creation of security over assets which are in the private domain does not, in general, require any regulatory or similar consents.

However, the creation of security over public domain assets is prohibited and some restrictions in respect of the creation of security over concession/regulated assets may be imposed, notably through specific regulations or the relevant concession contracts.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

Trusteeship is generally not recognised by Portuguese law. Thus, even if the relevant agreements indicate that the security agent holds security for the benefit of a given lending syndicate, unless all lenders are disclosed as holders thereof, the security agent shall appear as the sole beneficiary of the security entitlements and shall be the sole entity with authority to file enforcement procedures in respect thereof.

Hence, in the context of the enforcement procedures, the security agent may be required to prove before a court that it holds title to the secured obligations.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

The only *prima facie* way to have all the lenders recognised as beneficiaries of a given security is to name them as holders of the secured obligations and corresponding security. However, this entails the need to amend the relevant agreement (or execute a new notarial deed) each time the lenders assign, buy or sell part of the loans, which is not a practical solution. For this reason, attempts have been made to set up alternatives and to put in place more lender-friendly solutions, as is the case where the security agent is made the registered beneficiary of the security and either benefits from a parallel debt or is made contractually bound to assign the secured obligations to all the lenders prior to enforcement of the security. Other alternatives include having the entire lending syndicate registered as secured creditors but with proper intercreditor arrangements in place (setting up the rules for action by individual creditors and for allocation of the proceeds of security enforcement).

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

The enforcement of mortgages consists of a sale of the relevant assets through court proceedings. The sale of pledged assets may be made through court or out-of-court proceedings.

Appropriation or foreclosure of the asset is generally not available to the beneficiaries of mortgages or pledges other than in the case of financial pledges or pledges granted by a business entity or person in security of a commercial obligation.

Court procedures usually take several months or even more than a year if the complexity of the legal arguments at stake leads to court appeals.

Please refer to section 5 below for restrictions concerning insolvency/bankruptcy and restructuring proceedings.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

No different rules apply to domestic or foreign investors in this respect.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

Upon the opening of bankruptcy proceedings, all security other than financial collateral over the insolvent's assets must be enforced within the bankruptcy proceedings and payment of creditors' claims shall be made in accordance with the Portuguese Insolvency and Company Recovery Code ("CIRE") rules.

Furthermore, the insolvency order delivered by the court suspends any outstanding executory proceedings having as an object the attachment or seizure of the insolvent's assets, and prevents the bringing of any new executory proceedings or the enforcement of any security against the insolvent entity. Any lawsuits related to such assets are attached to the bankruptcy proceedings.

In addition, all claims from creditors of the insolvent entity must be lodged within the insolvency proceedings. Therein the creditor shall mention the amount of its claim as well as any security from which it may benefit over the assets of the insolvent entity.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

The insolvency administrator is entitled to terminate agreements which may be qualified as detrimental to the insolvent estate by notice to the relevant counterparty. The counterparty may either accept termination of the contract and return to the insolvency estate the consideration received or, alternatively, challenge the termination of the contract in court.

There are certain acts and transactions which are legally deemed to be detrimental to the insolvent company's estate. Other than these, acts performed within two years prior to the opening of the corporate bankruptcy proceedings that generally diminish, jeopardise or delay the rights of the debtor's creditors may be qualified as detrimental to the insolvent estate, provided it is made proof of bad faith of the relevant parties. Bad faith is presumed by law in the case that the counterparty or the beneficiary of the act is related to the insolvent entity.

Upon payment of the insolvency procedure costs (which must be settled prior to all other claims), claims shall be paid in the following order:

(a) secured claims (those with security over assets which are part of the insolvent estate up to the value of those assets);

(b) preferential claims, including:
   i. general creditors' preferential claims over the assets in the insolvent estate up to the value of the assets over which such preferential claims exist and where the claims are not extinguished in consequence of the declaration of insolvency;
   ii. certain debts to the tax and social security authorities;
   iii. claims by creditors which have provided capital to finance the insolvent's activity during the SIREVE procedure (see question 5.5 below) over all movable assets of the insolvent;
   iv. employees' claims over the specific company premises where they carry out their activity; and
   v. claims by the party that applied for the opening of the insolvency proceedings; and

(c) unsecured claims and subordinated claims.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Bankruptcy proceedings are generally applicable to all persons or legal entities, except for the Republic of Portugal and public/administrative entities and companies. In addition, insurance companies, credit institutions and other financial corporations are subject to specific insolvency rules (and not to the CIRE).

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

A creditor may, without filing a judicial proceeding, retain possession of the assets pertaining to a certain entity if it is in the possession of such assets and if the claim arises from expenses or damages caused by such assets.

Creditors may also enforce security over assets of the project company outside the court, provided such security was granted under the Directive on Financial Collateral Arrangements.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

The Portuguese insolvency law provides for a special recovery proceeding which aims to promote the rehabilitation of debtors facing financial difficulties (*Processo Especial de Revitalização* – "PER"). These proceedings are available to a debtor which finds itself in a distressed financial situation who is not technically insolvent yet.

The plan approved within a PER is binding on all creditors, including those which did not take part in the negotiations. Therefore, when a plan is approved by the legally-prescribed majority of creditors and further confirmed by the judge, the provisions contained therein are enforceable against non-voting or dissident creditors.

Moreover, the plan approved by the majority of the creditors and confirmed by the judge by a definitive order allows the debtor and its creditors to benefit from a specific and more favourable tax regime set forth in sections 268 to 270 of the Portuguese Insolvency Code.

Portuguese law further provides for an out-of-court recovery system (*Sistema de Recuperação de Empresas por Via Extrajudicial* – "SIREVE") which is a non-judicial procedure that aims to obtain a settlement between a company which may be insolvent or facing imminent insolvency, and its creditors.

The SIREVE will be revoked with the entering into force of the new out-of-court recovery procedure (*Regime Extrajudicial de Recuperação de Empresas* – "RERE"), whose publication in the official gazette is still pending. RERE corresponds to a non-judicial procedure that aims to obtain a settlement between a company in financial distress or in an imminent insolvency situation and its creditors. It involves a voluntary arrangement between the company and all or part of its creditors, whose content is freely established by the parties and typically confidential.

The effects of the RERE are restricted to the participating creditors and their claims, and securities may be only modified to the extent therein agreed; therefore, and contrarily to what happens in respect of a plan approved and confirmed within a PER, there is no cramdown on dissident creditors.

Should the parties to the agreement expressly and unanimously decide to deposit the agreement with the Commercial Registry Office and provided that a statutory auditor formally certifies that through that agreement the debtor restructures at least 30% of its liabilities and that, as a result of such agreement, it achieves positive equity and its equity results superior to its share capital, it will benefit from the more favourable tax treatment applicable to PER as mentioned above.

Although the RERE is primarily addressed to non-insolvent companies, exceptionally and temporarily, within the 18 months after the entering into force of the RERE regime, a debtor that is technically insolvent may still make use of this special regime, instead of filing for its insolvency.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Directors may continue to trade even if a company is facing financial difficulties provided that they act with a special duty of care and do not violate their legal duties and legal principles applicable to the management of companies.

Within insolvency proceedings, the insolvent entity's directors may be found liable if they fail to meet their legal obligation to file for corporate insolvency proceedings within 30 days of the debtor becoming insolvent or if the insolvency situation has been created or aggravated as a consequence of a felonious or gross fault during the period of three years before the opening of the corporate insolvency proceedings.

Directors may be subject to ancillary penalties – prohibition from performing commercial activities – and/or ordered to pay amounts unduly received from the insolvent company, and may be deemed jointly and severally liable with the company in certain circumstances.

Where the debtor is declared insolvent by the court, directors may also be held criminally liable for fraudulent insolvency, negligent insolvency and the unlawful favouring of creditors.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Under general Portuguese law, there are no restrictions on foreign direct investment or foreign ownership of a project company. However, the exercise of an economic activity within the regulated sectors (such as energy, water and waste management, telecoms, postal services, railways, commercial aviation and financial services) may require authorisation from the regulator to both Portuguese and foreign investors.

Restrictions may apply under the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering regulations into Portuguese law. There may also be temporary embargo situations applying to persons or entities residing in non-EU states.

There are no currency controls under Portuguese law and money can be freely transferred into or out of Portugal. Also, there are no restrictions on the remittance of profits or investments abroad.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No particular restrictions in relation to foreign direct investment apply.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The protection of private property is upheld by the Constitution. Accordingly, the nationalisation, expropriation or requisition of private property can only take place on the grounds of public interest and provided that private entities are duly compensated.

While there is a legal framework setting out the terms for the expropriation process and calculation of indemnification payable in relation to immovable assets, there is no general framework for nationalisation processes.

There is, nevertheless, a specific legal regime setting out the framework for the public appropriation of share capital, in whole or in part, from private legal persons for public interest reasons.

There are no distinctions between domestic and foreign investors in this respect.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The governmental agencies or departments with authority over projects depend mainly on the relevant sector of activity of a project. In general terms, the respective Ministries (energy, infrastructure, transport, health, etc., and – when applicable – environment) are responsible for the launch, licensing and major regulation of the projects, either directly or through their governmental departments, e.g.: *Direção Geral de Energia e Geologia* (energy); *Instituto da Mobilidade e dos Transportes, I.P.* (roads); *Administração Regional de Saúde* (health), etc.

The approval of the Ministry of Finance may also be required where a project involves public investment or, more generally, where the PPP legal framework applies.

In this respect, reference should be made to the *Unidade Técnica de Acompanhamento de Projetos* ("UTAP"), an administrative entity under the supervision of the Ministry of Finance, recently created for the follow-up of PPP projects.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Project documents are valid and enforceable without any need for registration, authentication or filing with any governmental authority, save for certain pledge arrangements which need to be authenticated by a Notary or by any competent authority.

Private agreements with acknowledgment of a payment obligation shall also only be directly enforceable before the courts if authenticated by a Notary or by any competent authority. For that reason, financing agreements are usually notarised.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Other than assets in the public domain (e.g. the hydro domain, mineral resources, roads and railways) which may not be appropriated by private entities, the ownership of land or other assets does not require a licence.

However, the exercise of a specific economic activity by use or operation of such assets may require a licence and, in the case of an asset in the public domain, the attribution of a right of use (of the relevant asset, normally through a concession regime).

There is no distinction between national and foreign entities in this respect.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

There is no specific tax regime applicable to the extraction or export of natural resources, other than in respect of the extraction of oil (but not applicable to natural gas).

Additionally, Portuguese oil legislation foresees that the agreements for the prospection, research and production of oil shall include an annual fee ("*renda de superfície*") calculated by reference to the area of the concession. Other fees and royalties may be agreed in the relevant concession agreements or licences.

Portugal has implemented excise duties on petroleum and energy products, in line with EU legislation, which are triggered when products are released for consumption.

The extraction and/or export of natural resources may also be subject to the general taxes applicable within the Portuguese tax system; namely, Corporate Income Tax ("CIT") and Value-Added Tax ("VAT").

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Income derived from foreign currency exchange may be subject to CIT. Commission fees payable to a financial credit institution for foreign currency exchange may trigger Stamp Duty.

In general terms, Portugal does not apply controls on foreign currency exchange, without prejudice to money laundering controls in line with those applicable in other EU Member States. Furthermore, reporting obligations to the Bank of Portugal may also apply to certain transactions.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Interest or dividends paid by Portuguese-resident companies to non-resident entities are, as a general rule, subject to withholding tax at a rate of 25% (this rate may, under certain circumstances, be increased to 35%).

With respect to interest or dividend payments, the withholding tax can be waived or reduced under the EU Interest and Royalties Directive, the EU Parent-Subsidiary Directive or under bilateral double tax treaties signed by Portugal, as long as certain conditions are met.

Note that the CIT legislative reform implemented a participation exemption regime for dividends (and capital gains), which considerably extended the cases in which dividends paid to other jurisdictions (e.g. with whom Portugal has signed a double tax treaty and there is administrative cooperation in tax matters) are not subject to withholding tax.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

There are no restrictions or limitations regarding the establishment and maintenance of onshore foreign currency accounts or offshore accounts in other jurisdictions.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Please see question 7.6 above concerning withholding taxes related to the payment of dividends to a foreign parent company. Regarding dividends paid to a resident parent company, exclusion from taxation is also available provided some requirements are met (namely, a certain level of shareholding – currently 10% held for at least 12 months).

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Environmental impact assessments are generally required for infrastructure projects. The PPP law establishes that PPP procurement procedures shall only be launched after approval of the relevant environmental impact declaration. Financing documents also normally include this environmental impact declaration as a condition precedent ("CP") to the disbursement of funds.

Depending on the sector in question, a project may also be subject to the European Integrated Pollution Prevention and Control ("IPPC") rules. The environmental licence (which is required, in particular, for industrial projects) must be obtained before operation commences, and must be successively renewed during the entire period of operation of the relevant plant.

Furthermore, in the context of the EU emissions trading system, for projects in certain industrial sectors and meeting certain conditions and/or thresholds, operators must hold a permit to emit greenhouse gases, and be the holder of emission allowances.

Depending on the sector of activity, health and safety laws may apply in terms consistent with European directives in this respect.

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

In general terms, project companies are not subject to specific procurement rules. There are, however, some specific cases where a project company may be subject to the regime set forth in Portuguese public procurement law, namely: (i) if the project company has been established for the specific purpose of meeting general interest needs and is controlled by public entities or financed mainly from the public budget; (ii) if the project company has been created for the specific purpose of meeting general interest needs, operates in the energy, water, transport or postal services, and a public entity exercises a dominant influence over it; and (iii) if a project company has been granted, without an international public procurement process, special or exclusive rights in the public energy, water, transport or postal services sectors, affecting the ability of third parties to exercise activities on those sectors.

Moreover, public procurement rules shall also apply to construction contracts and services agreements entered into by a project company (i) which is in more than 50% directly financed by a public entity, and (ii) whose contractual price equals or exceeds €5,548,000 and €221,000, respectively.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Portuguese law does not foresee any restrictions, controls, fees or taxes on the granting of insurance policies by a foreign insurance company.

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes. No limitation applies under Portuguese law regarding payment of insurance to foreign secured creditors.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

In general, no restrictions apply to the employment of foreign workers. However, citizens of non-EU countries must obtain a work, visa residence or equivalent permit to live in Portugal.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

In general, the import of goods is a taxable event for the purposes of VAT and customs duties. VAT and customs duties are payable by the importers (whether or not a taxable person) at the time the goods pass the customs control. In some circumstances, VAT may be self-assessed by importers in their VAT return.

**10.2 If so, what import duties are payable and are exceptions available?**

VAT is charged on importation of goods at the rate that applies to a supply of similar goods within the Portuguese territory. The taxable value of imports is determined in accordance with customs legislation, excluding VAT itself but including customs duties and any other taxes or charges levied on imports, as well as incidental expenses such as commissions, packaging, transport and insurance expenses incurred up to the first destination within Portugal.

Customs duties are calculated, on an *ad valorem* basis, as a percentage of the value of the goods being declared for importation. The level of that percentage depends on the kind of product imported and the country of origin.

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

Although Portuguese law does not provide for a specific provision regarding exclusion of liability in case of *force majeure*, the principle is generally accepted and enforceable in Portugal. In general, project contracts provide for detailed provisions in relation to *force majeure* events and the terms under which the parties have agreed to mitigate the effects of *force majeure*, and exclude liability for breach of contract resulting from a *force majeure* event. The terms agreed between the parties in this respect are generally accepted and enforceable in Portugal.

## 12 Corrupt Practices

**12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?**

No specific rules apply on corruption and bribery activities in the projects sector. Nevertheless, entities are subject to general criminal law, which sets forth corruption and bribery as criminal offences which may be punished with fines or imprisonment up to a maximum of eight years (without prejudice to the possibility of aggravated penalties in specific cases).

We also refer to the provisions of the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering regulations into Portuguese law.

## 13 Applicable Law

**13.1 What law typically governs project agreements?**

Project agreements are typically governed by Portuguese law. A different applicable law may be chosen (provided that the choice of law observes the requirements set out in Portuguese law or in the applicable international conventions). We note, however, that concession contracts and other project agreements entered into with public entities are mandatorily governed by Portuguese law.

**13.2 What law typically governs financing agreements?**

The parties may freely choose the law which will govern the financing agreements with observation of the requirements set out in Portuguese law or in the applicable international conventions.

Although financing agreements in project finance deals in Portugal are commonly subject to Portuguese law, it is not uncommon for international lending syndicates to require finance agreements to be submitted to English law.

**13.3 What matters are typically governed by domestic law?**

In the context of project finance deals, the creation of security interests over assets which are located in Portugal is, according to the applicable conflict of laws rules, mandatorily governed by Portuguese law.

## 14 Jurisdiction and Waiver of Immunity

**14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?**

Portuguese courts recognise the parties' autonomy to select the forum of their disputes, even when the selected forum has no particular connection with the dispute, and have consistently recognised the provisions of the Brussels Regulation as prevailing over the Portuguese Code of Civil Procedure, under which the parties are required to establish a significant interest in the designated jurisdiction to select it as the appropriate forum for their disputes.

Notwithstanding, Portuguese courts may ignore foreign jurisdiction clauses and assume jurisdiction in special cases where they may claim to hold exclusive jurisdiction, e.g. actions relating to local land, in proceedings related to the validity of the incorporation or the dissolution of companies domiciled in Portugal, in proceedings relating to the validity of entries in public registers, or in proceedings related to the registration or validity of patents.

In addition, a waiver of immunity is recognised and enforceable in Portugal. Although there is no specific national act or international convention entered into by Portugal in this regard, Portuguese law gives immunity from jurisdiction of the Portuguese courts to sovereign states (and to other public entities) by virtue of a general principle of customary international law. State immunity is, however, given a strict extent and is limited to acts involving the exercise of sovereign authority.

## 15 International Arbitration

**15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?**

Major project contracts typically provide that the parties shall resort to arbitration for the resolution of disputes. Where international contractors are involved, the parties often choose to apply the rules of international centres such as the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA") and the Rules of Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL").

International arbitration clauses are widely recognised by Portuguese courts irrespective of the choice of the parties to locate the seat of the arbitration in Portugal or abroad. At the enforcement stage, the decree of enforceability of an arbitral award is likely to vary greatly depending on the applicable legal regime. An international arbitral award rendered in Portugal is immediately enforceable in Portuguese territory under the rules of the Portuguese Arbitration Act and of the Portuguese Code of Civil Procedure. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty or bilateral agreement (see question 15.2 below), generally under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

Foreign arbitral awards that are not covered by any of these international treaties may still be recognised and enforced in Portugal under the general provisions of the Portuguese Arbitration Act, which were greatly influenced by the UNCITRAL Model Law and by the New York Convention.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

In the context of international arbitration, Portugal is a party to the following international conventions:

(a) the Geneva Protocol on Arbitration Clauses of 1923;

(b) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;

(c) the New York Convention, which entered into force in Portugal on 16 January 1995;

(d) the Inter-American Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975; and

(e) the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force in Portugal on 1 August 1984.

On a bilateral level, Portugal has signed Judiciary Cooperation Agreements with Guinea-Bissau, Mozambique, Angola, São Tomé and Príncipe, the Special Administrative Region of Macao (People's Republic of China) and Cape Verde. These bilateral agreements entered into between Portugal and other Portuguese-speaking countries equate arbitral awards to national courts' judgments and subject both decisions to the same legal regime.

### 15.3 Are any types of disputes not arbitrable under local law?

Unless the matter is subject to the exclusive jurisdiction of national courts or to compulsory arbitration, any dispute involving an economic interest is arbitrable. Portuguese law also extends arbitrability to non-pecuniary rights under which the parties can enter into agreements.

Only a few types of disputes, namely some disputes related to insolvency proceedings, are subject to the exclusive jurisdiction of national courts and thus considered non-arbitrable.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Disputes concerning intellectual property rights related to medicines, collective labour rights and sports regulation are subject to mandatory domestic arbitration.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Although it is common in project finance deals to have direct agreements with the government (in particular, in its capacity as grantor in a concession contract), those agreements are normally designed to address step-in rights of financial institutions and do not provide any particular political risk protections.

Change-in-law risk is normally addressed by contract in the standard terms for international project finance deals.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Under certain circumstances (e.g. interest paid to financial institutions), withholding tax on interest payments may be waived.

Under the EU Interest and Royalties Directive and since 1 July 2013, no withholding tax is due on interest payments made by resident companies, provided the following conditions are met: (i) the paying and beneficiary entities are subject to (and not exempt from) corporate tax and take one of the legal forms listed in the annex of this directive; (ii) both entities are considered EU residents for the purposes of double tax treaties; (iii) a direct 25% shareholding is held by one of the companies in the other's capital, or both are sister companies (i.e. are both held, in at least 25%, by the same direct shareholder and in either case the shareholding must be held for at least a two-year period); and (iv) the entity receiving the interest payment should be its effective beneficiary. Under the provisions of the double tax treaties signed by Portugal, the domestic withholding tax rates foreseen for interest payments can be reduced to rates ranging from 5% to 15% (no withholding applies in the case of long-term loans extended by US banking or financial institutions).

Withholding tax may apply depending on the taxable construction of the claim under the guarantee.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Portugal has tax regimes applicable until 2020 aimed at fostering investment, particularly foreign investment. These comprise tax incentives to investment made in Portugal in specific business sectors (e.g. the mining and manufacturing industry), such as (i) CIT deductions or tax credits, and (ii) exemptions or reductions in Real Estate Tax, Real Estate Transfer Tax and Stamp Duty.

The tax exposure of a foreign investment in Portugal will depend on how such investment is structured (e.g. if it involves a direct presence in Portugal or not). For instance, if such foreign investment is made through a local subsidiary, this affiliate will be subject to the taxes which are typically applicable to national companies; namely (among others), CIT, VAT, Stamp Duty and property taxes. Loans, mortgages and other security documents may be subject to Stamp Duty in Portugal, at rates that vary between 0.04% per month or fractions thereof up to 0.6% (one-off), depending on the maturity of the loan or the term of the guarantee, as applicable.

The current Stamp Duty Code provides for exemptions applicable to certain loans (e.g. shareholders' loans, under certain conditions) and guarantees (e.g. those granted to financial or credit institutions, under certain conditions).

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

In general, the most relevant issues have been addressed.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

In general terms, bonds may only be issued by limited liability companies incorporated in Portugal whose share capital is paid up in full and which have been registered with the relevant Commercial Registry Office for at least one year. This requirement may be waived if the issuer makes available to investors financial information on the company, with reference to a date not later than three months prior to the issue date, audited by an independent auditor, registered with the Portuguese Securities Market Commission, and prepared in accordance with the applicable accounting rules.

In accordance with new legislation published in February 2015, a company may only issue bonds if, after the issuance, it has a ratio of financial autonomy equal to or higher than 35%, to be calculated in accordance with a certain legally set formula. This limit does not apply to (i) companies listed on a regulated market, (ii) companies enjoying a credit rating or bond issues enjoying a credit ratio attributed by a rating agency registered with the European Securities and Markets Authority ("ESMA") or with the Portuguese central bank (*Banco de Portugal*), (iii) issuances the repayment of which is specially secured in favour of the bondholders, (iv) bond issues with a nominal or subscription amount equal to or higher than €100,000, or (v) issuances subscribed by qualified investors (and without subsequent placement to non-qualified investors).

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

To the best of our knowledge, there is no experience of Islamic project finance in Portugal, nor are there any finance instruments structured in accordance with Islamic law in the Portuguese financial sector.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

See question 19.1 above.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

The inclusion of interest payment obligations in a loan agreement is common practice and fully valid and enforceable in Portugal.

Although civil law foresees maximum rates of interest, those provisions are not applicable to loans provided by financial institutions in relation to which only very specific limitations (e.g. for consumer credit or a surplus interest rate for overdue amounts) may apply.

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Since 2016, Teresa has been a partner in the Projects – Infrastructures, Energy & Natural Resources practice group. Before joining VdA in 2008, Teresa was an associate with the project department at Allen & Overy (London) where she acquired expertise in the financing of projects in various jurisdictions. From 2011 to 2014 she acquired reputation as deputy at the Cabinet of the Secretary of State for Infrastructure, Transports and Communications, being responsible for drafting and reviewing legislation concerning these sectors as well as leading negotiation teams in the context of the infrastructure PPP review requested by the bail-out arrangements applying in Portugal between 2011–2014. Teresa is frequently sought for leading-edge national and international transactions on project finance transactions and capital markets, mainly focused on the infrastructure and energy sectors, due to her high expertise. She has extensive experience in overseas markets, particularly in Portuguese-speaking African countries, namely Mozambique.

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In recent years, Ana's practice has been focused on the development and implementation of projects within the energy sector, in Portugal and in other jurisdictions where VdA Legal Partners is present, particularly in Cape Verde (in energy and finance matters), Angola (in energy and finance matters) and Mozambique (in oil & gas-related matters).

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# Spain

Héctor Bros

Cuatrecasas

Jaume Ribó

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

The Spanish economy grew at a healthy rate – just above 3% – in 2017. This, together with the expansionary monetary policy of the European Central Bank and the balance sheet clean-up exercise (which is almost in its final stage for most banks), has boosted the appetite of lenders for new projects. However, partly due to budgetary constraints and also related to the fact that the country now boasts – notably in its highway and high-speed train networks – one of the most extensive and modern infrastructure systems, there continues to be a stark contrast between the limited number of new projects available and the greater appetite for funding among lenders (driven also by the abundant cash sitting on their balance sheets).

Notwithstanding the general scarcity of new projects, a number of major infrastructure funds have acquired relevant interests in many concession-driven projects, a good part of them prompted by the need of cash-strapped sponsors to reduce their corporate debt. In most cases, lenders have welcomed the newcomers, partly because they were the main beneficiaries of the de-leveraging process of the relevant sponsor, and partly because of the incentive to gain access to new clients. As in previous years, most new financings have been offshore, mainly in Latin America and Europe, although 2017 has seen some far-reaching interesting highway projects, such as the approval by the Central Government of the Extraordinary Plan for Roads Investment (*Plan Extraordinario de Inversión en Carreteras*), which sets the pace for up to €5bn of PPP-based investments on highway and other high-capacity roads, including both construction and maintenance, distributed among some of the top 20 projects of the Trans-European Network (TEN), which is intended to be tendered in full before 2020.

On the energy side, the renewable power sector has experienced a revival during 2017, following the awarding of up to 5,000 MW of new wind and solar projects, after several years of scarcity of new projects, mostly due to adverse changes in the regulatory framework occurring during the crisis. Together with this, the year has continued to witness high levels of investment from alternative lenders, which have mainly concentrated on brownfield distressed transportation (the Madrid toll roads being the most relevant example) and, to a lesser extent, energy projects.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

In the area of transport, most of the new projects have been located in the northern regions, such as the €320m project financing of the N-636 Gerediaga–Elorrio road, in Vizcaya, or the €900m project financing of the hard-toll highways AP-1/AP-8 and GI-632, in Gipuzcoa, which included the €500m refinancing of the European Investment Bank tranche. Project finance structures have also been used to permit the acquisition of hard-toll highways, such as the privatised tunnels of Vallvidrera and Cadí, acquired by Abertis and BTG in 2012 and recently reshuffled to accommodate a new investor. Equally, a number of interesting and fairly innovative deals have been implemented for underground, tram and other railway-based infrastructure, such as the three concessions for the huge underground Line 9 of Barcelona (totalling more than €3bn in public-private partnership (PPP) schemes), the light rail systems of Malaga and Bilbao, and the financing of some of the civil engineering works behind the impressive high-speed rail network. Some of these projects have now been the object of major divestments by the original sponsors, with institutional infrastructure funds taking the bulk of the equity stakes.

Other significant deals have been closed in the context of the acquisition of various portfolios of car parking facilities (most notably, Parkia and Empark in 2016 and 2017, respectively), in some cases as a result of joint ventures with publicly controlled companies (e.g. the €200m financing of Bamsa) or in the context of tender processes sponsored by governmental entities, such as the railway management company Adif.

In the waste treatment business, the country has also seen interesting investments in waste treatment plants (e.g. the Ecoparks of Zabalgarbi or Zubieta), which in some cases have been at the mercy of unexpected political changes.

Finally, in the renewable energy business, the recent awarding of a large amount of greenfield MWs for photovoltaic and wind-based projects (see question 1.1 above) has resulted in significant new project financings for major groups such as Forestalia, Grupo Jorge Energía or Grupo Cobra.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Spanish law does not provide for a so-called "universal security" over the entire debtor's assets. Nor does it generally admit the creation of a "floating" or "adjustable" lien or encumbrance (except for certain mortgages and pledges over cash-like instruments). Therefore, a security agreement is usually required in relation to each type of asset.

Typically, the security package in a project finance transaction in Spain comprises a pledge over the shares of the project company, one or more pledges over bank accounts and receivables arising from project agreements (EPCs, operation and maintenance agreements, hedging agreements, insurance policies, etc.) and, eventually, actual or contingent security over the project's physical assets (whether by means of a pledge or a mortgage, depending on the type of asset).

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Real property is taken as security by means of a real estate mortgage (*hipoteca inmobiliaria*). Under Spanish law, real estate mortgages cover: (i) the plot of land and the buildings built on it; (ii) the proceeds from the insurance policies insuring such property; and (iii) the improvement works carried out on the property and natural accretions. Should the parties agree to it, such mortgage may also include movable items located permanently in the mortgaged property.

Security over machinery and equipment may be created by means of a chattel mortgage (*hipoteca de maquinaria industrial*) or a non-possessory pledge (*prenda sin desplazamiento de maquinaria industrial*). The choice will depend on whether the specific asset meets certain legal requirements.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

In Spain, security over receivables can be taken in two different ways:

(i) By creating a possessory pledge. Although the use of this form of security for receivables is not expressly contemplated under the applicable law (the Spanish Civil Code), it has traditionally been admitted by case law and widely applied in practice. Under this pledge, the pledgor would be entitled to collect the receivables in the absence of a default, unless agreed otherwise. However, the obligation to notify the debtor about the creation of the pledge is, in the opinion of the majority of scholars and certain case law, a requisite for the effective transfer of possession under the relevant pledge (although some hold the opinion that such notification is not a perfection requirement but a precautionary measure to avoid the relevant debtor of the receivables being released from its payment obligation by paying the original creditor, i.e. the pledgor). As a matter of practice, it is sometimes agreed that notice to the relevant debtors shall only be given upon potential or effective default, or if certain covenants (e.g. financial ratios) are not met.

(ii) By creating a non-possessory pledge (*prenda sin desplazamiento de la posesión*), except if they are represented by securities or considered financial instruments. Under this form of pledge, no notification to the relevant debtor would be required (unless such debtor is a public authority), on the basis that the filing of such pledge with the relevant Chattel Registry would give it the necessary publicity *vis-à-vis* third parties. As with the possessory pledge, unless otherwise agreed, this form of security would not prevent the pledgor from collecting the receivables in the absence of enforcement.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

The pledge of bank accounts is simply a pledge of the credit rights of the holder of the account *vis-à-vis* the bank, which should typically correspond to the account balance.

The formal requirements are identical to those that apply in the case of any other possessory pledge of receivables. Possession is transferred by notification to the depository bank. The creation of the pledge does not imply, unless otherwise agreed by the parties, the freezing of the account.

In the event of pledges over bank accounts securing cash settlements of financial instruments (such as netting-based financial agreements), it may be possible to subject the pledge to a specific regime regulated under Royal Decree 5/2005. The pledge created under this regime would not require notarisation.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes, it is certainly possible, and is one of the most common types of security in Spanish project finance transactions.

If the shares to be pledged belong to a private limited company (*sociedad limitada*), as the quota units are not represented by issued certificates, possession is transferred by their entry into the notarial deed of pledge and, eventually, registration of the pledge in the Registry Book of Shareholders (*Libro Registro de Socios*) of the relevant pledged company.

When the shares belong to a public limited company (*sociedad anónima*), transfer of possession is achieved as follows: (i) if the share certificates (*títulos múltiples* or *resguardos provisionales*) have been issued, by endorsing the title guaranty and entering the pledge in the Registry Book of Shares (*Libro Registro de Acciones*); and (ii) if no share certificates have been issued, by registration of the pledge in the Registry Book of Shares.

In both cases, it is also advisable for the pledgee to request and obtain certification from the company's secretary that the pledge has been entered in the Registry Book of Shareholders or the Registry Book of Shares, as applicable, which will also comply with the requirement of notification of the pledge to the company whose shares are pledged.

When the pledged company has its shares represented by book entries (*anotaciones en cuenta*), the pledge must be entered in the relevant account, and is enforceable against third parties once entered in the book entry register; in the case of shares traded on a Spanish secondary market, the book entry register will be held by the central clearing house. On request, the entity responsible for the book entry register will issue a certificate stating that the pledge has been entered.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

For possessory pledges to be opposable to third parties, a notarised agreement (*póliza notarial*) or, as the case may be, a deed (*escritura pública*), must be created, as these public documents verify the date and terms and conditions of the pledge (other than pledges under Royal Decree 5/2005; see question 2.4 above).

Some other types of security are subject to compulsory notarisation and entry on public registries (particularly mortgages and non-possessory pledges), which has certain implications in terms of cost, due to: (i) registry fees; and (ii) stamp duty of 0.5% to 1.5% of the secured liability (principal, interest and any related costs), depending on the region where the collateral is located.

Notary fees are fixed amounts that vary according to the secured liability (approximately 0.03% of the secured liability), although in transactions with an aggregate value higher than €6m they can be reduced if negotiated with the notary.

Registry fees will be approximately 0.02% of the secured liability.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

For security documents that need to be filed within a public registry, the expected elapsed time from the date the documents are notarised to the actual filing by the public registry is usually from two to six weeks, assuming the relevant security document was correctly drafted and no errors were found by the registry that needed to be amended by the parties. As to registry fees, see question 2.6 above.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

Regulatory or other consents with respect to the creation of security over real property or machinery would apply only in very limited cases, depending on the exact location of the asset, its nature and the parties involved.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

Spanish law does not recognise trusts as a legal concept. Therefore, security trustees, although used in transactions where foreign lenders are involved, are seldom used for a Spanish security package. Instead, lenders tend to appoint an agent for the Spanish security, which would hold the security in its own name and on behalf of the other lenders.

It is possible for the security agent to enforce claims on behalf of the lenders and the other secured parties, as long as each party grants a notarised power of attorney to the security agent, expressly authorising it to carry out the enforcement proceedings. This system nevertheless has two problems: from a practical perspective, Spanish banks are reluctant to grant powers of attorney to other banks, and prefer to appear themselves throughout the enforcement proceedings; and from a legal perspective, authors and case law are inconsistent regarding the role of an agent acting on behalf of a syndicate of lenders upon enforcement.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

The structure of "parallel debt" between lenders and a special purpose vehicle (SPV) is not known under Spanish law. Should this structure be adopted in a transaction where the secured obligations are governed by Spanish law, there is a risk that it is considered to be a fiduciary relationship unsupported by a real credit of the agent against the project company. If the secured obligation is governed by foreign law, there should be no problem for the Spanish security to secure such parallel debt, to the extent this is valid and enforceable under the applicable law. Notwithstanding this, there are clearly insufficient judicial precedents to assure that this will always be validated by the courts.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?**

The timing and value of enforcement will depend very much on the type of security enforced and the enforcement proceedings chosen by lenders.

Enforcement of collateral security is typically carried out through a public auction, in the context of judicial or notarial proceedings. For notarial enforcements, see question 5.4 below.

The rights derived from the relevant security can be judicially enforced either through declaratory civil proceedings or through summary proceedings. The latter action is faster and more effective, while the former is costly and time-consuming. However, to start summary proceedings, certain requirements must be met. In particular, the lender shall: specify the agreement giving rise to the claim and the final due amount, with a full break-down of each concept; provide a notarial deed where a Notary Public affirms that calculations have been made in accordance with the terms and conditions of the facility agreement; and present a copy of the notarial request for payment addressed to the debtor.

For the enforcement of a pledge, the court will request the deposit of the pledged assets; and for the enforcement of a mortgage, the court will give notice of the foreclosure to any other mortgage creditor. Once the above actions have been taken, the court will publish a date for auction. The debtor will only be able to oppose foreclosure under limited circumstances, such as prior extinction of the pledge, full payment of the secured obligation or existence of a material error on the calculation of the due amounts.

The time schedule for the actual recovery of amounts through enforcement will depend on each case, since there is no time limit for the court to complete the proceedings.

The enforcement of pledges over receivables may also be achieved through set-off.

Restrictions on enforcement of security regarding regulatory consents are very specific, usually related to energy transactions, and will ultimately depend on the kind of project and the assets on which security is enforced.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

Generally, there is no distinction between domestic and foreign entities when it comes to foreclosing Spanish security granted by a project company or in relation to a project.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

As a general rule, as from the declaration of insolvency of the project company, secured lenders will be prevented from enforcing their security until the earlier of the following: a composition of creditors is approved; or at least one year has elapsed since the declaration of insolvency, provided that during this period no liquidation proceedings have been commenced.

Exceptionally, the above standstill period will not apply if the insolvency judge determines that the assets which constitute the object of security are not devoted to the business activity of the insolvent company, do not constitute a productive unit of such company or, eventually, such asset is not necessary for the continuation of the business operations.

At any time during the standstill period, the insolvency administrator may decide to satisfy immediately any due amounts to the secured lenders, in order to avoid the relevant security being enforced.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

Any claims of secured creditors will be qualified as "privileged claims" up to the value of the collateral on which they fall; any excess being qualified as an "ordinary claim" or, in the case of interest claims, a "subordinated claim". As a general rule, no third parties may benefit from the value of the secured assets insofar as the secured creditor has not been paid (whether by enforcement of the relevant security or at the request of the insolvency administrator – see question 5.1 above). In connection with this, secured creditors will not be affected by the contents of the creditors' composition agreement unless they agree otherwise.

It may be possible to challenge security created "to the detriment of the insolvency estate" within the two years preceding the declaration of insolvency, even in the absence of fraudulent intent. In particular, there is a presumption of prejudice to the insolvency estate in the event: (i) that the security was granted for pre-existing debts or for new debt incurred to cancel pre-existing, unsecured debt; or (ii) of any prepayments or other acts of early cancellation of secured payment obligations.

Refinancing agreements achieved before the date of insolvency which meet certain requirements (substantial increase in the available credit, extension of the maturity date, general enhancement of the financing obligations of the relevant debtor) and which result in a general improvement of the prospects of the debtor in the short and medium term shall not be challengeable during the two-year clawback period, provided that: (i) the refinancing agreement is entered into with creditors representing at least 60% of debtor's liabilities as of the date of the agreement; (ii) the terms of the agreement allow the future viability of the company; and (iii) the refinancing agreement is formalised as a notarial deed. Irrespective of the above, if a refinancing agreement meets all the following requirements it shall also not be challengeable during the two-year clawback period if: (i) it increases the ratio of assets over liabilities; (ii) the current assets exceed the current liabilities; (iii) the value of security does not exceed 90% of the existing debt for such creditors, nor the percentage of the existing debt covered by security prior to the refinancing agreement; (iv) the applicable interest rate has not increased by more than 33% over the prior applicable interest rate; and (v) the refinancing agreement is formalised as a notarial deed.

If the refinancing agreement: (i) has been ratified by at least 51% of the debtor's financial liabilities; and (ii) substantially increases the available credit, extends the maturity date, or enhances the financing obligations of the relevant debtor, such agreement may be sanctioned by the insolvency judge, in which case it may also bind dissident lenders (subject to such refinancing agreement having been entered into by certain reinforced majorities, ranging from a minimum threshold of 60% to 80%, depending on whether or not the particular dissident lenders are secured and the scope of the cramdown).

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Governmental entities of any type (whether territorially based – such as national, regional or municipal authorities – or those of a functional nature) will not be subject to the Insolvency Act. However, companies directly or indirectly controlled by governmental entities will also be subject to general bankruptcy laws.

Additionally, certain types of companies (such as banks and other credit entities, financial services companies or insurance companies) are subject to specific insolvency regulations, although the composition, appointment and operation of the insolvency administration will still be regulated by the Insolvency Act.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Yes; out-of-court foreclosure, available for certain types of security, is typically carried out by a Notary Public and takes the form of a public auction. The terms and conditions of such auction are loosely regulated in the law and hence they usually follow the provisions agreed by the parties in the relevant security document. For any unregulated aspects, the Notary Public tends to follow equivalent provisions applicable to judicial enforcements. Should the auctioned assets not be acquired by any bidder, after the two first auctions, lenders are given the option to acquire ownership over such assets, but in that case lenders shall not be able to sue the grantor of security for any outstanding amounts.

In the case of security over bank accounts or listed securities, particularly when the secured obligation consists of cash settlement agreements or derivative contracts, secured lenders may appropriate directly and immediately the secured assets, without conducting a public auction. Equally, certain regional laws (such as Catalan law) expressly permit private sales of the secured assets or, in the case of highly liquid security, appropriation by set-off.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Section 5*bis* of the Spanish Insolvency Act provides companies with a way to achieve restructuring of their debts without having to request a formal declaration of insolvency.

The directors of a company may submit to the relevant court a notification that the company has initiated negotiations in order to achieve the restructuring of its debt, for which the company has three months. If negotiations fail after such time, the company has a month to request a formal declaration of insolvency.

#### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

In accordance with the Spanish Insolvency Act, the insolvency situation of a company may be considered by the court to be "fortuitous" or "guilty". The insolvency will necessarily be considered "guilty" in certain scenarios specifically described by the Spanish Insolvency Act, which mainly consist of situations where the directors of the insolvent company failed to carry out their obligations with the necessary diligence (i.e., amongst others, keeping separate accounting books, embezzling assets of the company, fraudulently detracting assets from the company or failing to request the declaration of insolvency within two months after the directors knew or should have known that the company was insolvent).

If the insolvency is considered to be "guilty", the consequences for the directors may include:

(i) prohibition from managing assets from third parties and from acting on behalf of third parties, for a period ranging from two to 15 years;

(ii) the loss of any rights they may have as creditors of the insolvent company;

(iii) the obligation to return any funds or assets they may have unduly obtained; and

(iv) eventually, the liability to refund all or part of the unpaid debts of the insolvent company.

## 6 Foreign Investment and Ownership Restrictions

#### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

With the exception of certain special sectors, such as air transport, broadcasting, telecoms or national defence, foreign investment is widely liberalised. However, non-resident investors must notify the Foreign Investment Registry of the amount, destination and form of investment, mainly for statistical purposes. The obligation to notify does not restrict the ability of the foreign investor to remit income coming from investment outside Spain.

Exchange controls are also liberalised, so that, as a general rule, currency is freely transferable through a registered bank account from Spain to any country and *vice versa*, although certain information must be provided periodically (monthly, quarterly or annually) depending on the amounts of foreign transactions carried out over a calendar year.

Recently enacted anti-money laundering regulations now provide that any company shall have a Spanish Tax Identification Number when entering into potentially taxable transactions (e.g. execution of notarial deeds with tax implications). The aforementioned identification does not have any impact on the residence for tax purposes of non-resident entities.

In addition, a Spanish or foreign entity entering into a notarial deed or other equivalent agreement shall identify its "real owner" (*titular real*), i.e. whether there is any individual ultimately owning 25% or more of the share capital of the foreign entity, and if there is not, the identities of the members of the board of directors.

#### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

This is not applicable. See question 6.1 above.

#### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Expropriation of private property must be based on public utility or social interest. These concepts and the procedure for expropriation are strictly regulated, with very limited, if any, room for governmental discretion. No distinction is made between national and foreign ownership.

Generally, governmental authorities shall have no pre-emption rights for the sale of property, other than in the case of protected natural areas and certain regulated businesses.

## 7 Government Approvals/Restrictions

#### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The agencies and departments with authority over a project greatly depend on the kind of project. In energy projects, the responsible authority would be the state's government to authorise any construction, transfer or modification of premises for the production, transport or distribution of energy when the project affects more than one region or the energy is transported or distributed outside the region where it is produced. Regional governments have competences regarding electricity generation and distribution inside their respective region and therefore depending on the size and location of the project, they may also have a role.

Another relevant agency in the energy sector is the National Markets and Competition Commission (CNMC), operating since October 7, 2013, which includes within the same entity different supervisory responsibilities for each regulated sector (energy, postal, transportation, competition, etc.). Therefore, nowadays the scope of the CNMC spans all energy sectors (electric power, fuel, gas, etc.) and also acts as a consultant for the Spanish and regional government in all matters regarding energy sectors and is strongly involved in the applicable regulation.

#### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Generally, security instruments are notarised and, in the case of mortgages and certain forms of pledges over chattel property, filed at the relevant public registry, such registry typically being the land registry in the case of real estate and the chattel property registry in the case of machinery, IPRs, receivables and other forms of chattel property. See section 2 above.

We refer to question 6.1 above for notification requirements to the Foreign Investment Registry or to the Bank of Spain, as the case may be.

Specially regulated sectors, such as energy or telecommunications, may require specific supervision from regulatory bodies. Equally, administrative concessions and mortgages upon such concessions need to be approved by the relevant concession granting entity and subsequently filed with the land registry.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Although the actual ownership of land or natural resources (other than water, mineral resources, natural gas and oil) does not require a licence, developing a business or project related to such land or resources may require certain permits or authorisations granted by authorities at national or regional level depending on the size and location of the project, which may be related to the nature of the industry or its environmental impact. Local licences (for example, for construction) may also be required.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Under Spanish law, there are several state taxes payable on the exploitation of electricity generation projects and on the processing of energy products (oil, gas, etc.) when those are used as fuel. Some of these taxes are harmonised with EU Directives and are called special taxes on electricity and on hydrocarbons.

Generally speaking, these special taxes are not actually paid by the project company but its payment (if all legal requirements are met) is suspended until the electricity or energy product reaches the final consumer, who will be the actual payer.

There is also a state tax on oil and gas extraction and exploitation based on the extension of land used for such purposes and the amount of years the project company will be authorised to operate on such land.

Moreover, since January 1, 2013, there is another state tax on electricity generation based on the production of electricity either on renewable or conventional electricity production installations which will be subject to a tax rate of 7%.

Additionally, there are other regional and local royalties payable on the extraction of natural resources based on the environmental impact the project may cause. Those royalties vary depending on the kind of natural resource and the region where the extraction takes place.

Finally, project companies in the extraction and exploitation of hydrocarbons sector will be subject to company income tax at a special rate of 30% (instead of the general tax rate which is 25%).

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

There are no currency, exchange control or other regulatory restrictions that limit the availability or transfer of funds for the project company to make any payments due, subject to the notification requirements provided in question 6.1 above.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Other than withholding taxes (see section 17), there are no restrictions on the repatriation of investment returns or loan payments to non-resident parties, except for the obligation to notify the Foreign Investments Registry or, in the case of loans and other forms of debt financing, the Bank of Spain, as described in question 6.1 above.

Section 18 of the Spanish Corporate Income Tax Act provides for a general limitation on the tax deductibility of financial expenses. Net financial expenses exceeding 30% of the operating profits of a company – as defined by the Spanish tax legislation – are not tax-deductible.

For that purpose, net financial expenses are defined as the difference between the financial expenses (except those not deductible under article 15 g), h) and j) of the Spanish Corporate Income Tax Act) and the interest obtained.

In all cases, net financial expenses up to €1m are tax-deductible. The net financial expenses which were not tax-deductible in a particular tax year can be carried forward with no time limitation. In the event that the financial expenses do not exceed the 30% threshold, the difference between such 30% and the percentage of the operating profit of a tax year can be added up to the limit of the subsequent five tax years.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes. However, bank accounts held by Spanish companies outside Spain and operations carried out through such accounts are subject to regular declarations to the Bank of Spain.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

In addition to the withholding taxes described in section 17 below, the following restrictions may apply:

(i) under Spanish corporate law, there are certain requirements regarding the payment of dividends, which are common to many other jurisdictions, such as the need to set off losses from previous years or to assign 10% of the profits to a statutory reserve until the reserve reaches 20% of the share capital, as well as other requirements intended to avoid the payment of dividends by a company that is not financially viable; and

(ii) from a contractual perspective, project financing agreements will typically restrict the distribution of dividends. Standard restrictions would include: (i) meeting certain financial covenants; (ii) reaching a certain percentage of repayment of senior debt; (iii) ensuring that the project has been operating for a number of years; and (iv) cash sweep provisions.

Additionally, minority shareholders may be entitled to have their shares purchased by the project company if the shareholders decide not to distribute any dividends notwithstanding the fact that the company has operational profits.

Finally, under certain concessions or other administrative contracts, public authorities establish minimum percentages of equity throughout the project, which could also act as a restriction on the payment of dividends.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

There are certainly environmental, health and safety regulations potentially applicable to a project financing, which may vary substantially depending on the type of project and the region where the project is developed, since part of the legal competences in such aspects correspond to regional governments.

From an environmental point of view, before commencing any large-scale construction work potentially affecting the environment, it will likely be required to obtain the previous approval of the relevant regional environmental authority, by means of an environmental impact assessment issued by the project company, which the relevant authority would review and approve, usually subject to the fulfilling of certain regulations and measures aimed at assessing and subsequently mitigating the environmental risks associated with the project.

In conclusion, the federal nature of the Spanish administration and the complexity and dispersion of regulations make it necessary to carry out a case-by-case analysis.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

As long as they do not use governmental funds or subsidies, there is no specific legal framework for procurement by privately-held project companies, except in the case of entities operating in regulated sectors such as energy or water.

However, as a matter of practice, it is relatively common that project companies wishing to subcontract large works (mainly construction and civil engineering) set out a procurement system resembling that applied by governmental entities, particularly with regard to the hiring principles (transparency, non-discrimination, concurrence and equal treatment). In some cases, notably infrastructure concession contracts, this contracting framework may be imposed by the concession granting authorities in order to ensure that part of the concession works are subcontracted to competitors of the concessionaire.

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Generally not, although in the case of concessions and other administrative contracts it might be necessary to complete a case-by-case analysis of the relevant concession terms.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Generally yes, although for the avoidance of any doubt it would be advisable to review the relevant insurance policy.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

Foreign workers (nationals outside of the European Union and Switzerland) generally need to obtain a work permit for stays of over 90 days in Spain, irrespective of their professional level (worker, technician, engineer or executive).

The two main kinds of work permit are: (i) a work permit for transnational rendering of services, which is used by companies which transfer an employee who remains hired by a foreign company, hence subject to the social security and tax regulations of the foreign company and generally lasts for a maximum period of one year, which can be extended to an additional year; and (ii) a regular work permit, which allows working in Spain for a period of time between 90 days and five years, if the person in question is hired by a Spanish company.

Despite all the above, depending on the origin country of the foreigner going to Spain, the application for a visa might also be required for stays shorter than 90 days, so as to allow entrance into the country and the possibility to render services.

In terms of Social Security, employees in the EU and Switzerland benefit from an EU regulation enabling employees to work throughout the different countries while maintaining their Social Security benefits in the country of origin. Similar regimes are foreseen for other countries through bilateral treaties (a treaty having been recently signed with the People's Republic of China). In addition, under settled case law, if certain requirements are met, bilateral treaties subscribed between EU Member States improving the current EU Regulation will apply.

Finally, case law has also stated that EU Regulation will apply to non-EU Member State nationals who lawfully render services in the EU and transfer within the EU Regulation geographical scope.

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

Customs duties may apply on imported project equipment from outside the EU, as established by EU regulations and trade treaties between the EU and third countries. In addition, the European Commission has powers to impose anti-dumping measures in line with World Trade Organization (WTO) principles.

**10.2 If so, what import duties are payable and are exceptions available?**

This will be determined by the common customs tariff uniformly applied by the EU Member States for imports which originate in third countries, and will depend on the nature of the imported equipment and its country of origin. As with anti-dumping measures, the duty, product and producers affected are established by a Council Regulation.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Article 1.105 of the Spanish Civil Code sets out as a general rule the absence of liability of any party for damages caused by a situation of *force majeure*. However, the parties can waive contractually the application of this general liability exclusion regime. Accordingly, most project financing agreements and other project contracts include as a specific event of default the occurrence of a *force majeure* event, which is usually defined in detail in the relevant contract. It is nevertheless unclear that Spanish courts would recognise acceleration of a project facility on the grounds of *force majeure*, unless there is a substantial impact on the ability of the project company to meet its payment obligation under the relevant facility, or the viability of the construction or operation of the project is seriously in danger as a result of *force majeure*.

Lenders are typically excluded from any contractual liability if they fail to provide the required funds due to *force majeure*. In the current economic turmoil, market disruption clauses are widely used.

In administrative contracts, such as concessions with public authorities, *force majeure* is a regulated term related to natural disasters or major alteration of public order, and is one of the circumstances which would entitle the concessionaire to benefit from an indemnity from the public authorities, in the event that the situation of *force majeure* renders the performance of the contract uneconomical for the concessionaire. Such indemnity may take different forms; typically, higher tariffs or longer concession terms. If the *force majeure* event impairs the continuation of the project, public authorities may choose to terminate the concession and indemnify the relevant concessionaire.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Spanish Criminal Code prohibits the bribery of national and foreign government officials. This is defined as the conduct of a private individual who offers or delivers a handout or remuneration of any kind to an authority, civil servant or person who participates in the exercise of public duties in order for the latter to perpetrate an act that is against the duties inherent to his or her office, or in order for him or her not to carry out such act, or to delay what he or she should carry out. The same prison sentences and fines are foreseen for the corrupt authority, officer or person. This is without prejudice to the additional punishment for the act perpetrated, omitted or delayed due to the remuneration or promise, if such act also constitutes a felony (which may imply criminal penalties of up to €9m or two to five times the profit obtained).

These penalties shall also be applicable when charges are brought against, or the acts concerned affect, officers of the European Union or civil servants who are nationals of another Member State of the Union.

The Criminal Code also prohibits influence-peddling, described as influencing a civil servant or authority by taking advantage of any situation arising from his personal relation with him/her or with another public officer or authority, to obtain a result that may directly or indirectly generate a financial benefit for him/her or for a third party, which shall be punished with imprisonment for six months to two years and a fine of one to two times the benefit intended or obtained.

Spanish jurisdiction would also apply to crimes committed abroad against the Spanish public administration. Perpetration of an act defined by law as a felony or misdemeanour shall entitle the victim to reparation for the damages and losses caused thereby.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Typically, project documents are governed by Spanish law (particularly when project counterparties consist of Spanish entities), although the relevant parties can choose to apply a foreign law, in accordance with the provisions of Regulation (EC) No. 593/2008 of the Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I). The selection of a foreign law will be valid and legally binding in Spain, and a Spanish court would apply such law provided that the contents of the relevant provisions of the chosen laws may be duly proved before the Spanish court without contravening the principles of Spanish public policy.

### 13.2 What law typically governs financing agreements?

Financing agreements are also typically governed by Spanish law, although as a matter of practice, when the group of lenders is dominated by foreign banks or international institutions, English or New York law may be the preferred option. Again, a foreign law may be chosen by the parties to govern financing agreements in accordance with the provisions of the Rome I Regulation (see question 13.1 above).

Security documents must, however, comply with the "*lex rei sitae*" principle existing under Spanish law, which determines that the governing law of a security document must be the law of the jurisdiction where the asset is located. Specific fiction location rules may apply to non-tangible assets (for example, in the case of receivables, location will be determined by the place of payment or the nationality of the debtor) and, for registrable assets, the governing law will be that of the place of the public registry where the asset is filed.

### 13.3 What matters are typically governed by domestic law?

Generally, security documents relating to assets located in Spain, and personal guarantees granted by Spanish entities (particularly when the assets of the relevant Spanish guarantor are mainly located in Spain), are governed by domestic law.

In concession agreements and other PPP agreements, the contractual relationship between the concessionaire and the public authorities will always be subject to the Spanish administrative laws.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Under Spanish law, waiver of immunity is legally valid and enforceable unless it relates to certain entities which are affected by special immunities, such as: (i) persons or entities under public law, and assets owned by such entities; (ii) autonomous organisations, semi-public entities or agencies; (iii) diplomatic and consular entities; and (iv) certain cooperatives. Further, the assets connected to a public service (such as the assets of an administrative concession) may also be subject to immunity even if they are operated by private entities.

Submission by the parties to a foreign jurisdiction is valid, binding and enforceable in Spain: (i) in the case of foreign courts covered by conventions, in accordance with the provisions of Council Regulation (EC) No. 593/2008 of 17 June 2008 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or the applicable bilateral convention; and (ii) in the case of foreign courts not covered by Brussels/Lugano or bilateral conventions, in accordance with the domestic conflict of law regulations, which would reject the selection of foreign courts in cases where the exclusive jurisdiction of the Spanish courts under the Spanish Law of the Judiciary is violated.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, the express submission by the parties to international arbitration and arbitral awards contained in an agreement will be recognised by Spanish courts in accordance with the provisions of the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), of the 1961 European Convention on International Commercial Arbitration (the "Geneva Convention") and of Spanish Law 60/2003 of 23 December 2003 on Arbitration (the "Spanish Arbitration Law").

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Spain ratified the New York Convention in 1977. Also, Spain ratified the Geneva Convention in 1975.

### 15.3 Are any types of disputes not arbitrable under local law?

The Spanish Arbitration Law does not list the matters which cannot be subject to arbitration. Instead, such law establishes that a dispute may be arbitrable "if the parties may dispose of" the subject matter of obligation. Examples of disputes which are not arbitrable will mainly be related to family law (e.g. parental authority, marital status, filiation) and matters in which the Public Prosecutor's Office has to intervene (e.g. criminal procedures).

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Arbitration is only possible if the parties involved have expressly agreed to it in the relevant agreement or in a separate document. To solve a dispute through arbitration, the express will of the parties to submit their disputes to arbitration is legally required. Such will shall be verifiable in writing, contained in a document signed by the parties or in an exchange of communications (letter, fax, telex, telegram or other means) evidencing such express agreement.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Political risk clauses are very unusual in Spanish project finance. In those cases where there are serious concerns regarding future changes in government policy which could affect the existing agreements between a project company and a public authority, the project company (or its lenders) would typically seek that the project be backed by a specific government resolution. Direct agreements with public authorities are very unusual.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Generally speaking, interest paid by a Spanish borrower under a loan to a domestic lender (other than a financial institution) is subject to withholding tax at 19%. Likewise, interest income paid to a non-EU tax resident is subject to withholding tax at 19%, unless a lower rate applies under a tax treaty (treaty rates ranging between 5% and 15%). Interest payments to EU residents or EU permanent establishments (other than those residing in tax-haven jurisdictions) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a regular company).

On the other hand, proceeds of a claim under a guarantee or the proceeds of enforcing security are generally subject to withholding tax as if such payments were made by the borrower.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

As a member of the European Union, Spain benefits from the free transit of goods within the EU, including exchange rate fluctuations and transaction costs. Therefore, Spain's EU membership represents an important part of its foreign policy.

Additionally, Spain has more than 75 income tax treaties currently in force, as well as a remarkable treaty network with Latin American countries which reduces or eliminates the Spanish taxes payable to residents of treaty countries.

The main tax incentive is the Spanish international holding company (ETVE) regime, which nowadays is a well-established legal framework that has turned Spain into one of the most favourable jurisdictions within the EU to channel and manage international investments. ETVEs can benefit from an exemption on inbound and outbound dividends and capital gains, as long as certain requirements are met. Since ETVEs are Spanish regular entities, they are treated like regular limited liability companies, and can therefore benefit from tax treaties signed by Spain, as well as EU Directives.

Under Spanish law, there are no relevant taxes on foreign investments in addition to those that would apply to a Spanish investor.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

Most of the relevant issues have already been covered in the previous sections.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Companies bearing the legal form of a private limited company (*sociedad limitada*) may not be legally entitled to issue, guarantee or secure bonds and other debt securities. In addition, public limited companies (*sociedades anónimas*) are subject to certain quantitative limitations in the amount of unsecured bonds outstanding at any one time, as compared to their level of equity and reserves. These limitations should not apply to banks and other credit entities or listed and insurance companies, and there are other more minor exceptions. In the context of certain PPP projects, the issue of bonds may be subject to prior consent by the relevant governmental authority, although the general regulations on concessions are permissive on the issue of bonds.

Capital market instruments may be structured as private or public placements (depending on the type of investors addressed, number of retail investors addressed, total issue amount, minimum amount of securities to be acquired per investor, and minimum unit par value of the securities). Private placements have no disclosure or supervision requirements with the Spanish Securities and Exchange Commission (to the extent that the relevant instruments are not intended to be listed in an official market). Nevertheless, except for private placements exclusively addressed to qualified investors, private placements require the intervention of an authorised financial entity in order promote the allocation of securities.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

*Istina'a*, *Ijarah*, *Wakala* and *Murabaha* are not instruments expressly recognised under Spanish law. However, it is sometimes possible to structure project finance transactions in compliance with *Shari'ah* law using other instruments recognised under Spanish law which, although they do not have the same characteristics as the original Islamic instruments, are similar in nature; such as an EPC agreement for the *Istina'a*, an operating lease for the *Ijarah*, a mandate for the *Wakala* or the purchase of chattel property with deferred payment for the *Murabaha*.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

There is no relevant case law in Spain regarding the application of *Shari'ah* law as the governing law of a contract or dispute. However, it is unlikely that Spanish courts will accept its application, unless the governing law of the relevant agreement is set as the law of a country with legislation based on *Shari'ah* law (see also question 13.1 above).

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Under Spanish law, the inclusion of an interest payment obligation in a loan agreement is fully valid and therefore there is no risk of it affecting its validity and/or enforceability.

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Amongst other transactions, Héctor Bros advised lenders in the €2.5bn financing of Tranches I, II and IV of the Barcelona Metro Line 9, the €900m financing of the AP-1, AP-8 GI-632 hard-toll highways in the Basque Country, the €400m project debt restructuring of the Vallvidrera and Cadí tunnels and the €1.4bn regional infrastructure debt restructuring of the *Generalitat de Catalunya*, or the acquisition by several investment funds of the bank debt of the distressed Madrid toll roads. He has also participated in high-profile international project finance transactions, such as the $19bn Sadara petrochemical project in Saudi Arabia, where he advised the Spanish Corporate Internationalisation Fund (FIEM), and the €600m non-recourse financing to Abertis in connection with the acquisition of the Italian A-19 "Serenissima" toll road.

Héctor Bros has been recommended by several directories, including *Chambers Europe*, *Who's Who Legal*, *Best Lawyers* and *The Legal 500*, in Banking & Finance, Project Finance and Public Law.

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CUATRECASAS

With over 950 lawyers, Cuatrecasas is a leading law firm in Spain, Portugal and Latin America. We advise on all areas of business law, through 19 legal specialties and 15 industry groups. We have 13 offices in Spain, two in Portugal, and 12 international offices in cities in Europe, the Americas, Asia and Africa. We represent some of the largest companies in Spain and Portugal and advise foreign investors interested in the Iberian market. Year after year, we are listed by international directories such as *Chambers* and *The Legal 500* as number 1 in the main legal practice areas. In 2015, *Financial Times Innovative Lawyers* also recognised our firm as the "Most Innovative Firm in Corporate Europe".

The firm's Finance Practice consists of over 50 lawyers based in Madrid, Barcelona, Lisbon, London, Mexico City and Bogotá, with expert knowledge and extensive experience in complex national and international financial transactions. The lawyers work seamlessly from different locations, ensuring a wide coverage for their clients, wherever they are based. The team has extensive expertise advising sponsors and banks in all types of domestic and foreign, corporate and structured, financial and debt capital markets transactions. Among other aspects, such transactions consist of: structured and project finance facilities; refinancing, acquisition finance and other sorts of repackaging; synthetic and mortgage-backed securitisation; credit assignments; issuance of fixed-interest securities and other financial instruments; and consumer credits. We also deal with bankruptcy issues in order to efficiently ensure bankruptcy remoteness and an adequate security package structure, extending the scope of our advice to the restructuring of debt. In addition, we advise on matters and relevant issues related to equity requirements for credit institutions, as well as for other entities.

Chapter 29

# Taiwan


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

In Taiwan, project finance primarily applies to infrastructure projects developed by the private sector or through a public-private partnership. The major legislation that governs private participation in infrastructure projects is the Act for Promotion of Private Participation in Infrastructure Projects (the "PPP Act"), last amended in 2015. The PPP Act provides 14 categories of public works for private sector participation, including, among others: transportation facilities; sewerage treatment facilities; water supply, flood control and drainage facilities; hygienic and medical facilities; recreation/tourism facilities; power supply facilities; sports facilities; industrial, commercial, technical and agricultural facilities; and government office buildings.

A project company under the PPP Act may apply for mid- and long-term loans from domestic banks at preferential interest rates. Also, foreign banks may participate in the syndication of loans. In addition, there is further deregulation regarding the issuing of new shares and corporate bonds to facilitate the project company's financing.

Among the 14 categories, transportation facilities have the lion's share of the project finance projects. However, green energy has been the industry in focus for the government. In recent years, we have seen some small project financings for independent power plants and wind farms.

In 2016, the Equator Principles were adopted for the first time in Taiwan by a bank in their project finance for a wind farm.

In order to stimulate economic growth and drive industrial transformation, the Taiwanese government approved the Special Act for Forward-Looking Infrastructure in July 2017. The Forward-looking Infrastructure Development Program (2017–2024) will expand investments in major infrastructure (including railways, aquatic environments, green energy, digital technology, and urban and rural facilities). The government investment in this large-scale infrastructure programme will total NT$882.49 billion (US$28.56 billion), and is expected to spur public and private enterprise investment of NT$1.78 trillion (US$57.53 billion). In addition, the Ministry of Economic Affairs ("MOEA")'s InvesTaiwan Service Center will provide every project with one-stop services by dedicated staff to help resolve problems to rally investments for Taiwan.

The Financial Supervisory Commission ("FSC") amended the Enforcement Rules of the Financial Asset Securitization Act in September 2016 and allows future creditor claims to be the assets that can be securitised in the case of a private participation in the construction and operation of a new infrastructure in accordance with the Act for Promotion of Private Participation in Infrastructure Projects. Therefore, the rights over income derived from the operation of the infrastructure project during its operation period, obtained by the private institution according to the concession agreement, can be securitised. The purpose of the amendment is to attract long-term private capital into infrastructure investment.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The most significant project financing transaction in Taiwan in recent years is the Taiwan High Speed Rail project (a NT$323.3 billion (US$10.5 billion) multi-tranche syndicated loan) in 2000 which was restructured to NT$381.06 billion (US$12.7 billion) in 2009. Project financing was also adopted for other large-scale projects, such as: Taipei 101 Tower (NT$35.3 billion (US$1.2 billion)), which opened in 2004; Taipei Port Container Terminal (NT$16 billion (US$533 million)), which began operation in 2009; Kaohsiung Kuo Ming Container Terminal (NT$16.2 billion (US$540 million), which began operation in 2011; and Taipei Dome Complex (NT$15.4 billion (US$513 million)), which consists of a main dome building used as a baseball ground and for other sporting and cultural activities (construction commenced in 2012 but was suspended in 2016) and shopping malls, cinemas and hotels nearby (construction of the nearby buildings has not yet commenced). For green energy which is also a hot topic in recent years in project financing, the significant project financings that are concluded include Formosa 1 Wind Power project (a NT$2.5 billion (US$83 million) syndicated loan) in 2016.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

As a general rule, the security provider and the security interest holder should enter into an agreement to identify the specific asset subject to the security interest. A general security agreement where such specific asset, such as a floating charge, is not identified, is not enforceable under Taiwan law. In addition, different types of assets may be subject to different requirements, such as registration or filing with the competent authorities, on the perfection of the security. Such requirements are discussed briefly in our answers to questions 2.2 to 2.5.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes. In order to create a valid mortgage over the land, buildings and plants, the mortgagor and the mortgagee should enter into a written agreement, and a registration with the competent authority is required.

As for machinery and equipment, the security to be created may be a pledge or a chattel mortgage. The machinery and equipment on which a chattel mortgage can be created are subject to the list promulgated by the authority. Both security interests (pledge and chattel mortgage) give the security interest holder first priority over the machinery and equipment. To create a pledge, the pledgor and the pledgee have to enter into a written agreement and the pledgor should deliver the possession of the machinery and equipment to the pledgee, but registration with the competent authority is not required. To create a chattel mortgage, the mortgagor need not deliver the possession thereof to the mortgagee; however, registration with the competent authority would be necessary in order for the mortgagee to claim the chattel mortgage against a *bona fide* third party.

For projects subject to the PPP Act, approval of the authority in charge of the PPP project is required before project assets are encumbered for the purpose of project finance.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

To create a pledge over receivables, the pledgee and the pledgor must enter into a written agreement and, with the pledgee's consent, the pledgor (or charger) is free to collect the receivables in the absence of a default. In addition, the receivables must be identifiable according to the content of the pledge agreement. Further, the debtor should be notified of the creation of the pledge in order for the pledgee to be able to claim the pledge against the debtor. The pledgor should provide the pledgee with documentary evidence of the receivables. Usually, the pledgor and the pledgee will, in the pledge agreement, require the debtor to remit the outstanding receivables to a bank account designated by the pledgee in the event that the debtor is informed of the pledgor's default.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. To create a pledge over cash deposits, the pledgee and the pledgor must enter into a written agreement. The pledge shall not become effective against the account bank taking the cash deposits unless the account bank is notified of the creation of the pledge. Nevertheless, please note that the concept of a floating charge is not recognised under Taiwan law. In other words, the pledge covers only the cash in the bank account when such pledge is created and notified to the account bank. The pledge will not cover the cash deposited in the bank account after the account bank is notified of the pledge. To deal with this issue, the pledgor, in practice, will be required to periodically confirm with the account bank the amount of cash in the bank account to ensure that the pledge also covers the cash deposited after the creation of the pledge.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes. According to the Company Act, a company should issue shares in certificated form if its issued capital reaches a certain amount specified by the competent authority. Currently, the threshold amount is NT$500 million. In addition, a public company may issue shares in scripless form. To create a pledge over shares in certificated forms, a written agreement is required. The certificates of the pledged shares shall be duly endorsed and delivered by the pledgor to the pledgee. Furthermore, the company issuing the shares shall be notified of the creation of a pledge in order to register such pledge on the shareholders' roster. The creation of a pledge is valid between the pledgee and the pledgor when the certificates of the shares have been endorsed and delivered to the pledgee. However, the creation of the pledge cannot be claimed against the company unless the company is notified of the creation of the pledge.

To create a pledge over listed shares which are traded and transferred through the book-entry system of Taiwan Depository and Clearing Corporation ("TDCC"), the pledgor and the pledgee have to sign a form prescribed by the TDCC and have the pledge registered with the TDCC.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

No notarisation or stamp duty is required for the creation of security over different types of assets. Whether registration is required depends on the type of assets provided as security (please see the answers to questions 2.2 to 2.5).

The registration fee for creating a chattel mortgage over a movable asset is NT$900. The registration fee for creating a mortgage over real property is equivalent to 1/1,000 of the total amount secured by the mortgage.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Regarding the registration fee, please refer to our answer to question 2.6. The authority in charge of the registration will only conduct a formality review and it is not expected that the registration will take a significant amount of time.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

In addition to the requirement of registration for certain types of security interests as mentioned above, generally the creation of the security interests does not require a regulatory or similar consent, unless the individual or private entity has made any contractual commitment with the government agencies. In Taiwan, facilities of public utilities such as pipelines are usually owned by the state or state-owned enterprises, and thus the chance of them being provided as security are remote.

A project company under the PPP Act shall not transfer, lease out, or create any encumbrance on, the concession rights obtained under the concession agreement, nor shall it make such concession rights an object for enforcement in a civil action, unless otherwise declared by the authority in charge of the PPP project that such an act is necessary in accordance with relevant provisions under the PPP Act. According to a ruling issued by the competent authority in charge of the PPP Act, the concession rights refer to the rights to build and operate the infrastructure.

However, a project company may, with the prior consent of the authority in charge of the PPP project, transfer, lease out, or create any encumbrance on, any operating asset and/or equipment obtained from the building and/or the operation of infrastructure.

Any transfer, lease, or creation of any encumbrance in violation of any of the preceding two paragraphs shall be null and void.

It is worth noting that, according to the interpretation of the Ministry of Economic Affairs, a foreign company having no branch office in Taiwan is not allowed to be registered as a security interest holder. In local practice, the competent authorities will not permit such a foreign company to be registered as a mortgagee of real property or a chattel mortgagee of a movable asset.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

As general practice for a syndicated loan, syndicated banks will appoint an agent bank to act for and on behalf of the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property. In addition, there will be a clause in the syndicated loan agreement to the effect that the syndicated banks' claims against the borrower under the syndicated loan agreement are joint and several. Given this, the agent bank may claim the whole amount of the loan from the borrower and enforce the security and apply the proceeds from the security to the claims of all the lenders.

Nevertheless, under Taiwanese law, it is questionable whether or not a third party, who is not a creditor/lender, could validly hold the collateral as a trustee or a security agent for other creditors/lenders. Pursuant to the Civil Code, a mortgage/pledge would not be validly created in favour of the creditor/mortgagee/pledgee if there is no underlying credit owned by the mortgagee/pledgee against the debtor.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

As advised in question 3.1 above, in practice, if the lenders' claims against the borrowers are joint and several, one of the lenders may be appointed as the agent bank by syndicated banks to act for and on behalf of all the syndicated banks, including registering the agent bank as, for instance, a mortgagee and foreclosing the mortgaged property.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

A secured creditor may exercise its rights over security through compulsory enforcement despite the ongoing bankruptcy proceeding or liquidation. The standard steps for initiating compulsory enforcement are: (1) filing a petition with the court for a writ of execution; (2) court officials seizing the security; and (3) the court holding an auction for the sale of the security and distributing the proceeds to the secured creditor. Unless other creditors have priority over the underlying security, the proceeds should be paid to the secured creditor first.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

The restrictions explained in question 4.1 above also apply to foreign investors and creditors in the event of foreclosure on the project company's operating assets or machinery or concession right.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

If the project company enters a bankruptcy proceeding, the security owned by the project company will become a part of the bankruptcy estate and all enforcement actions against the project company will be stayed and all unsecured creditors must follow the bankruptcy proceeding. A secured project lender has a preferential right to claim proceeds from the sale of the underlying security through the bankruptcy proceeding while it still retains the right to initiate a compulsory enforcement action during the bankruptcy proceeding. In addition, if the sale proceeds (from court auction through compulsory enforcement proceedings) are insufficient to repay the claims in full, it may participate in the bankruptcy proceeding to get additional distribution *pari passu* with the unsecured creditors.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

There are no preference periods with respect to the security. The bankruptcy administrator may, within six months of the bankruptcy adjudication, apply to the court for the invalidation of the following acts of the debtor: (1) provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and (2) repayment of the debts not yet due. In addition, the bankruptcy shall, within two years after declaration of the bankruptcy proceeding, file with the court to rescind the transaction which the bankrupt conducted with or without consideration before the bankruptcy proceeding if such transaction is deemed detrimental to the rights of the bankrupt's creditor and is revocable under the Civil Code.

As for preferential creditors' rights, below are certain examples:

(i) land value incremental tax, land value tax and house tax levied on the sale of the real property which will rank prior to the mortgagee and the unsecured creditors;

(ii) labour wages due and payable by the employer but overdue for a period of up to six months which will rank prior to unsecured creditors; and

(iii) fees and debts incurred for the benefit of the bankruptcy estate which will rank prior to unsecured creditors.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The following may apply for bankruptcy adjudication: (1) natural persons; (2) juristic persons; and (3) partnerships and any other incorporated association with a representative or an administrator. An unincorporated association without a representative or administrator is excluded from a bankruptcy proceeding, and there is no special legislation applicable to such entity.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

A creditor and the project company may sign an agreement whereby the ownership of the mortgaged or pledged security will be transferred to the mortgagee or pledgee automatically when the project company defaults. However, in the case of a mortgaged security, such agreement to transfer cannot be enforced against a *bona fide* third party, unless the mortgage is registered with the competent authorities.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Taiwanese law provides for a reorganisation proceeding which is slightly similar to the "chapter 11 proceedings" used in the US if a company is in financial difficulties, ceases its business or is likely to cease operations but is able to be re-established. The company or its shareholder(s) or creditors meeting the qualification requirements provided under the Company Act may apply to the court for a reorganisation proceeding. A reorganisation plan, which normally contains a restructuring of the company's debts, will be prepared by the reorganisation administrators and should be agreed by the secured creditors' meeting, unsecured creditors' meeting and shareholders' meeting and then approved by the court. The shareholders' meeting will not have a voting right if the company does not have any net assets. The reorganisation plan approved by the court is binding on the company and all its creditors and shareholders.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

If a company is in financial difficulties and its assets are insufficient to repay its debts, directors are obligated to apply for reorganisation proceedings (if the company is still able to re-established) or bankruptcy proceedings instantly. Failure to do so would make directors subject to an administrative fine of NT$20,000 to NT$100,000 and would possibly entail personal liability for failure to perform their fiduciary duty.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Foreign investors who wish to make direct investments in a Taiwanese private company, regardless of the industry, are required to obtain prior approval from the Investment Commission of the Ministry of Economic Affairs ("IC"). In addition, Taiwan maintains a list of industries in which foreign investment is prohibited or restricted up to certain percentage (the "Negative List"). For investors from the People's Republic of China ("PRC"), only those industries that are announced in the "Positive List" by the government are opened for PRC investments. PRC investors are prohibited from investing in the industries which are not in the Positive List.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

None of the bilateral or multinational investment treaties signed by Taiwan provides any exemption from the restrictions stated in question 6.1 above.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Generally speaking, the Taiwanese government may expropriate land in accordance with the Land Expropriation Act, under which the owners of the expropriated land are entitled to reasonable compensation. Pursuant to the Statute for Investment by Foreign Nationals, the government may expropriate or acquire an invested company for national security and defence reasons by paying a reasonable compensation, provided that the total foreign investment in such invested company is less than 45% of the total capital amount of the invested company. If the total foreign investment in an invested company has never accounted for less than 45% of its total capital amount, the invested company will be immune from expropriation for 20 years from its establishment.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Various central and local government authorities are authorised to implement projects under the PPP Act. The Department of Promotion of Private Participation under the Ministry of Finance is responsible for administering the PPP Act and overseeing projects in the typical project sectors.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

In general, Taiwanese laws do not require that specific financing or project documents be registered or filed with government authorities for validity (or enforceability); nor do the laws require that such documents be in conformity with specific formalities.

**7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?**

Foreign entities may not own forest land, land with mineral deposits, water sources or other pieces of land with similar resources. Other than the above, a foreign entity with a branch in Taiwan may acquire pieces of land in Taiwan, provided that its home country grants reciprocity to Taiwanese nationals and entities.

The extraction of natural resources requires a licence under the Mining Act and the operation of pipelines (for water, electricity, gas, and so on) also requires a licence under the Act of Regulating Private Utilities. A project company incorporated in Taiwan and awarded the concession right pursuant to the PPP Act should generally be eligible for such licence.

**7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?**

Under the Mining Act, only Taiwanese nationals, whether natural or judicial persons, can own mineral rights to extract natural resources. A mineral rights holder needs to pay the government mineral royalties and mineral rights fees twice a year. Mineral royalties are calculated at 2% to 50% of the price for petroleum and natural gas, 2% to 20% for metallic minerals, and 2% to 10% for other minerals, while the amount of mineral rights fees depends on the kind of minerals and the terms of the concession. Tariffs may be imposed on the export of natural gas and petroleum, but there is no tariff for exporting natural gas and petroleum to a WTO member or a country which has a free trade agreement with Taiwan.

**7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?**

Taiwan has foreign exchange restrictions and controls. Generally speaking, a Taiwanese corporate entity or individual has an annual foreign exchange quota of US$50 million (or its equivalent) or US$5 million (or its equivalent), respectively, and may therefore remit sums of foreign currency within the quota into or out of Taiwan without prior approval from the Central Bank of the Republic of China (Taiwan) ("CBC"). The CBC has the sole discretion to grant or withhold its approval on a case-by-case basis if the Taiwanese corporate entity's or individual's quota would be exceeded for such conversion. No government fee or tax is payable purely on foreign currency exchange transactions.

**7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?**

Any remittance and repatriation of funds to a party in another jurisdiction will be subject to foreign exchange control in Taiwan if it involves exchange settlements against New Taiwan dollars. For example, any remittance of over US$1 million (or its equivalent) into or out of Taiwan by a company should be declared by the remitting company to the bank handling foreign exchange, with supporting documents.

As to tax treatment, the remittance of dividends to foreign shareholders is subject to withholding tax at 20% or lower if there is a tax treaty between Taiwan and that jurisdiction, while the remittance of loan payments is not taxable except for interest, which is subject to a 20% withholding tax or a lower tax treaty rate.

**7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?**

A project company may open and maintain a foreign currency account as long as it provides all the documents required by the bank for opening an account. Taiwanese law does not prohibit a Taiwanese company from opening an offshore account in another jurisdiction.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

Under the Company Act, a company should not pay dividends unless and until its losses have been covered, a legal reserve has been set aside, and there are surplus earnings left. If a company pays dividends in violation of the above requirements, creditors of the company may request nullification of the dividend distribution and demand compensation for losses incurred, and the statutory representative of the company will be sentenced to up to one year's imprisonment. If the dividends are paid to a foreign parent company, they will be subject to withholding tax as explained in question 7.6 above.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

Taiwan has various environmental, health and safety laws and related administrative regulations. The impact that they may have on a project financing depends on the nature and the contractual terms of the project. If a project involves substantial environmental issues or may create hazardous worksites or substances with a risk of significant liabilities (e.g., soil and groundwater pollution and clean-up), the lenders may be cautious about providing project finance or may demand the inclusion of repayment acceleration clauses in the loan agreement. The Environmental Protection Administration under the Executive Yuan is currently the highest governmental authority supervising all environment-related matters, and the local environmental protection bureau would oversee projects located in its jurisdiction.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

As long as over 50% of a company is owned by the private sector and not characterised as a state-owned enterprise, its procurement should not be subject to any special legal/statutory framework such as the Government Procurement Act. According to the PPP Act, where the government or any government-owned enterprise makes any equity investment in, or makes any donation to, a project company, the total equity investment or donation from the government and such government-owned enterprise shall not exceed 20% of the total capital or the total assets of the project company. If a project company enters into an investment contract with the competent government authorities under the PPP Act, its procurement may be subject to the special requirements under the investment contract.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Foreign insurance companies may not sell insurance policies in Taiwan unless they obtain a licence to do so from the FSC. In addition, insurance companies must submit the terms and conditions of their insurance policies to the FSC for approval before selling them in the market. Once licensed and approved, they will not be subject to any special restrictions or controls on their sale of insurance policies over project assets. If the insurance premium on the project assets is paid by a Taiwanese company or the Taiwan branches of a foreign company, such Taiwanese entity may have to bear the tax withholding obligation.

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

A foreign company may be named as a payee or receive an insurance payment through a pledge of the insurance policy in Taiwan only after it has been recognised and has set up a branch in Taiwan in accordance with the Company Act.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The hiring of foreign workers is subject to certain restrictions under the Employment Services Act. A permit from the competent labour authorities is required in order to hire technicians, engineers or executives. Application procedures and government administrative measures are provided under the Employment Services Act and the regulations promulgated by the Council of Labour Affairs.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Certain equipment and components used by construction contractors such as cranes, cables and wires are subject to inspection during import clearance procedures for public safety reasons. The government authorities in charge of inspecting such imports and labour safety are the Bureau of Standards, Metrology and Inspection and the Council of Labour Affairs. In general, importation of goods for sale or other commercial use is subject to import duties and a 5% sale tax; the importation of certain commodities such as tyres, vehicles, gasoline and machineries is subject to commodity tax. The PPP Act provides: (i) an import duty exemption for certain qualified equipment used by construction contractors; and (ii) a deferred (until one year after commercial operations) instalment payment of import duty on operating equipment to be used by a project company.

### 10.2 If so, what import duties are payable and are exceptions available?

Products are classified in accordance with the Customs' Classification of Commodities of the R.O.C. Code ("CCC Codes") with corresponding import duty rates. The CCC Codes are published on the website of the Directorate General of Customs. To encourage the development of certain industries, the importation of some equipment and key parts required by such industries may enjoy zero import duty. Exemptions from import duties are generally provided under Article 49 of the Customs Act. See also the import duty exemption explained in question 10.1 above.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

*Force majeure* exclusions are common in project contracts. Taiwanese law generally respects party autonomy, thus a *force majeure* clause is usually enforceable. Under the Taiwan Civil Code, an obligor is generally not held liable for non-performance if the non-performance is through no fault of the obligor.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Bribing a public official in exchange for certain favours constitutes a criminal offence in Taiwan. According to the Statute of Punishment for Corruption, a person may be sentenced to one to seven years' imprisonment and fined up to NT$3 million if he offers a bribe or other unjust enrichment to a government official in return for his breach of duty; or up to three years' imprisonment and/or a NT$500,000 fine for bribing a government official in return for a favour which does not entail a breach of the government official's duty.

In a government procurement project, if the bidder (or supplier or contractor) gives public officials a commission, kickbacks, a brokerage fee, or any other unjust benefits to win a procurement contract, the bid bond may be confiscated, and the contract may be terminated or rescinded. Furthermore, the bidder may be barred from bidding for government procurement projects for one year.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

With regard to the PPP projects, the PPP Act shall prevail. Unless otherwise specified in the PPP Act, the rights and obligations between the authority in charge and the project company shall be governed by the concession agreement and for matters not specified in the concession agreement, the relevant provisions under the Civil Code shall apply.

In Taiwan, parties to a contract are generally free to choose the governing law of the contract. In practice, it is common for the parties to choose Taiwanese law as the governing law for projects in Taiwan; in particular, the government counterpart to an investment agreement under the PPP Act is not likely to accept a foreign law as the governing law. However, for EPC contracts involving international contractors, we have seen contracts governed by New York law or English law.

### 13.2 What law typically governs financing agreements?

Most infrastructure projects in Taiwan are locally financed. Thus, Taiwanese law typically governs financing agreements.

### 13.3 What matters are typically governed by domestic law?

Investment agreements, off-take agreements, financing agreements, project insurance policies and land acquisition agreements are typically governed by domestic law.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Under Taiwanese law, parties may agree to submit their disputes to a foreign court or an arbitral tribunal located outside of Taiwan, even if one of the parties is a government agency. Taiwanese courts generally honour such an agreement on the basis of party autonomy in the absence of any of the following circumstances:

(a) it will be unfair for the subject matter to be adjudicated by the chosen jurisdiction;

(b) the consent of a party to submit to the chosen jurisdiction is obtained by fraud, duress or other unlawful means;

(c) the parties are not on an equal footing when they enter into the submission to jurisdiction agreement;

(d) it will be inappropriate or inconvenient for the chosen jurisdiction to adjudicate the subject matter; and

(e) the country of the chosen jurisdiction does not recognise and enforce judgments of the Taiwanese courts on a reciprocal basis.

The principle of sovereign immunity does not apply to projects in Taiwan.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Taiwanese courts recognise arbitration agreements requiring submission of disputes to arbitration institutions or *ad hoc* arbitration outside of Taiwan. The arbitral awards rendered under such arbitration agreements are generally recognised and enforceable unless any of the grounds for denial of recognition or enforcement prescribed under the Arbitration Act applies.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Taiwan is not a party to the New York Convention. However, provisions similar to Article 5 of the New York Convention are provided under the Arbitration Act. For example, Taiwanese courts may dismiss a petition for the recognition and enforcement of a foreign arbitral award on certain grounds, including that the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan, or the dispute is not arbitrable under Taiwanese law, or there is no reciprocity of recognition of arbitral awards.

### 15.3 Are any types of disputes not arbitrable under local law?

Under the Arbitration Act, disputes that can be resolved through arbitration are limited to "those which may be settled in accordance with the law". A good example of a matter that may not be settled or arbitrated is a dispute over the validity of intellectual property rights, because it can only be decided by the Intellectual Property Office or the Intellectual Property Court.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Some types of disputes are subject to mandatory arbitration under Taiwanese law, e.g., a dispute between the Stock Exchange Corporation and a securities firm, no matter whether there is an arbitration agreement between them. In addition, in a dispute over a government procurement contract for construction works or technical services, if the government agency refuses to accept mediation suggestions or resolutions proposed by the Public Construction Commission under the Executive Yuan, and the contractor files for arbitration, the dispute must be resolved by arbitration.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Political risk protections such as direct agreements with the central government or political risk guarantees are rare in Taiwan because the legal framework and political regime are relatively stable, and the government generally does not feel the need to offer such protections. In some exceptional cases, the government has agreed to buy back the project assets to facilitate project finance.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest paid to foreign lenders is subject to withholding tax as explained in question 7.6 above. However, exemption may be available for interest derived from: (1) loans given by a foreign government or financial institution for economic development; (2) financing facilities offered to its own branch or other Taiwanese financial institutions by a foreign financial institution; (3) loans extended by foreign institutions to legal entities within Taiwan for important economic construction projects approved by the Ministry of Finance; or (4) favourable-interest export loans or guarantees to legal entities within Taiwan from foreign government institutions or foreign financial institutions specialising in export lending or guarantee.

Proceeds from exercising a claim under a guarantee or proceeds from enforcing security will not be subject to withholding tax.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

While tax incentives were offered to foreign investors in the past, the current tax regime generally does not treat foreign and local investors and creditors differently, except that no withholding tax applies to the profits repatriated to a foreign company by its branch office in Taiwan and that certain interest income of a foreign company is exempt from withholding tax, as explained in question 17.1 above.

A foreign investor subscribing for shares issued by a qualified project company under the PPP Act and holding the shares for at least four years may enjoy tax credits of up to 20% of its investment amount. Such tax credits, which are also offered to domestic investors, may be applied against the withholding tax on the dividends expatriated by a project company to its foreign shareholders.

Under Taiwanese law, no tax is required to be paid in order for foreign investments, loans, mortgages or other security documents to take effect or to be successfully registered.

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

The risk allocation under many project agreements with a government counterpart may not necessarily be in line with international practice and may be more protective of the government party. Thus, risk control or mitigation measures would be especially important.

Legal entities in which the PRC investors hold more than 30% shares or capital in total or which are controlled directly or indirectly by PRC natural or juristic persons are considered PRC investors. Their investments in Taiwan are limited to certain businesses and are subject to special approval from the IC.

### 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

The issuance of corporate bonds by a project company in Taiwan is subject to the regulatory requirements and restrictions under the Company Act and the Securities and Exchange Act, including the financial conditions, the limitation on the total issuance amount and the reporting to the competent authorities for effective registration of the issuance.

However, the criteria of the financial conditions and the limitation amount applicable to the issuance of corporate bonds by a Taiwan project company can be exempted to a certain extent if the Taiwan project company involved in an infrastructure project is a public company and the proceeds resulting from such bonds issuance will only be used for the infrastructure project concerned.

## 19 Islamic Finance

### 19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

The development of Islamic finance in Taiwan is still in its embryonic stage. To date, there are no known examples of Islamic projects that have been financed in the jurisdiction of Taiwan. However, under Taiwanese law, *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments may be used in the structuring of an Islamic project financing in Taiwan.

### 19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

Under the Law Governing the Application of Laws to Civil Matters Involving Foreign Elements, parties to a contract are free to select the governing law of their contract. We doubt that ordinary courts would acknowledge *Shari'ah* as governing law. No precedents have been seen so far.

To our knowledge, there has not been any notable case of dispute or jurisdiction so far. Furthermore, currently we do not see a trend in favour of Islamic financing in Taiwan.

### 19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

The inclusion of an interest payment obligation in a loan agreement will not affect its validity or enforceability in Taiwan. No case has been reported to date in which such provision has resulted in a validity issue or hindered its enforceability if Islamic law applies to the contract and the intention is to execute such provision in Taiwan.


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Hsin-Lan Hsu graduated from National Taiwan University (LL.B.). She served as a notary public at Keelung and Taipei District Courts for nearly two years. She then won a scholarship from the Ministry of Education to study International Economic Law in France, where she obtained a DEA at Paris I University.

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Lee and Li is often named as one of the best law firms in evaluations of international law firms and intellectual property right firms. For instance, it was selected as the best *pro bono* law firm in Asia and the best law firm in Taiwan many years in a row by the *International Financial Law Review (IFLR)*; it was also consistently named the National Deal Firm of the Year for Taiwan and awarded Super Deal of the Year by *Asian Legal Business*.

Chapter 30

# Turkey


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Despite the decline in energy prices, high financing costs and volatility in the exchange rates, energy is still driving sectors for project finance. Due to Turkey's energy demand, which is estimated to increase by approximately 7% per year until 2023, the Turkish energy market has been experiencing major changes, with an aim of liberalisation, attracting private sector participation and the establishment of a competitive market. In recent years, Turkey has aimed to diversify its energy supply routes and sources, such as nuclear energy, and to increase the share of renewable energy. Lately, Turkey enjoys its geopolitical position by holding its energy transit hub status, *e.g.* petroleum and natural gas trade between West and East/maritime and pipeline transportation of oil and gas between the energy-demanding European countries and energy-rich eastern countries.

There are also a significant number of ongoing public-private partnership (PPP) projects in energy, highways, airports, ports, healthcare, road and railway sector projects. In recent years, the Turkish government promotes independent investment in these sectors and has also put great focus on PPP projects over the last few years. These PPPs are mainly focused on the Turkish healthcare, energy, airport, road and railway sectors. In addition, the government's ongoing urban transformation programme, residential mass housing and shopping mall developments have a substantial impact on the sector.

Still, in terms of the new investments, we believe that, in 2018, most of the companies, domestic and foreign investors and large conglomerates are reluctant to make new investments and are instead seeking to refinance existing ones.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Please see below some of the ongoing or recently closed project financings which are significant in recent years in Turkey:

- Third bridge project (US$3 billion) in Istanbul (closed).
- Third airport (€6 billion) in Istanbul, one of the largest PPP projects closed in Europe.
- Turkstream gas pipeline (US$12.7 billion) between Turkey and Russia, which will directly connect the large gas reserves in Russia to the Turkish gas transportation network, to provide reliable energy supplies for Turkey, south and south-east Europe.
- Rosatom, the leading partner; the first Turkish nuclear plant project – expected to commence construction in 2018, with electricity production to be achieved in 2023.
- Trans-Anatolian pipeline, which will connect Turkey with Azerbaijan's major BP-operated Shah Deniz gas field.
- Turkey's first liquefied natural gas terminal at the Aegean port of Aliaga to process imported natural gas.
- Akkuyu nuclear power station project (US$20 billion) in southern Turkey.
- Gebze-Izmir highway and bridge project (US$2.5 billion), the first road project in Turkey to be procured under the build-operate-transfer model (closed).
- Canakkale highway and bridge project (TYR10.5 billion).

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

General security agreement is not possible under Turkish law. Each type of asset shall be collateralised separately. In general, the following securities are utilised in project finance deals:

- *Pledge*.
  - Pledge over movables.
  - Pledge over shares of the company.
  - Pledge over bank accounts.
- *Mortgage*.
- *Transfer/assignment of receivables*.
- *Guarantee and suretyship*.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes.

*Pledge over the movables*: Amongst others, all the movable operation equipment such as machinery and equipment, tools, devices, electronic communication devices as well as receivables, intellectual and industrial property rights, licences and permits that are not required to be registered to another registry and are not considered as administrative permission, raw materials, all kinds of earnings and revenues, rental income, stocks, trade name and/

or commercial title, commercial enterprise are subject to the pledge over movables under Movable Pledge Law No. 6750. Pledge over movables is established through execution of a pledge agreement before the Notary Public and registration of the same together with the list of pledged movables before the Pledged Movables Registry which is also kept by the Notary Public in Turkey. Records of the Registry are publicly available.

*Mortgage*: A mortgage denominated in TRY, or any other currency, can be created by registering the mortgage with the land title registry. A mortgage is created through following a two-stage process:

- The contractual terms agreed by the parties that form the mortgage agreement are typed by the land title registrar on printed official forms forming the official deed of mortgage. The deed of mortgage is signed by the parties before the land title registrar, who also signs and seals the deed.
- The deed of mortgage is registered by the registrar in a specific column in the records for the mortgaged real property, which is kept at the land title registry.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Yes. Assignment is created by a written agreement between the assignor and the assignee. While the consent of the counterparty of the contracts is not required for a valid and effective assignment, it is advisable to inform the counterparties. If the counterparty is not informed, the counterparty discharges his obligations if he pays the assignor. In general, the assignor continues to retain the assigned rights if there is no event of default. If an event of default occurs, these rights are then directed to the assignee or to its order.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. A written pledge agreement is required for the establishment of a bank account pledge under Turkish law. Although consent/notification of the account bank is not required by law for validity, a notification against an acknowledgment notice from the account bank is recommended in order to ensure certain obligations of the account bank, such as restricting withdrawals, and to confirm that no prior ranking pledge, assignment or counterclaim exists.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes. Pledge over the shares in a company is established through the execution of a pledge agreement between the parties.

Share certificates of joint stock companies must be in printed form (registered or bearer), and the pledged shares must be endorsed by the shareholders and delivered to the pledgee (lender). An approval decision of the company whose shares are pledged and registration of the pledge to the share book of the company are also recommended.

Share certificates of a limited company may not be in printed from, in which case the shareholders' resolution approving the pledge and registration of the pledge to the share book of the company are required. The pledge agreement for the limited companies must also be executed before the Notary Public.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Please see above for the notarisation and registration requirements for various collaterals.

Stamp duty of 0.948% is applied for each security agreement but shall be capped by approximately TL 2,135,949.30. Pledge over movables is exempt from stamp duty and other taxes. In addition, exemptions generally apply to financings by banks, foreign credit institutions or international finance institutions. Furthermore, construction agreements for manufacturing and constructing capex investments within the scope of an investment incentive certificate are also exempt from stamp duty.

Negligible notary fees and costs are accrued for the share pledge over the limited companies.

Mortgage is subject to deed charges of 4.55% over the mortgage amount.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Filing, notification or registration is required depending on the type of the collateral. Please see above for further explanation.

In general, provided the required documents and information are in order and appointments are taken from the relevant registries or notaries (if necessary), filing or registration process is completed on the date of application or within a couple of days following the application date.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

No, except for the regulated markets such as energy (electricity, petroleum, gas and LPG), there is no specific regulatory consent required from the governmental authorities for the creation of security in Turkey.

Although it is not a consent requirement, it is worth noting that the Turkish resident guarantors providing a guarantee in favour of foreign parties should inform the Turkish Treasury within 30 days following the date of the guarantee.

## 3 Security Trustee

### 3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Although the security agent structure is widely utilised in foreign law-governed transactions accompanied by Turkish law security documents where the security is held by a security agent or trustee, as none of those transactions were tested before the courts in Turkey regarding the security agent provisions, to date, there is no relevant court precedent on the subject.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

In Turkey, the following mechanisms are utilised:

- Parallel debt is commonly utilised while structuring the security agent concept. In a parallel debt structure, the borrower undertakes and accepts that it has, by way of an abstract acknowledgment of debt (*mücerret borç ikrarı*), a separate and independent payment obligation against the security agent, in an amount equal to the outstanding amounts under the loan agreement. Therefore, the security agent has an independent right to demand payment of the parallel debt, *i.e.* the outstanding amounts under the loan agreement.
- It is also possible to utilise joint and several creditorship system in which each lender has a right to claim the outstanding amounts under the loan agreement from the borrower and the amounts collected by the security agent (acting on behalf of and for the benefit of the lenders) can be distributed to the other lenders *pro rata* to their claims in accordance with the finance documents.
- In some cases, a foreign security agent structured outside the jurisdiction of Turkey is preferred, since if the security agent arrangement is recognised by foreign jurisdiction, it is likely that a Turkish court may also uphold it as being valid.

Still, enforceability issues may arise since the Turkish courts are not familiar to these structures and the concept yet.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

In principle, the foreclosure process of mortgages and pledges is carried out by the competent execution office, which will initiate a public auction for the sale of the mortgaged/pledged assets. Although public auction is a transparent method and has a likelihood of being challenged by the debtor or third parties, it has certain disadvantages with respect to its complicated procedure and long duration.

In terms of movable pledges, the new Movable Pledge Law No. 6750 also gives right to the pledgee to request the transfer of the ownership of the movable asset to itself upon non-performance of the debt. If it is the intention of the parties to grant the pledgee with such a right, then this should be included in the Movable Pledge Agreement.

Except for the regulated areas such as the Turkish energy markets (electricity, petroleum, gas and LPG), there is no specific regulatory consent required for enforcement.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

Foreclosure proceedings by foreign lenders may be subject to *cautio judicatum solvi*, or security costs for foreigners, unless there is *de facto* or *de jure* reciprocity with the country of such foreign lenders.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

In case the project company is declared bankrupt by the courts and the liquidation process is commenced against the company via official bankruptcy offices, the secured party may not proceed with an individual debt collection proceeding, but would have to apply to the bankruptcy offices to be registered and recorded during the liquidation process. Sale of the secured assets is handled together with the sale of "all assets in the bankruptcy estate", and the proceeds may be held off from the creditor if there are challenges against the ranks or receivables.

Please refer to question 5.2 below for the ranking principles.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

According to Execution and Bankruptcy Law No. 2004, the receivables of secured creditors have priority over the sale proceeds of the secured assets after deduction of the relevant taxes *in rem*, *e.g.* taxes arising from the use or mere existence of the secured assets such as real estate taxes, motor vehicle taxes, custom duties, etc. and expenses arising from the administration or preservation of the secured assets or from the sale.

The distribution of the sale proceeds of the bankruptcy estate to the creditors, which do not have secured receivables, will be ranked as follows:

<u>First rank</u>

- Receivables of the employees including notice and severance pay accrued within a year prior to the bankruptcy, and notice and severance pay that accrues due to the termination of the employment following the bankruptcy of the company.
- Debts of the employer to the institutions and funds being a legal entity incorporated to establish aid funds for employees.
- Any and all alimony receivables arising from family law accrued within a year prior to the bankruptcy.

<u>Second rank</u>

- Receivables of persons whose assets have been left to the administration of the bankrupt as a guardian/administrator.

<u>Third rank</u>

- Receivables that are privileged pursuant to the provisions of special laws.

<u>Fourth rank</u>

- All other receivables of the creditors which do not enjoy a privilege.

**5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?**

Public bodies are excluded. However, commercially operated or managed companies established by public bodies/enterprises under private law provisions can be subject to bankruptcy proceedings under the principles of Execution and Bankruptcy Law No. 2004

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

If the debtor company is declared bankrupt by the courts, the creditors cannot individually seize the assets of a company in an enforcement or debt collection proceeding. If there is no bankruptcy or a (pending) postponement of bankruptcy with respect to the debtor, creditors may also initiate debt collection proceedings against the debtor, without filing any lawsuit before the courts.

In terms of movable pledges, the new Movable Pledge Law No. 6750 also gives right to the pledgee to request the transfer of the ownership of the movable asset to itself upon non-performance of the debt.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Turkish courts may grant a moratorium by suspending debt collection proceedings against the debtor in case that the debtor's request for reorganisation or postponement of bankruptcy is accepted by the court. In postponement of bankruptcy, the court may also suspend other debt collection proceedings with a provisional injunction during the course of the litigation process.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Under Turkish Commercial Code No. 6102, the directors should constantly inspect the latest balance sheet of the company for any signs of financial distress and take necessary measures to overcome it or to liquidate the company if it is not possible for the company to overcome such distress.

According to Article 376 of Turkish Commercial Code No. 61022: (i) if the latest annual balance sheet affirms that half of the share capital and legal reserves remains uncovered due to loss, the directors must invite the shareholders to a general assembly meeting and propose remedial measures; (ii) if the latest annual balance sheet affirms that ⅔ of the sum of share capital and legal reserves remain uncovered due to loss, this will result in the automatic dissolution of the company (*i.e.* the company is deemed technically bankrupt) unless the general assembly adopts a resolution on either to decrease the capital to ⅓ or to replenish the lost equity as per the proposal of the board of directors, thus, the directors must immediately invite the shareholders to convene a general assembly meeting and inform the shareholders in the relevant meeting of the current financial distress the company is in; and (iii) if there are any signs that could indicate that the company has become "insolvent" (*i.e.* if the company's assets are inadequate to cover its debts), the board of directors will prepare an interim balance sheet based on both the methods of continuity principle and the possible market value of the assets.

The duty of care of the board of directors may be associated with the notification requirements imposed on the board of directors. Considering the deteriorating financial conditions of a company, the analysis would thus be two-fold: (i) a claimant may argue that the board of directors was at fault when failing to act with care about the financial situation of the company and such fault resulted in damages to the company; or (ii) a claimant may allege that the board of directors failed in its notification duties (provided that such failure leads to such damages).

Members of the board of directors are liable as per Article 553 *et seq.* of Turkish Commercial Code No. 6102. Article 553 of Turkish Commercial Code No. 6102 provides that the members of the board of directors will be liable towards the company, its shareholders and its creditors in the event that they breach their duties arising out of the law and the articles of association of the company, unless they are able to prove that they have no fault in the breach. The applicable statute of limitations is two years after the shareholders or creditors having become aware of the liable person and the damage, in any case, five years following the breach.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Foreign real persons or foreign legal entities having 50% or more of the shares or the right to appoint or remove majority of the persons having the management rights in a Turkish company, must apply to the governorship where the target real estate is located (governorship approval) before acquiring the title before the land registry. The respective governorship communicates with the general staff and the City Police Department to check if the target real estate is located within a military or security zone, prohibited zone or special security zone. After making the evaluation, if the general staff and the City Police Department provide clearance, the governorship provides an approval (valid for six months) to the foreign shareholding project company to acquire the title of the target real estate.

On the other hand, for certain types of companies in regulated sectors (such as banks, insurance and brokerage companies, energy companies acting based on licences, factoring and financial leasing companies), obtaining prior authorisations or approvals from competent governmental authorities may be required in order to acquire shares or voting rights that reach or exceed certain thresholds.

Finally, foreign investors can transfer these amounts abroad through Turkish banks in foreign currency or Turkish Lira. If the amount is above or equal to US$50,000, the relevant Turkish bank conducting the transfer must notify the relevant Turkish authorities within 30 days following the transaction (excluding payments for exports, imports and invisible transactions).

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No. However, Turkey is a party to the Bilateral Agreements on Promotion and Protection of Investments together with 94 countries and Bilateral Agreements on Prevention of Double Taxation with 80 countries.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Other than the general provisions in the Turkish Constitution, nationalisation and expropriation are provided in Expropriation Law No. 2942 and its implementing regulations. However, unless there is public welfare and prompt, adequate and effective compensation to be paid in return, foreign direct investments may not be expropriated or nationalised.

In addition, Bilateral Agreements on Promotion and Protection of Investments provides certain protections against nationalisation for the investors.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Energy Market Regulatory Authority (EPDK), Energy Exchange Istanbul (*Enerji Piyasaları İşletme Anonim Şirketi*), the State Hydraulics Authority (*Devlet Su İşleri*), Banking Regulation and Supervision Agency (BDDK) are the main relevant governmental agencies or departments with authority over the projects. Local municipalities have also authority for certain permits such as construction permits or workplace opening and operating permits.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

In general, legal entities, the tariffs of which are regulated and hold an electricity generation licence, are permitted to provide share pledges over its shares or assign/transfer the receivables in relation to their licences, provided that these companies obtain a prior consent of the Energy Market Regulatory Authority (EMRA). In addition, certain direct or indirect share transfer restrictions or conditions of EMRA's prior consent are set forth under the relevant regulations, while changes which do not require EMRA consent will still need to be notified (where, necessary, together with an application for a licence amendment) within six months.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

The construction and operation of certain projects are subject to licensing such as energy or natural gas. In terms of the ownership of land, it should be checked whether acquisition of land by such foreign company is restricted due to its country of incorporation, as determined by the Council of Minister's decision based on the bilateral international arrangements.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

The extraction and export of natural resources requires licensing and the holders of licences may be required to pay royalties or fees over the extracted or exported natural resources to the relevant authorities. Subject to certain exemptions, the exportation of national resources may also be subject to certain custom duties as well.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Certain restrictions are provided for the foreign currency exchanges pursuant to Decision No. 32 on Protection of the Value of Turkish Lira and its implementing regulations. Corporate or income taxes may also accrue depending on the profits gained by or the status of the relevant persons.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

All facility and security documentation where the loan is granted by banks, foreign credit institutions or international finance institutions are exempt from stamp tax. However, this exemption is only applied if loan is utilised in Turkey. Otherwise, stamp tax is applied and must be paid for each original copy.

Banking and insurance transactions tax (BITT) is also not payable when the lender is a foreign bank.

The loans granted by foreign financial institutions are subject to the resource utilisation support fund (RUSF). According to the current legislation, regressive RUSF rates apply to foreign exchange and gold borrowings provided to Turkish residents (banks and financing institutions are exempt) from abroad depending on the maturity.

RUSF rates on foreign currency denominated loans are as follows:

- With the maturity less than one year: 3%.
- With the maturity between one (including one year) and two years: 1%.
- With the maturity between two (including two years) and three years: 0.5%.
- With the maturity between three (including three years) and more than three years: 0%.

RUSF rates on Turkish Lira-denominated loans are as follows:

- With the maturity less than one year: 1%.
- With the maturity between one (including one year) and more than one year: 0%.

In addition, RUSF calculation differ based on the type and the currency of the loan. RUSF is calculated:

- Over the principal amount in case the loan is foreign exchange-denominated.
- Over the interest payments in case the loan is Turkish Lira-denominated.

Thin capitalisation rules are applied irrespective of the relevant party's country of incorporation.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes. The project companies can establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

As a general principle, a withholding tax at the rate of 15% shall be applicable over the dividends paid out to a foreign shareholder by a project company. This rate may differ depending on the jurisdiction in which the shareholder is incorporated, due to double taxation agreements. If the relevant double taxation agreement stipulates a lower rate than that stipulated in Turkish law, then the lower rate shall apply.

Please see question 7.6 above for RUSF.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Applicable laws and regulations and the required licences differ as per the nature/type of the project.

The main licences and relevant authorities are as follows:

*EMRA*: the electricity generation licence; electricity distribution licence; retail licence; transmission licence; wholesale licence; export-import licence; and natural gas import licence.

*Municipalities*: workplace opening and operating licence; non-sanitary enterprise certificate; health protection strip; and operation permit and zoning permits.

*Relevant Ministries*: environment impact assessment certificates; tourism investment certificate; investment incentive certificate; tourism operation licence; environment permit and environmental licence; industrial registry certificate; and forestry permissions.

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

In general, procurements must comply with the requirements in the Law on Prevention of Unfair Competition on Importation.

In addition, procurements of foreign equipment are subject to the Customs Law and its implementing regulations.

Finally, if 50% shares of the project company is owned by public entities, Public Procurement Law No. 4734 and State Procurement Law No. 2886 shall be applicable.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Insurance Law No. 5684 requires Turkish companies to insure their insurable interests in Turkey through insurance companies operating in Turkey. Accordingly, save for the below cases, foreign insurance companies cannot provide or guarantee the project assets:

- Transportation insurance for goods being subject to export/import.
- Hull insurance for aircraft, ships and helicopters which are purchased with foreign loans, exclusively limited to the loan amount and applicable for the term until the foreign debt is paid, or limited to the period of financial leasing if the same are brought home by financial leasing obtained abroad.
- Liability insurance arising from the operation of ships.
- Life assurances.
- Personal accident, sickness, health and motor vehicle insurances, limited to the time people will be abroad or their temporary stay abroad.

In addition to the above, liability insurance determined by the Turkish Treasury can be provided by foreign insurance companies.

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes. The insurance policies over project assets are payable to foreign secured creditors.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

There is no general restriction which may require Turkish citizens to be employed by a project company. Certain specific sectors' rules and regulations should be checked.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Private procurements are generally covered by the Customs Law and its implementing regulations, and shall be compliant with Law on Protection of Unfair Competition on Importation No. 3577.

In addition, custom duties and VAT calculated over the customs value together with certain fees are paid as per the goods imported to Turkey.

Further, certain goods are subject to controls or approvals of the relevant authorities based on the qualification of the goods.

Finally, certain goods which have hazardous effects with respect to environmental protection or certain chemicals and scrap metals are prohibited.

### 10.2 If so, what import duties are payable and are exceptions available?

VAT rates of 1%, 8% or 18%, depending on the type of the imported good, are applied.

There are four main incentive implementations which consist of general incentives, regional incentives, incentives for large-scale investments and for strategic investments as per State Aid for Investment Decision No. 12/2005. The incentives generally include (i) a VAT exemption, (ii) a custom duty exemption, (iii) an exemption of certain other tax reductions, or (iv) land allocations.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

Despite the lack of a uniform *force majeure* definition or exclusion under Turkish law, the concept is well known and commonly utilised at Turkish practice based on freedom of contract. Parties are required to determine explicitly the *force majeure* events, exclusions and its consequences in their agreements.

## 12 Corrupt Practices

**12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?**

Other than the general provisions under Criminal Law No. 5237, which mainly covers and criminalises bribery, embezzlement, fraud, bid rigging and other forms of corruption, such as the negligence of supervisory duty and the unauthorised disclosure of business secrets, the following legislation applies to corrupt business practices and bribery:

- Criminal Procedure Law No. 5271.
- Law on Public Officers No. 657.
- Law on the Declaration of Property and Fight Against Bribery and Corruption No. 628.
- Regulation on the Declaration of Property.
- Regulation on Ethical Principles for Public Officers and Procedures and the Principles for Application.
- Law on Misdemeanours No. 5326.
- Law on the Financing of Terrorism No. 6415.
- Law on the Prevention of Laundering the Proceeds of Crime No. 5549.
- Regulation on Compliance Programmes Regarding Obligations on Laundering the Proceeds of Crime and the Prevention of Financing of Terrorism.
- Regulation on Precautions Regarding the Prevention of Laundering the Proceeds of Crime and the Financing of Terrorism.

## 13 Applicable Law

**13.1 What law typically governs project agreements?**

Other than those executed with or issued by government entities or related to the transfer of operating rights or licences or concession agreements or operation and transfer arrangements, which shall be governed by Turkish law, parties are free to determine foreign law and jurisdiction for the project agreements, such as supply and maintenance agreements, construction agreements, procurement agreements, etc.

In general, English law governing documentation is preferred at Turkish markets.

**13.2 What law typically governs financing agreements?**

In general, Turkish law and English law are determined depending on the nature/type of the project agreements.

**13.3 What matters are typically governed by domestic law?**

Other than those listed in question 13.1 above, security arrangements for the rights, receivables and assets (including pledge over the shares of a Turkish project company) located or arisen in Turkey are governed by Turkish law.

## 14 Jurisdiction and Waiver of Immunity

**14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?**

Parties are free to settle the courts of foreign jurisdictions for an agreement containing a foreign element, unless the subject matter of the dispute falls in the exclusive jurisdiction of the Turkish courts. According to recent developments, a specific foreign court in the relevant jurisdiction (the High Court in London, rather than English courts, must be selected as a competent court in the agreement).

In general, states or any state entity will enjoy the sovereign immunity from both lawsuit and seizure. However, states or any state entity shall not benefit from such immunity while acting in a private or commercial capacity. In addition, according to the Vienna Convention on Diplomatic Relations, in order for the immunity to be valid and binding for a state or state entity, the waiver must be made by the relevant state itself.

## 15 International Arbitration

**15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?**

Yes. Foreign arbitration or arbitral awards are not recognised if (i) there is an absence of an arbitration agreement or clause (in written form), (ii) the subject matter of the dispute is capable of being settled by arbitration under Turkish law, (iii) the recognition or enforcement of the award is contrary to public policy, (iv) the judgment given on the matter falls within the exclusive jurisdiction of the Turkish courts, or (v) the award is not final.

In addition, if one of the parties claims that (i) such party was not properly represented before the arbitral tribunal in accordance with the due process and thus, such party does not accept the tribunal's ward, (ii) such party was not given notice as to the appointment of the arbitrator or arbitration proceedings or was otherwise unable to present his/her case, (iii) the arbitration clause/agreement is invalid under the applicable law, (iv) the appointment of arbitrators or procedural rules applied by the arbitrators is contrary to the parties' agreement, (v) the arbitral award relates to a matter that was not in the arbitration agreement/clause or it exceeds its scope, or (vi) the arbitral award has not become final or enforceable or binding under the applicable law or the procedural rules to which it was subject to or the arbitral awards was annulled by the competent body of the place it was made.

**15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?**

Yes. Turkey is party to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (NY Convention) since 1992, and enforces arbitral awards of other contracting states without re-examination of the merits subject to the conditions set forth under the NY Convention.

As Turkey is a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States since 1987, the disputes may be resolved before the International Centre for Settlement of Investment Disputes, provided that the dispute arises out of a foreign investment and the other necessary conditions are fulfilled.

In addition, Turkey ratified the European Convention on International Commercial Arbitration in 1991.

### 15.3 Are any types of disputes not arbitrable under local law?

Yes. For instance, (i) disputes arising out of *in rem* rights such as rights over the immovable, and (ii) disputes which cannot be subject to the parties' will, such as facility or employment issues, or issues related to the administrative, criminal or bankruptcy law, cannot be subject to the arbitration procedure.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Depending on the laws and regulations applicable to such claims, some of the disputes are subject to mandatory arbitration in Turkey, such as disputes regarding collective bargaining agreements, consumer law or disputes regarding private legal relationships between state-owned institutions such as municipalities.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

There have been none that we are aware of.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Turkish law requires Turkish borrowers to withhold taxes from interest and similar payments to foreign lenders under facility agreements. The general rate of applicable income tax, *i.e.* through withholding, is 10% for foreign lenders that are not licensed banks or financial institutions, while it is 0% for regulated banks or qualified financial institutions.

In addition, while BITT is not applied for foreign lenders, BITT of 5% over the interest or other income, such as fees, is applied for Turkish banks or to any facility office of foreign lenders located in Turkey.

The proceeds of enforcing security or of a claim under a guarantee, on the other hand, is not be taxable unless the beneficial owner has a taxable presence in the form of a permanent establishment in Turkey.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

All facility and security documentation where the loan is granted to Turkish borrowers by banks, foreign credit institutions or international finance institutions are exempt from stamp tax. However, this exemption is only applied if the loan is utilised in Turkey. Otherwise, stamp tax is applied and must be paid for each original copy.

BITT is also not payable when the lender is a foreign bank.

Please see question 7.6 above for RUSF.

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

Subordination rules and claw-back risk may be deemed as potential issues for a foreign lender.

In contractual subordination, it may not be possible to obtain a specific performance before the execution offices since it is not recognised nor tested by law, and secondly, in case of bankruptcy, all the creditors of the bankrupt debtor will be ranked in accordance with the provisions of Execution and Bankruptcy Law No. 2004.

In addition, the lenders may have claw-back risk *vis-à-vis* other creditors of a Turkish debtor that is unable to pay its debts (insolvent) whereby other creditors are entitled to apply to courts to invalidate certain transactions entered into by the insolvent debtor. These voidable transactions generally consist of those made for no consideration (including donations) or for a consideration that is significantly less than the actual value of the transaction or that is made with the intention of harming its creditors.

In addition to the above, guarantee and surety in security options may be important for the lenders or equity investors:

- *Guarantee:* The obligation of the guarantor is independent of the agreement it guarantees. As a result, the validity of the underlying contractual relationship does not affect the enforceability of the guarantee obligation. Guarantee is not subject to specific creation requirements (for example, written agreement or requirement determining a cap for the guarantee), with the exception of a personal guarantee. According to the Turkish Code of Obligations, the suretyship conditions are applicable to create a personal guarantee.
- *Surety:* The security obligation of the surety depends on the validity of the debtor's debt, *i.e.* if the debtor's debt becomes invalid for any reason, the surety is entirely released of all its obligations (contrary to the guarantee). Accordingly, the surety's liability is always ancillary in nature. Surety is established through written agreement which includes a statement of the amount of maximum liability agreed in handwritten by the surety. In addition, the suretyship period for real persons and type of suretyship (for example, whether ordinary or several) must be specified in the agreement. If a married individual is the surety, the law requires the spouse of the surety to provide consent on or before the date of the surety agreement, except for certain cases.

### 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

In general, issuance of debt instruments through public offering or private placement or to the qualified investors are subject to the following laws and regulations:

- Turkish Commercial Code No. 6102.
- Capital Markets Law No. 6362.

- Decree on the Protection of the Value of Turkish Lira No. 32 and its implementing regulations.
- Communiqué on Debt Instruments of Capital Markets Board.
- Listing Directive of Borsa Istanbul.

The total amount of issuance shall not exceed certain limits determined for the issuing company by the Capital Markets Board, the sole authority on the capital markets in Turkey. In addition, registration before the Borsa Istanbul and obtainment of approval certificate for the issuance and the issuance limit by the Capital Markets Board are required for the issuing companies in Turkey.

## 19 Islamic Finance

### 19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

*Sukuk* is the most common instrument utilised in the financings at Turkish markets. According to the Communiqué on Lease Certificates, lease certificates/*sukuk* can be structured on an asset (*sukuk al ijarah*), management, purchase and sale, partnership (*sukuk al-musharaka*) and construction agreement (*sukuk al-istisna*) basis.

*Ijarah*: Similar to the financial leasing, the structure is based on the use of asset and receiving rental receivables while the ownership remains with the lessor with all its liabilities and is commonly used if a company needs an asset but cannot afford or not is willing to purchase the same in cash.

*Istisa'a*: It is a type of contract where one party is obliged to produce a specific item with a specific quality and size such as a facility or product in a given period for a determined amount where the other party is obliged to pay the total amount of money at the end of the period. These certificates enable the payment at a future date and include the cost which is equal to the total complete sale price and fund costs.

*Murabaha*: It is an instrument based on a sale contract between the seller and the client for the sale of goods, which includes profit agreed by the parties and repayments are mostly made in instalments.

*Wakalah*: As an Islamic type of power of attorney or agency arrangement, *Wakalah* is an agreement where the client appoints an agent to invest funds and such agent manages those investments on behalf of the clients for a specific period of time to generate an agreed profit in return.

### 19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

As long as there is a foreign element, parties are free to determine foreign law to govern their agreement, including *Shari'ah* law. However, amongst others, the enforcement and recognition of decisions provided under *Shari'ah* law before Turkish courts depends on the fact that it should not be contrary to the public policy.

### 19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

This should be subject to the general rules and principles of the recognition and enforcement rules of Turkish law.


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Selin Bayar is one of the senior partners and has extensive experience in a range of banking and finance, corporate transactions, including mergers and acquisitions, private equity investments, privatisations, joint ventures, strategic alliances and IPO transactions. Ms. Bayar regularly represents foreign companies and banks, private equity funds, and other investment funds and financial institutions in cross-border transactions, specifically in Turkey. She also has significant experience in project finance, capital markets and public offerings. Her industry expertise includes energy, banking and insurance, healthcare, telecommunications and the media.


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Esen Irtem Karagöz works in both cross-border and domestic financing transactions including acquisition, project, corporate finances, asset financing or other hybrid financings, by representing lenders and borrowers related to various types of loans such as FI loans, bilateral, club or syndicated loans, Islamic- or conventional-based lending, secured, unsecured or ECA-covered loans. She has significant experience in Islamic finance, especially in *Murabaha* syndications of Turkish participation banks and Turkish corporates.

Ms. Irtem regularly advises on ISDA, CTA and other OTC transactions. She is also involved in major bond issuances by Turkish and foreign banks in and outside Turkey.

Ms. Irtem has specialised, in recent years, in debt restructuring of Turkish companies together with Turkish banks and financial institutions.

She joined a secondment programme at an international law firm, working with the EDM, M&A and project finance and infrastructure practice groups in the firm's London and Munich headquarters. During her secondment practice, she enriched her experience by being involved in multi-jurisdictional deals.

Pekin & Bayar
Law Firm

Pekin & Bayar, as being one of the oldest law firms in the market holding a non-Turkish resident clientele base, has been able to encounter structures and issues not widely known during its years of experience. This gave our firm the chance to be able to follow the long-term evolution of the legislative framework and the reasoning behind the legislation, which has significant importance with respect to capital markets laws, both in terms of products and institutions, while enabling us to work with innovative solutions.

Pekin & Bayar's B&F Team provides services for international and local banks, financial institutions, ECAs, borrowers and sponsors in relation to the full spectrum of financing alternatives, including acquisition and leveraged financing, public lending, syndications, Islamic finance, project and corporate finances, asset financing or other hybrid financings. While we provide our legal services for both lenders and borrowers, we also consider the commercial concerns of the client, financial needs, strategy, technical details and other specifications of the financing, and we aim to provide innovative and tailored solutions for multifaceted and complex financing structures with a dynamic, experienced and results-oriented team. Thanks to our wide range of retainer clients in various sectors (such as Finans Leasing, Finans Portfolio, Turkcell Finansman, Burgan Yatırım), we are able to understand the needs of creditors and borrowers, in particular in project finance deals, and provide sound and workable solutions for both sides of the financing.

As the B&F Team of Pekin & Bayar, we are acting as local legal counsel for numerous multinational financial institutions and international banks (such as RBS Turkey) in connection with their banking services and finance transactions in Turkey, which includes consultancy services in compliance and regulatory matters, whereby we utilise our experience of 70 years. Our extensive experience in the legislation relating to financial institutions enables us to handle matters on an economic basis and to deal with issues constructively as they arise.

# Ukraine

Olexiy Soshenko

Redcliffe Partners

Olena Polyakova

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Ukraine resumed growth (2.4%) in 2017 which is a positive sign, but at the same time growth remains modest due to the challenges faced by Ukraine, such as the suspension of economic ties with the occupied territories in eastern Ukraine and Crimea, reorientation to new markets, fluctuations in world commodity prices and reforms yet to be completed. Privatisation, the opening of the land market, the reform of the judicial system, reforms of state and municipal enterprises, and forex liberalisation are amongst the key reform priorities in Ukraine. The main trends in the project finance market in Ukraine are towards projects in renewable energy and infrastructure. Ukraine is the least energy-efficient economy in Europe, and energy efficiency and renewables are priorities both for Ukraine and for international finance institutions which are actively involved in project finance in Ukraine.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The following significant project financings have taken place in recent years in Ukraine:

1. Financing by EBRD and IFC of the construction of a new private grain terminal in Ukraine's Black Sea commercial port, Yuzhny by M.V. Cargo. The project is being developed as a Ukrainian joint venture with the participation of Cargill, the world's largest provider of agricultural products and services, and the Ukrainian Sea Ports Authority, a state enterprise managing Ukrainian sea ports and infrastructure.
2. Financing by FMO (*Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.*) of the construction of grain and sugar storage facilities by Astarta-Kyiv, a Ukrainian agricultural and industrial holding company, and the largest sugar producer in the country.
3. Financing by EBRD of the construction of a grain drying complex at Odesa port by GNT Olimpex Holding Ltd. According to the project, the grain drying complex with an annual capacity of 500,000 tonnes will be integrated with the company's handling terminal at the port. GNT Olimpex Holding Ltd. unites private suppliers of shipping, stevedoring and dry cargo handling services.
4. Financing by EBRD of the Eco-Optima Wind Farm construction by Eco-Optima, a Ukrainian-Italian joint venture company which will operate a wind farm in the Staryy Sambir region of western Ukraine. This wind farm has a total capacity of 12.5MW and is expected to generate at least 25.5GWh per year.
5. Financing by EBRD of the construction of a 4.5MW solar power plant by a local project company, Green Agro Service LLC, in the Vinnitsya region of south Ukraine. Power generation of the plant is estimated at 5,012MWh/a.
6. Financing by EBRD of the construction of two hydropower plants on the Bily Cheremosh River in western Ukraine by Hydropower LLC. The hydropower plants, with a total capacity of 1.6MW, will produce 6,470MWh annually which will be sold to the grid at the feed-in tariff.
7. Financing by Landesbank Berlin of the construction of Botievo wind farm by DTEK group, Ukraine's largest energy company.
8. Financing by EBRD of the construction of a 2MW small hydropower plant on the river Rika in Western Ukraine, Zakarpattia region by Aquanova Development LLC, a Ukrainian SPV established for the purpose of financing the development, construction and operation of the hydropower plant.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Currently, it is not possible to give asset security by means of a general security agreement over assets of different types, and a separate agreement is required in relation to each type of asset. It is possible to create a security interest over the similar type of assets under a general security agreement.

All forms of security fall into two broad categories depending on the type of asset constituting security:

- pledge (security over movable property, including equipment, transport vehicles, inventory, shares, securities, receivables, contractual rights, funds in bank accounts and intellectual property rights); and
- mortgage (security over real estate, including buildings and their parts, residential apartments, land plots, unfinished construction, ships and aircraft).

Future assets (i.e., receivables, movables, etc.) can constitute security, provided that the assets are sufficiently identifiable. Security over future assets will be effective from the moment of acquisition by the security provider of such assets.

In general, any security needs to be registered in the applicable public register in order to give the lender priority against third parties and to be recognised in the insolvency of the person granting the security.

Security is normally registered in the following public registers:

- for security over land and buildings, the State Registry of Property Rights to Real Estate; and
- for other assets, the State Registry of Encumbrances Over Movable Property.

There are other registries for certain very-specific assets.

**2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?**

Security can be taken over real property (land), plant, machinery and equipment by taking a mortgage and/or pledge depending on the type of asset constituting security.

Pledge agreements must be in writing. Pledge agreements in relation to vehicles and property rights under notarised contracts must be also notarised. To establish a priority over other creditors, the pledge must be registered with the State Registry of Encumbrances Over Movable Property.

Mortgage agreements must be in writing and certified by a notary. To establish a valid and enforceable security interest under a mortgage agreement, the mortgage must be registered with the State Registry of Proprietary Rights to Immovable Property, which is usually done by a notary simultaneously with the execution and notarisation of a mortgage agreement.

In addition, the notary usually registers the prohibition on alienation of the mortgaged property with the State Registry of Proprietary Rights to Immovable Property; registration is not mandatory but is undertaken in most cases because it protects creditors from unauthorised disposal of the collateral.

**2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?**

Security can be taken over receivables where the chargor is free to collect the receivables in the absence of a default.

A pledge of receivables agreement must be concluded in the same form as the agreement that established the underlying obligation (e.g., if the underlying agreement was notarised, then the pledge agreement must be also notarised).

The security provider is obliged to notify its debtor about the pledge of receivables. The law, however, does not prescribe a period during which such notification must be made. The debtor's acknowledgment of the pledge is legally not required, but is recommended to evidence receipt of the pledge notice and to potentially obtain assurances of cooperation upon enforcement.

If receivables are due to the pledgor under an export contract with a non-resident counterparty governed by a foreign law, it is recommended to provide for an English law-governed assignment in favour of the secured creditor.

**2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

Security can be taken over bank accounts. Normally, parties choose one or both of the following legal forms for such pledge:

- pledge of property rights under a bank account agreement (usually used for foreign currency); or
- pledge of funds on the bank account (usually used only for UAH funds, as a pledge of foreign currency funds requires an individual licence from the National Bank of Ukraine).

The account holder is required to notify the account bank in writing of the security.

The legal framework for the taking and enforcement of security over bank accounts has been significantly improved over the past year. As a result of the recent reform, contractual restrictions on the use of funds on the pledged bank accounts are enforceable against the security provider and the termination and/or amendment of bank account agreements requires the creditors' consent. In addition, creditors can access information about the transactions with the pledged bank account, while previously the disclosure of information was protected, being banking secrecy under the banking legislation. Direct debits of funds on pledged bank accounts were expressly recognised as an out-of-court enforcement method.

**2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?**

Security can be taken over shares in companies incorporated in Ukraine. Shares in Ukraine are issued by public and private joint-stock companies only in registered, dematerialised (non-certificated) form.

To create a pledge over shares, the security provider and the secured creditor must enter into a share pledge agreement in writing, and block the shares on the respective securities account maintained by the security provider with a custodian.

A pledge over shares generally would not extend to any revenues generated by the respective shares, such as dividends and other corporate distributions, unless the pledge agreement provides otherwise.

**2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?**

There is no stamp duty in Ukraine. For mortgage agreements and notarised pledge agreements, a state duty must be paid in the amount of 0.01% of the value of collateral. Additionally, notaries normally charge notary service and registration fees, which are negotiable and their amount depends on the value of collateral. For pledge agreements, which are not notarised, there is a nominal registration fee payable for registration of a security interest in the public register.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

The security is registered in real time by a notary, who can check in real time whether any other security interests are registered in relation to the asset being secured.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

Normally, no regulatory or similar consents are required to create security over privately-owned assets. Certain regulatory or similar consents are required with respect to the creation of security over state or municipal property: a consent (approval) of the state authority or the local council, which owns and manages the relevant property, is often required. The consent of the State Property Fund of Ukraine is required to create security over assets of state companies subject to privatisation and shares acquired in the course of privatisation, as long as shareholders' privatisation obligations have not been fulfilled.

## 3 Security Trustee

### 3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The concept of a "security trust" is not recognised under Ukrainian law. The security trustee or agent structures will be recognised in Ukraine provided that the security agent or trustee is considered to be a creditor of the entire secured obligation.

### 3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As trust structures are not recognised in Ukraine and security must be granted to a creditor, as in a number of civil law countries, English law parallel debt or joint and several creditor structures are used to achieve the same commercial effect for syndicated loan agreements.

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

The timing and value of enforcement may be affected, amongst other things, by: (i) the statutory 30-day grace period to remedy the event of default during which the security holder is not allowed to commence enforcement; (ii) pre-emptive rights of other shareholders/participants in cases of enforcement of security over shares and/or participation interests in certain types of legal entities in Ukraine; (iii) the requirement to obtain regulatory approvals and consents for enforcement, such as the consent of the Antimonopoly Committee of Ukraine if certain mandatory thresholds are met; (iv) lengthy court proceedings in cases of court enforcement (first instance court proceedings take up to two months, appeal and cassation proceedings may last up to six months and 12 months, respectively); and (v) conducting public auction sales.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Under Ukrainian law, generally no restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies. Restrictions may apply to foreign investors or creditors with respect to foreclosure on agricultural land, which may not be owned by foreigners.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

After the commencement of a bankruptcy proceeding, the court would order a stay (moratorium) of creditors' individual enforcement actions to preserve the debtor's estate. During the moratorium, the individual actions of creditors are suspended, including enforcement actions of secured creditors with respect to the collateral. The claims of secured creditors are generally satisfied from the value of collateral in liquidation of the project company after it is recognised as bankrupt by the court.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

In insolvency proceedings, a court will be able, following an application from the insolvency manager or any creditor, to invalidate any transactions made by a debtor during a one-year period prior to the date of the commencement of insolvency proceedings, if such transaction resulted in the debtor: granting security; alienating assets, incurring undertakings or waiving proprietary claim(s) without consideration; performing obligations before they became due (this would not include an acceleration or mandatory prepayment of a loan, but it would include a voluntary prepayment of a loan); entering into obligations as a result of which it became insolvent; alienating or acquiring assets not at their market value, as a result of which it became insolvent; or making any cash payments or receiving payments in kind when the amount of creditors' claims exceeds the value of the debtor's assets (this would mean that repayments or payments under loans and suretyships would potentially be challengeable if the value of the debtor's assets is lower than the aggregate amount of the creditor's claims at the time the payment occurred).

In the event that the court declares the debtor bankrupt, then proceeds realised from the sale of the debtor's assets in the course of the liquidation proceedings will be distributed in the following order of priority:

- Rank 1: claims of secured creditors (but only to the extent of the proceeds realised through the enforcement of such security). If the proceeds of the disposal of the assets secured to a particular creditor are not sufficient to cover that creditor's claim, then the balance of that secured creditor's claim becomes an unsecured claim (i.e., Rank 4);
- Rank 2: claims for payments due to the employees and expenses incurred in connection with insolvency proceedings;

- Rank 3: claims for taxes;
- Rank 4: unsecured creditors' claims;
- Rank 5: claims of employees to receive contributions from the share capital of the debtor; and
- Rank 6: claims of unsecured creditors who missed the 30-day submission period, and any other claims.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Public companies, which are not subject to privatisation, and certain energy companies are excluded from bankruptcy proceedings. Such companies may be subject to bankruptcy proceedings if the Ukrainian Parliament changes their status. Special bankruptcy proceedings apply to companies with a state as its majority shareholder, which may have an effect similar to exclusion from bankruptcy. Any financial rehabilitation plan, amicable settlement agreement and/or the composition of the liquidation estate must be approved by the state authority authorised to manage the state assets of such company. In the absence of such approval, the company may not be liquidated and any actions with the assets will not be permitted.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Seizure of the assets of the project company in an enforcement is possible through the court proceedings. Out-of-court proceedings are also available to creditors if there is agreement between the parties and the seizure is consensual. Seizure of shares of a parent company and an irrevocable power of attorney may be considered additional out-of-court instruments to seize the assets of the project company in an enforcement.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Dissenting creditors can be crammed down only in Ukrainian insolvency pursuant to a rehabilitation plan or an amicable settlement agreement both developed by a debtor, agreed with the majority of its creditors, and approved by the court. The secured creditors will, however, have a veto right in relation to the amicable settlement agreement and rehabilitation plan. Moreover, the rehabilitation plan may not worsen the position of the dissenting creditors as compared with the creditors who voted for it.

On 14 June 2016, the Ukrainian Parliament passed a new Law "*On Financial Restructuring*", which became effective on 19 October 2016, and will remain effective until and including 19 October 2019. The aim of this Law is to create a workable procedure for the voluntary restructuring of debt obligations. It creates favourable regulatory and tax treatment of writing off bad debts or otherwise restructuring them, which is important for Ukrainian banks. Amongst the positive changes introduced by the Law, the most noteworthy include the staying of insolvency proceedings and the application of a statutory moratorium following the commencement of a financial restructuring, the introduction of standstill agreements, and the equivalent of the debtor in possession financing.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Directors owe some basic fiduciary duties to the company, including to act in the best interests of the company and in good faith. If directors breach any fiduciary duty, in theory, they can be held liable to the company. A director can be held criminally liable for intentionally leading the company towards bankruptcy. Employment law provides strong protection to directors from liability in the course of performing his duties.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Ukrainian law establishes a national treatment regime for foreign investors. There are very limited restrictions on foreign ownership of a project company. Foreign ownership is restricted only in areas that have strategic importance for the security of the state, such as the defence industry. Ownership of a project company by a Russian company or individual may be restricted under Ukrainian sanctions legislation.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Ukraine has signed 78 bilateral investment treaties with partner countries, treaties with investment provisions, such as the EU-Ukraine Association Agreement, the Energy Charter Treaty, and investment related instruments within the WTO and other international organisations.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Ukrainian law protects foreign investments from nationalisation or expropriation. The Constitution of Ukraine guarantees protection of private property. Forced deprivation of private property may only be used in cases where "social necessity" can be demonstrated, and is subject to the prior payment of full compensation. The Law of Ukraine "*On the Regime of Investment Activity*", dated 19 March 1996, provides guarantees against nationalisation, except in cases of emergency measures in the event of natural disaster, accidents and epidemics.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Typically, central government authorities in charge of the relevant sectors are involved, for example, in the fields of:

a) energy and renewable energy: the Ministry of Energy and Coal Industry of Ukraine; the State Agency on Energy

Efficiency and Energy Saving of Ukraine; the State Inspection of Energy Supervisory of Ukraine; and the National Energy and Utilities Regulatory Commission;

b) natural resources: the State Ecological Inspection; the State Service of Geology and Mineral Resources of Ukraine; the State Agency of Water Resources; the State Service of Ukraine for Geodesy; Cartography and Cadastre; and the National Energy and Utilities Regulatory Commission;

c) construction: the Ministry of Regional Development and Construction; the State Architecture and Construction Inspection of Ukraine; and the State Agency on Energy Efficiency and Energy Saving of Ukraine; and

d) transport and infrastructure: the Ministry of Infrastructure; the State Aviation Administration of Ukraine; the State Service of Ukraine for Transport Safety; and the State Agency of Motor Roads of Ukraine, etc.

Other governmental agencies with cross-sectional competence are also involved; for example, the State Service on Labour Issues, the Fiscal Service of Ukraine and the Antimonopoly Committee of Ukraine.

The process of decentralisation is ongoing in Ukraine. One of its aspects is the transfer of powers from central government authorities to regional offices. One of the first major authorities that will transfer its powers to the local level is the State Architecture and Construction Inspection of Ukraine. So far, 90 new regional offices of the State Architecture and Construction Inspection of Ukraine have been opened.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Cross-border loan agreements must be registered with the National Bank of Ukraine to be valid and enforceable, except for sovereign and sovereign-guaranteed loans and loans from international finance institutions.

The NBU has in place a "cost of funding cap" on all cross-border loans, except for cross-border loans granted by international financial organisations, or cross-border loans to, or guaranteed by, the state of Ukraine. The current cap rates are as follows:

Fixed-rate loans:

- maturity less than one year – 9.8% *per annum*;
- maturity between one and three years – 10% *per annum*; and
- maturity more than three years – 11% *per annum*.

Floating-rate loans:

- LIBOR for three months USD deposits plus 7.5%.

Borrowers are not permitted to make payments under a loan agreement to the extent that the total cost of funding the loan exceeds the cap. In determining the cost of funding, all costs, including interest, default interest, fees, costs and expenses are included in the calculation, irrespective of whether it is an actual payment (such as interest), or a contingent payment, such as default interest or a commitment fee.

A state enterprise in which the state owns more than 50% of the share capital must obtain the specific approval of the Ministry of Finance before executing of a loan agreement. Some state enterprises, because of their specific status, may also be required to obtain additional governmental approvals. For example, National Joint Stock Company "Naftogaz" must also obtain the approval of the Ministry Energy and Coal Industry of Ukraine when receiving a loan from a foreign lender.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Land ownership does not require a licence, yet it is certified by a relevant title document, typically, the state act on the right of ownership. A foreigner cannot acquire ownership of agricultural land. A foreigner can acquire non-agricultural land subject to certain conditions, which differ depending on the location of a land plot. A foreigner can acquire land outside city boundaries only where it acquires a building, and also for construction of facilities related to its business activities. Land from state or municipal ownership can be sold to a foreign entity, provided that it registers a permanent representative office with the right of business activities in Ukraine. Land allocation procedures/change of land designation for the project are lengthy and require the consent of the government where land is sold to a foreign entity.

Natural resources are deemed to be in the ownership of the people of Ukraine, and can only be granted into use, including to foreigners. A special permit (licence) for subsoil use can be issued for exploration and/or commercial production of oil and gas. Permits (licences) are not transferable in Ukraine. However, it is possible to enter into an agreement with a licence holder, for example, a production sharing agreement, or other agreement, which would be in conformity with the law. A foreign entity should establish a representative office in certain instances; for example, if it uses natural resources under a production sharing agreement.

In Ukraine, there are two types of pipelines: main pipelines; and industrial pipelines. Main pipelines are in state ownership; however, some elements of them, built at the expense of private entities, belong to those entities. This industry is regulated by the Law of Ukraine "*On Pipelines Transport*".

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Companies engaged in extracting mineral resources in Ukraine, regardless of the form of their ownership, are liable to a rent payment for subsoil use. The rent payment base is the value of each type of mineral resource extracted. The value of the corresponding mineral resource is calculated based on the higher of: (i) actual sales prices; or (ii) estimated costs, except for hydrocarbons. The actual sales price for oil and condensate is established by the state as an average price of one barrel of "Urals" oil, calculated at the exchange rate of the National Bank of Ukraine on the first date of the month after the reporting period. The tax rates of the rent payment for subsoil use are: for metal ore, 5%–8%; for coal, 1%–1.5%; and for oil and gas, 6%–70% (depending on the type of oil and gas deposits). Hydrocarbons extracted under a production sharing agreement are subject to reduced tax rates: 1.25% for gas; and 2% for oil. Additionally, the adjusting coefficients (0.01–2) are applied to the tax rates, depending on the type of the mineral resource and the conditions of its extraction.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

50% of all foreign currency proceeds received by a Ukrainian company which is not a commercial bank currently should be converted into the Ukrainian hryvnia. This requirement does not, *inter alia*, apply to: (i) any loans to the state of Ukraine or guaranteed by the state of Ukraine; (ii) any financing provided by international financial institutions such as IFC, EBRD, EIB; (iii) certain structured trade or commodity loans provided by banks based outside of Ukraine and/or with the participation of foreign export credit agencies; (iv) any foreign currency funds placed on the correspondent and deposit accounts of foreign banks with Ukrainian banks; (v) funds provided under international technical support (TC) programmes; and (vi) any proceeds received under commission or agency agreements which should be transferred to the owner of the funds by the relevant agent.

There are no fees other than bank fees and/or taxes on foreign currency exchange.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no special taxes on the return of the investment or the loan principal itself. Any passive income (interest, royalties, dividends), income from the sales of bonds, corporate rights or property are subject to withholding tax at 15%. However, if the Ukrainian entity pays the aforementioned income to a beneficial owner, that is a tax resident of the jurisdiction, with which Ukraine has an effective double taxation treaty, the rate may be reduced (in some cases up to zero). Where interest or royalties are paid to a related party, non-resident, transfer pricing and thin capitalisation rules may apply.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Project companies can establish and maintain onshore foreign currency accounts. Project companies can establish and maintain offshore accounts only subject to permission from the National Bank of Ukraine, which is normally rather difficult to obtain.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Under current currency control restrictions a project company can pay up to USD7,000,000 as dividends per month to a parent company incorporated abroad. Payment of dividends is carried out from the accounting profit of a project company. The dividends must be paid *pro rata* (i.e., proportionally), in accordance with the portion of the equity capital held by each shareholder. The shareholders of a joint-stock company with the same type and class of shares are entitled to the same amount of dividends per share. According to Article 31 of the Law of Ukraine "*On Joint-Stock Companies*", the following restrictions will apply: (i) the joint-stock company has no right to make a decision on payment of dividends and to pay dividends on ordinary shares in the event that 1) the report on the results of the placement of shares is not registered in the manner prescribed by law, 2) the size of its equity is less than the amount of its authorised capital, reserve capital and the amount of excess liquidation value of preferred shares at their nominal value; (ii) a joint-stock company has no right to make a decision on payment of dividends and to pay dividends on preferred shares in the event that the report on the results of the placement of shares is not registered in accordance with the procedure established by law; and (iii) a joint-stock company has no right to pay dividends (as opposed to declaring dividends) on ordinary shares in the event that: 1) the company has an obligation to buy back shares in accordance with the Law; and 2) the current dividends on preferred shares have not been paid in full.

There are no tax restrictions on the payment of dividends to the parent company. However, normally, the project company must pay the advanced corporate profit tax ("advanced CPT") to the state budget before or simultaneously with the payment of dividends. The advanced CPT is paid at the rate 18% from the excess of dividends above the taxable profit for the relevant period, if the relevant ordinary CPT obligation is already paid; if it has not previously been paid, the advanced CPT is to be paid from the whole amount of the dividends.

The Ukrainian Parliament is going to introduce amendments to the Tax Code of Ukraine, cancelling the usual CPT and providing the exit capital tax (ECT). According to the current wording of the amendments, ECT will be paid to the budget when dividends or similar payments (e.g., interest on loans received from the related parties, if the amount of loan exceeds the share capital by 1.5 times; return of investments, etc.) are made. The ECT rate would vary from 5% to 20%, depending on the type and nature of the payment.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

The environmental legislation is ample, and it continues to evolve in line with the Ukraine's international undertakings, including those under the Association Agreement with the EU. In 2017, an important new Law "*On Environmental Impact Assessment*" was enacted which introduced mandatory environmental impact assessment for a broad range of business activities.

The fundamental principles of environmental protection can be found in the Constitution and the Law of Ukraine "*On the Protection of Environment*". There are also numerous other laws and by-laws that can apply, depending on the peculiarities of a particular project and the industry, for example:

- The Forest Code of Ukraine dated 21 January 1994;
- The Water Code of Ukraine dated 6 June 1995;
- The Subsoil Code of Ukraine dated 27 July 1994;
- The Law of Ukraine "*On Waste Products*" dated 5 March 1998;
- The Law of Ukraine "*On Ensuring the Sanitary and Epidemiological Safety of the Population*" dated 24 February 1994;
- The Law of Ukraine "*On the Protection of Atmospheric Air*" dated 16 October 1992;
- The Code for Civil Protection dated 2 October 2012;
- The Law of Ukraine "*On Labour Protection*" dated 14 October 1992;
- The Labour Code of Ukraine dated 10 December 1971; and
- The Safety Rules in the Oil and Gas Mining Industry, approved by the Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision dated 6 May 2008.

The abovementioned laws and regulations are mostly administered by the following government authorities: Ministry of Ecology and Natural Resources of Ukraine; Ministry of Health of Ukraine; State Agency of Water Resources of Ukraine; State Labour Service of Ukraine; and municipal authorities.

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

There is no specific legal/statutory framework for procurement by private project companies. Ukrainian procurement rules apply to contracts awarded by public sector institutions and state-owned companies.

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Foreign insurance companies are prohibited from providing insurance over assets in Ukraine, except for reinsurance, insurance of certain risks related to maritime transportation, commercial aviation, launch of rockets, and freight, insurance brokerage and agency services.

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Insurance proceeds are payable to a foreign (secured) creditor designated as loss payee in the relevant insurance contract.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Foreigners and stateless persons have the right to work under the same conditions and in the same manner as the nationals of Ukraine.

Foreigners and stateless persons who have arrived in Ukraine for employment for a specified period are accepted by employers for work on the basis of a permit for the employment of foreigners and stateless persons issued in accordance with the procedure established by the Law "*On Employment of Population*", unless otherwise provided by international agreements of Ukraine. The employer is also required to obtain a permit for several categories of foreigners as seconded foreign workers, unless otherwise provided for by international agreements of Ukraine.

The said Law also stipulates the categories of foreign employees who can work without a permit, such as: foreigners permanently residing in Ukraine; foreigners who have acquired refugee status; representatives of the foreign marine (river) fleet and airlines; workers of foreign media accredited for work in Ukraine; foreigners who arrived in Ukraine to participate in the implementation of international technical assistance projects; and certain others.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Generally, importing equipment is subject to 20% import VAT, excise and customs duties, if applicable.

### 10.2 If so, what import duties are payable and are exceptions available?

Investors that import certain equipment and spare parts, falling under the scope of the Law of Ukraine "On Stimulation of the Investment Activity in Priority Industries", may defer the payment of import duty and VAT by providing the customs authorities with a tax promissory note that should be paid within 60 days after its issuance. Also, the instalments plan is available for some types of the imported equipment. In such case, the import VAT may be paid within up to a period of two years, without any additional interest charge.

Additionally, for the equipment that is temporary moved into Ukraine for production or construction purposes, the special regime of "temporary admission" may apply. If it complies with all requirements, such equipment is partially subject to import VAT and customs duty; 3% from the amount to be paid if the equipment would be imported under the regular procedure, which should be paid for each month being on the territory of Ukraine. The tax liability is calculated and transferred to the budget in advance during the customs clearance procedure.

In the period to 1 January 2019 some types of equipment, related to biofuel production and its usage, may be exempted from import VAT. There is a special procedure for obtaining such incentive.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

The principle of *force majeure* is recognised in Ukraine, although Ukrainian law does not provide for specific exclusions.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The main legislation relating to anti-bribery and anti-corruption in Ukraine is as follows: Criminal Code of Ukraine dated 5 April 2001 ("Criminal Code"), and Law of Ukraine of 14 October 2014 ("On Corruption Prevention"). These laws apply to all sectors and there are no specific rules targeting the projects sector. Ukraine ratified/signed the following anti-corruption conventions/treaties relevant to the project sector:

- Civil Convention on Prevention of Corruption dated 4 November 1999, in 2005;
- Criminal Convention on Corruption dated 27 January 1999, and the additional Protocol thereto, in 2006;
- United Nations Convention on Corruption dated 31 October 2003, in 2006;
- Agreement on Creation of the Group of States against Corruption – GRECO dated 5 May 1998; and
- The Istanbul Anti-corruption Action Plan dated 21 January 2004.

Ukraine has also several contractual obligations towards foreign loan providers to implement anti-corruption measures within the administrative system of Ukraine (e.g., Loan Agreements with the International Monetary Fund of 30 April 2014 and 11 March 2015, and Memoranda of Understanding between the European Union and Ukraine for Macro-Financial Assistance for Ukraine dated 26 March 2013, 12 May 2014 and 25 May 2015).

Under Ukrainian law, any active or passive corrupt misconduct in connection with a private or public individual can lead to criminal and administrative offences for the violating individual. The potential penalties for individuals can, e.g., include: a penalty payment of up to EUR750; arrest of up to six months; personal restraints of up to five years; confiscation of property; disqualification from holding certain positions or engage in certain activities for up to three years; and/or imprisonment of up to 12 years.

Companies as well as individuals can be held liable for the corrupt behaviour of their employees/representatives. The potential liability for companies can include the following:

- penalties which can be up to double the amount of the received improper benefit;
- penalty payments of up to EUR38,600 for cases where the improper benefit is absent or cannot be determined; and/or
- confiscation of property.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

English law would typically govern project agreements.

### 13.2 What law typically governs financing agreements?

English law would typically govern international financing agreements.

### 13.3 What matters are typically governed by domestic law?

Security documents, land-related agreements, permits and consents, corporate governance matters, concessions, permits, and the issue of local securities are typically governed by Ukrainian law.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

A party's submission to a foreign jurisdiction and waiver of immunity is legally binding and enforceable.

Under the Budget Code of Ukraine, the Minister of Finance of Ukraine (if authorised by the relevant resolution of the Cabinet of Ministers of Ukraine) may waive sovereign immunity in relation to court proceedings related to the repayment of loans, and such waiver should be effective until the obligations of the borrower to repay the loan are discharged. Because of the sovereign immunity concept not being expressly defined in Ukrainian legislation, one could argue that the above waiver would only capture proceedings in connection with non-payment under a loan agreement. However, a more sensible approach is that all possible judicial or enforcement procedures in relation to sovereign loan agreements should fall under the discussed waiver. This is because all obligations of a borrower under a sovereign loan agreement should be deemed (directly or indirectly) related to the repayment of the loan. There is legal uncertainty with respect to the enforceability of a waiver of sovereign immunity in matters other than sovereign borrowings.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Arbitration agreements, whether as clauses in contracts or standalone agreements, are recognised by Ukrainian courts. This rule applies independently of the types of arbitration or the legal seat of arbitration chosen by the parties.

When the dispute reaches the court, it must discontinue proceedings and refer the parties to arbitration as soon as the respondent objects against the court's jurisdiction on the basis of a binding arbitration agreement. This is subject to the court not determining the arbitration agreement as being invalid, terminated or incapable of being performed.

Foreign and local arbitral awards are recognised and enforced by the local courts, unless such awards contradict the requirements set forth by Ukrainian law and applicable international treaties.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

In 1961, the (then) Ukrainian Soviet Socialist Republic acceded to the New York Convention simultaneously with the USSR, of which it then formed a part of. Ukraine continues to be a Contracting State to the New York Convention as a successor to the Ukrainian Soviet Socialist Republic.

### 15.3 Are any types of disputes not arbitrable under local law?

The Ukrainian legislation prohibits submission of a very narrow category of disputes to the international arbitration which normally have a public dimension to them. In particular, the following disputes are not subject to arbitral awards: (i) disputes over validity of governmental acts; (ii) disputes over the state registration of rights on real estate; (iii) disputes over the registration or validity of intellectual property rights; (iv) derivative actions against executives of the companies by their shareholders; and (v) disputes concerning the bankruptcy proceedings, etc.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Disputes between Ukrainian parties, none of which have foreign shareholders holding at least 10%, are subject to mandatory domestic arbitration proceedings.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Project lenders typically seek sovereign guarantees, which are available for projects with state participation.

Direct agreements recently have become available to creditors of renewable energy projects. Creditors can enter into direct power purchase agreements with the off-taker, State Enterprise "Energorynok". Under this agreement, the off-taker's right to terminate the PPA will be restricted by certain time limits. In particular, the off-taker will not be able to terminate the PPA during the 120 days following written notification to the creditors (or their agents) of its intention to terminate the PPA for a breach by a producer of its obligations; the breach can be remedied within this 120-day term before the PPA terminates.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Any interest payable by a Ukrainian borrower to a foreign lender is subject to withholding tax at the standard 15% rate (the lower rate may apply if reduced by the effective tax treaty). The withholding tax is paid at the expense of the income applicable to non-residents. There are no requirements to withhold tax from interest payable to a domestic lender.

### 17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no special tax incentives for foreign investors or creditors other than certain international finance institutions.

## 18 Other Matters

### 18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

It is important to take security over shares in the holding/parent company to avoid the need to enforce local security in Ukraine. Due diligence, in particular, of land/zoning requirements and currency control structuring are also among material considerations when participating in project financings in Ukraine.

### 18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

When raising capital, eligible companies typically use non-Ukrainian capital market instruments (such as Eurobonds) issued outside of Ukraine.

Ukrainian companies can issue local interest bearing bonds and zero-coupon bonds under Ukrainian law. In order to be able to issue local bonds, a Ukrainian company should have its share capital paid in full. Also, the aggregate value of bonds which can be issued by a company should not exceed the amount of its share capital (or the amount of the bonds' underlying security) by more than three times. Because of this rule, bonds issuance is usually feasible only for large-cap companies (e.g., state enterprises and banks). Corporate bonds can be denominated in UAH or a foreign currency. If such possibility is provided in the prospectus, bonds can be converted into other types of bonds, or into the shares of the issuer. Such conversion, however, requires the consent of the bondholders. Bonds issuance can be public (by way of placement on a Ukrainian stock exchange) or private. The issuance procedure is regulated by the National Securities and Stock Market Commission (the "Commission"), and, despite being well tested in practice, remains quite bureaucratic. The procedure begins with the issuer's corporate body granting corporate approval of the issuance. Thereafter, the issuer should prepare a prospectus and submit it together with a large number of supplemental documents to the Commission. After the Commission reviews the application and is satisfied with the provided information, it registers the prospectus and issues a temporary certificate. After this, the issuer should execute a service agreement with the Ukrainian Central Depository, publish the prospectus (or, in case of private placement, notify the anticipated bondholders), and execute agreements with the initial bondholders. After the agreements are executed, the issuer should register the issuance report with the Commission which, thereafter, issues a permanent bond certificate, at which stage the bond issuance is deemed completed.

## 19 Islamic Finance

### 19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

To our knowledge, there have been no cases of Islamic project financing in Ukraine.

### 19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

There have been no cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local laws relevant to the finance sector in Ukraine.

### 19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

As a matter of Ukrainian law, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability in Ukraine.

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REDCLIFFE PARTNERS

Redcliffe Partners is an independent Ukrainian law firm, a spin-off from Clifford Chance Kyiv. Redcliffe is a well-known legal adviser to multinational companies, investors, financial institutions and project developers operating or investing in Ukraine and the CEE.

With 30 domestic and internationally qualified lawyers, the firm operates across key practice areas: Antitrust; Banking & Finance; Capital Markets; Compliance; Corporate/M&A; Debt Restructuring & Insolvency; Intellectual Property; International Arbitration; Litigation; Real Estate; Tax; and Tax Litigation.

Redcliffe offers the expertise of a top-ranked international banking and finance practice in Ukraine. The firm's team has an outstanding track record of providing forward-thinking and business-tailored legal advice to foreign and local lenders, corporate and investment banks and international financial organisations, borrowers, project sponsors, and developers and investors in connection with all aspects of complex cross-border financings.

Redcliffe tops the list of law firms by number of Ukraine's largest Finance and M&A deals in 2017, as referenced in the Yuridicheskaya Practika Deals Tables.

Chapter 32

# USA


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

In 2017, we witnessed the Trump administration's professed goal to protect fossil fuels – particularly the coal industry – begin to manifest through tax reform, regulatory rollbacks, new rulemaking, litigation and trade decisions at the expense of natural gas and the renewables sector. At this point, there is still an enormous amount of uncertainty as to what measures will ultimately be implemented and how. Nevertheless, we still do not believe that these changes can ultimately reverse the strong market forces driving the decline in coal, such as the U.S. shale oil and gas boom, technological advances, mounting pressures from environmental groups, and the growing demand by states and energy consumers for a diverse and clean energy mix.

I. <u>U.S. Crude Oil Exports Reach Record Levels</u>

2017 was a record year for U.S. crude oil exports. According to recent U.S. Energy Information Administration ("EIA") statistics, the price of Brent crude as of December 7, 2017 was approximately $62/barrel compared to approximately $52/barrel around the same time last year. Ample oil supply provided a cushion in the aftermath of Hurricane Harvey and may explain why oil prices did not spike and actually fell after the hurricane struck.

Since the removal of the U.S. crude export ban in December 2015, crude oil exports have been consistently rising spurred by the U.S. shale oil boom, relatively flat domestic demand and increased Asia demand. According to recent EIA statistics, crude oil exports in the first half of 2017 increased by more than 300,000 barrels per day ("b/d") from the first half of 2016. Per the EIA, Canada and China were the largest recipients of U.S. crude oil exports during this period.

The growth of U.S. oil exports, if sustained, could spur further investments in oil export infrastructure as export growth tests existing storage and loading capacity, pipeline connectivity and shipping traffic management. Analysts estimate that bottlenecks could arise if exports rise to approximately 3.2 million to 3.5 million b/d. While U.S. oil exports have not yet reached those levels – U.S. oil exports in October 2017 reached 1.8 million b/d in October compared to 1.3 million b/d in September 2017 per Federal Reserve Bank of Dallas statistics – it will take time for the necessary export infrastructure to be put in place. The Louisiana Offshore Oil Port ("LOOP"), which handles imports from Very Large Crude Carriers ("VLCCs"), is expected to be the first U.S. port to load oil into a supertanker to streamline and expedite exports. LOOP is currently in the process of modifying existing pipelines and expects to be in a position to operate in both directions in early 2018.

II. <u>Continued Development of U.S. LNG Exports</u>

Over the last decade, the shale gas boom in the U.S. has propelled the country from net LNG importer to exporter. Nevertheless, the U.S. LNG export market is still in the build-out mode. Of the major U.S. LNG export projects, only Sabine Pass has achieved commercial operation. Industry experts posit that U.S. capacity to process LNG for export is set to grow even further with at least six LNG export projects expected to be operating and exporting into global markets by 2029.

Globally, the prognosis for the LNG market over the short term has been limited in that the market appears to be oversupplied until the mid-2020s, due to new U.S. export capacity, new capacity from Australia and new supplies from Asia, including from PNG LNG. Additionally, while Asia used to be an important destination for U.S. LNG exports, Asian spot LNG prices have fallen from $18–$20 per million British thermal units ("MMBtu") to an $8–$10 MMBtu range today, and it is unclear whether the current market environment is conducive for exporting shipments of U.S. LNG to North Asia.

Given that indigenous demand in North Asia does not appear to be growing at the rate that some anticipated when the contracts were first signed, efforts are underway by trading companies and gas companies, who previously signed long-term LNG supply contracts, to work with counterparties to develop alternative gas-to-power markets. As contracts executed from 2011–2013 are up for renewal, buyers are (i) increasingly moving away from the traditional oil-indexed long-term take-or-pay contracts to more flexible contract models, (ii) shortening contract tenors to five to seven years, and (iii) including more destination and volume flexibility in new contracts.

While it is still unclear how the global LNG export market will develop, it is clear that these are some of the major trends impacting the global LNG trade.

III. <u>Challenges for the Natural Gas Infrastructure Sector</u>

The domestic shale gas boom also generated a substantial need for natural gas infrastructure to transport shale gas from the oversupplied Marcellus Shale region to feed growing demand centres. Blackstone Group has agreed to pay $2 billion for EagleClaw Midstream Ventures, a gas-focused pipeline company in the region. Kinder Morgan has pledged to spend billions of dollars on new pipelines. Notable pipeline deals that closed in 2017 include the Whitewater Midstream, the Agua Blanca, the Midship and the Samalayuca pipeline projects.

At the same time, siting and building natural gas infrastructure has become increasingly contentious and challenging for such projects. Environmental organisations, such as the Sierra Club, are using litigation to pressure the Federal Energy Regulatory Commission ("FERC") to undertake more comprehensive reviews and further scrutinise new pipeline projects. On August 22, 2017, the D.C. Circuit Court of Appeals issued an order (*Sierra Club, et al., v. FERC, Nos. 16-1329 and 16-1387*) finding that FERC's assessment of the environmental impact of the $3.5 billion, 685 mile-long Southeast Market Pipelines Project ("SMP Project") was inadequate in that FERC's environmental impact statement ("EIS") did not contain sufficient information on the greenhouse-gas emissions that would result from burning the gas that the pipelines would transport. The Court also vacated FERC's approval of the SMP Project and required FERC prepare a conforming EIS. FERC has since prepared a draft supplemental EIS which concluded that operating the SMP Project would not result in a significant environmental impact. Additionally, FERC filed a request for a rehearing urging the D.C. Circuit to reverse its decision to vacate the permits.

While the matter is still pending, it is emblematic of a broader tension between the current administration's professed goals of streamlining approval of new infrastructure projects to meet growing demand for natural gas infrastructure, and promoting fossil fuels generally, and environmental organisations pushing back on the need for more fossil fuels. We anticipate challenges on these projects from environmental organisations to continue.

IV. The Advent of a New Chapter for Coal? – The Grid Resiliency Pricing Rule

In 2017, through new policies and reforms, we are beginning to see Trump's campaign promise to protect the coal industry and encourage domestic production of fossil fuels manifest in new government policies.

A notable example is the U.S. Department of Energy ("DOE") Notice of Proposed Rulemaking ("NOPR") issued on September 29, 2017. The NOPR is part of an effort to address grid resilience in response to the 2014 Polar Vortex, when record low temperatures almost caused blackouts in the U.S. Northeast. Under the NOPR, the DOE directed FERC to consider a set of regulations that would require that independent system operators ("ISOs") and regional transmission organisations ("RTOs") create cost-of-service based tariffs for power generation sources that can meet certain resiliency related criteria (e.g., plants that have 90 days' worth of fuel on site, such as coal and nuclear facilities).

Critics of the DOE's proposed rule view it not as a resiliency measure but as a thinly veiled attempt to subsidise coal and nuclear plants at the expense of natural gas and renewables (e.g., wind and solar facilities). Some posit that the proposed rule will not adequately address the grid resilience problem and, instead, essentially provides a guaranteed profit to the coal and nuclear energy sectors.

The rule's proponents claim that coal and nuclear power plants are critical to preserve grid reliability. Low-priced natural gas, partially as a result of the shale gas boom, and tax subsidiaries to the renewables sector have essentially driven many coal and nuclear power plants out of business. Additionally, proponents claim that renewables are too intermittent to be a reliable source of electricity. However, some critics disagree with that claim, positing that demand response programmes and wind energy did more for resilience during the 2014 Polar Vortex than coal-fired power plants.

At this stage, the full impact of the proposed rule is unknown given the lack of detail on the form and scope this rule will take. FERC faces a January 10, 2018 deadline to take action on the rule, although FERC could impose an interim final rule immediately with a provision for later modifications following public comment.

Despite the Trump administration's attempts through the DOE's proposed ruling, we still anticipate the decline in market share for coal and nuclear energy in the U.S. energy mix to continue. According to recent EIA statistics, the coal sector's percentage share of total U.S. electricity generation has declined from 44.4% in 2009 to 30.4% in 2016. Natural gas last year surpassed coal as the leading source of electricity in the U.S. for the first time ever.

Additionally, states such as California, Hawaii, New York, Oregon and Utah are propelling the clean energy transition through ambitious clean energy standards and simultaneously are seeking to leverage their influence through the permitting process, which is leading to further Federal-state tension. In a pending Second Circuit Court of Appeals case, the New York State Department of Environmental Conservation ("NYSDEC") petitioned the Second Circuit (*New York State Department of Environmental Conservation v. FERC, No. 17-3770*), to review FERC's decision that NYSDEC waived its authority to issue a decision on Millennium Pipeline Company's Valley Lateral Project's permit application because it failed to meet a one-year statutory deadline to issue a Clean Water Act permit. On these grounds, FERC urged the Court to deny the New York State Department of Environmental Conservation's request to halt construction of the Millennium Pipeline Company, LLC pipeline. On December 7, 2017, the Second Circuit rejected the NYSDEC's request. The Court directed an expedited review of NYSDEC's petition to review FERC's determination, with arguments being scheduled as early as January 24, 2018.

Further, the low cost of renewables may in the future become the biggest factor driving the decline in market share for coal. According to Lazard, on an unsubsidised basis over the lifetime of the facility, one megawatt-hour of electricity generated from wind and solar domestically is cheaper than one megawatt-hour generated from nuclear, coal, or even natural gas. This estimate does not account for the intermittent nature of wind and solar resources.

V. Notable 2017 Developments in Regional Energy Markets

a. ERCOT-FERC Jurisdictional Issues

Globalisation has changed the ways that energy is consumed and produced throughout the world. As the U.S. electricity grid becomes more interconnected with neighbouring Canada and Mexico, interesting jurisdictional issues arise. In Texas, unlike other states who are subject to FERC jurisdiction, Texas' grid operator, the Electric Reliability Council of Texas ("ERCOT"), has generally been exempt from FERC jurisdiction because ERCOT's synchronous electrical interconnections are contained wholly intrastate.

Under the Federal Power Act, FERC generally lacks jurisdiction over transmission lines that cross international boundaries if they do not also cross U.S. state lines. However, proposed connections to the Mexican national power grid have raised concerns in Texas that such connections could make ERCOT subject to FERC jurisdiction. Developments outside Texas, which ERCOT has no control over and may not even have knowledge of, could create the potential to commingle power with other states through Mexico's national grid. Nogales Transmission LLC has proposed to build a transmission line that would transmit electricity from Arizona to the Mexican national transmission system, to which Sharyland Utilities, a Texas-based electric transmission utility, is already interconnected. Additionally, Mexico has announced plans to interconnect its national grid with the Baja California transmission system, which is synchronously connected to the U.S. grid in California. Such developments might create the possibility of electricity flowing from California into Texas through Mexico.

While a declaratory order from FERC finding that a proposed connection would not change ERCOT's status would need to be obtained on a case-by-case basis, ERCOT and the Public Utility Commission of Texas are also looking into solutions that would address current and future connections between Mexico that have the potential to jeopardise ERCOT's status going forward.

b. Potential Oversaturation in the PJM Market

Commercial bank concerns of overexposure to the PJM Interconnection, L.L.C. ("PJM") market coupled with May's lower-than-expected results from PJM's Base Residual Action for capacity for the 2020–2021 period ("2020/21 BRA") have spurred a number of hybrid debt deals in the PJM market – such as the approximately $1 billion Lackawanna project financing ("Lackawanna"), $700 million CPV Fairview project financing ("CPV Fairview") and the $863 million Hickory Run project financing ("Hickory Run") – as sponsors look to take advantage of diverse capital sources.

The 2020/21 BRA capacity auction, which sets the capacity prices for delivery three years in the future, cleared a price for Capacity Performance Resources located in the RTO of $76.53/MW-day compared to $80–100/MW-day from last year's auction and well below market expectations. Some posit that the PJM market is already oversupplied and, with falling energy demand, in order for equity in new-build generation to yield a reasonable return, a wave of retirements – particularly in coal-fired or nuclear generation – and restructurings will be required. Exelon Corporation recently announced plans to retire the Three Mile Island Unit 1 nuclear plant in Pennsylvania unless it receives a state bailout.

Additionally, the capacity auction results compounded commercial lenders' concerns of potential overexposure to the PJM region, which has led to a tightening of the commercial bank market. As a result, sponsors have sought to take advantage of diverse capital sources. The financings for Lackawanna and CPV Fairview both featured two institutional fixed-rate tranches, in addition to a floating-rate commercial bank tranche. One institutional tranche was sold to North American institutional investors and another institutional tranche was sold to Korean institutional investors. The financing for the Hickory Run power plant in PJM featured an institutional tranche sold to Korean institutional investors. Some industry experts suggest that Korean investors are actively seeking both debt and equity opportunities in the PJM market and elsewhere and that we are merely at the front end of the Korean wave. While it is still too early to predict, it is clear that recalibration of capital structures will be necessary and investors will be closely monitoring the PJM market over the next year.

VI. Renewables Industry Faces Significant Headwinds from Tax Reform and the U.S. ITC Solar Tariff Case

The renewables industry is facing significant headwinds from recent tax reform and the U.S. International Trade Commission's ("U.S. ITC") Solar Tariff case. While it is still too early to discern which way the winds will blow, it is certain that the renewables industry will be impacted by these developments.

Over this past year, in anticipation of an overhaul of the U.S. Tax Code, features were added to loan and tax equity documentation in an effort to anticipate the economic effects of future tax law changes and further delineate risk allocation. Generally, sponsors were expected to bear change-in-tax law risk. Some features that were prevalent in tax equity deals include: (i) the use of negotiated tax rates (e.g., 20% or 25%) in determining a tax equity investor's initial investment amount (in addition to the use of floating tax rates in determining such tax equity investor's return on investment); (ii) the requirement of an absence of proposed or actual changes in tax laws as a condition to the tax equity investor's obligation to fund; (iii) the ability of tax equity investors to re-size capital contributions upon a change or proposed change in tax law; and (iv) tax allocations or cash distribution adjustments to protect the tax equity investors' return on investment. Notable tax equity deals that closed in 2017 include Beacon Solar 2 & 5, Northwest Ohio Wind, Rock Creek Wind, Broadview Wind and Bearkat projects.

On December 22, 2017, President Trump signed sweeping tax reform legislation into law. The new law preserves the existing Production Tax Credit ("PTC") and the Investment Tax Credit ("ITC") and maintains the current timeline for phasing out these tax credits (i.e., the 2.4 cents/kWh inflation-adjusted PTC for wind is applicable to projects that have begun construction prior to 2020 with step-downs applying to projects that have begun construction after 2016 and the 30% ITC for solar is applicable to projects that have begun construction prior to 2020 with annual step-downs beginning in 2020 until 2022, where the tax credit would stay at 10% indefinitely).

The new law limited the effect of the Senate's proposed "Base Erosion and Anti-Abuse Tax" ("BEAT") by allowing corporations to not include 80% of PTC and ITC through 2025 in the calculation of the BEAT. The renewables industry expressed concern that BEAT could chill tax equity investment by making the value of renewable energy tax credits in the future uncertain. BEAT is an attempt to prevent multilateral corporations from using cross-border payments to shift their income to their affiliates in lower-taxed countries. Under BEAT, at the end of each year, such corporations would need to quantify (i) a minimum percentage (i.e., 5% in 2018, 10% from 2019 through 2025, and 12.5% thereafter; banks are subject to rates that are one percentage point higher) of their taxable income, adding back in certain cross-border payments (excluding payments for derivatives in the ordinary course of business), and (ii) their tax liability, excluding any tax credits (with a carve-out for Research and Development credits and 80% of ITC and PTC, to the extent accrued prior to 2026). If there is a gap between (i) and (ii), the difference is collected as an additional tax. As such, while tax equity investors will not know at the time they are making their investment whether they will be able to fully realise the benefits of those credits in the future, the law provides some relief by imposing a lower BEAT rate in the 2018 tax year and by carving out 80% of PTC and ITC through 2025 from the calculation of the BEAT obligation.

Under the new law, starting in 2018, the corporate income tax rate will be reduced from 35% to 21%. This reduction in corporate tax rates will have the effect of reducing the size of the tax equity component of many renewable energy financings and may require that these transactions increase reliance on debt financing rather than tax equity. In certain instances, where deals have been structured under assumptions negotiated prior to the implementation of the said tax reforms, there may be adverse economic impacts on project developers and/or certain construction lenders that expected to be repaid from the proceeds of tax equity investments that may now be downsized. Reducing corporate tax rates may lead to fewer active tax equity investors in renewables financings, as corporations will have significantly lower effective tax rates and many may conclude that further efforts to reduce taxes may not be worth the effort. Nevertheless, we anticipate that the renewables sector will adapt quickly to the tax change and develop new financing structures that will support the industry's substantial capital requirements.

The solar industry is already facing significant headwinds from the U.S. ITC solar trade case, which has the potential to greatly impact the cost of installing solar power facilities in the United States. In September 2017, in a recent Section 201 trade case brought by Suniva Inc. and Solar World Americas, Inc., the U.S. ITC found that imports of crystalline silicon photovoltaic ("CSPV") cells and modules cause serious harm to the domestic manufacturing industry. U.S. ITC recommended a series of remedies, such as quotas, tariffs and licensing fees on imported CSPV cells and modules. The President has 90 days to review the recommendations and make a final decision in January 2018. President Trump has since requested further information from the U.S. ITC about how the low-cost imported CSPV cells and modules have harmed U.S. manufacturers.

In the meantime, there has been a rush to obtain tariff-free CSPV cells and modules before the President's decision.

VII. Technology and Innovation

For years, there has been a trend towards relying on fast-start gas turbines for backing up intermittent sources of power as opposed to relying on battery storage. While we are still in the early days of trying to commercialise a business model for integrating battery storage into the grid (e.g., there are disagreements as to whether batteries should be treated as an ancillary service or similar to a generator), given significant technological developments in battery storage, we do believe battery storage is an area to watch over the next few years. Certainly, the potential for combining battery storage with solar and wind projects could greatly enhance the reliability of renewable generation and improve grid operations.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

See question 1.1 above.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Several different tools are typically used to provide lenders security in the project assets, including a security agreement covering personal property of the project company.

The Uniform Commercial Code ("UCC") provides a well-developed and predictable framework for lenders to take a security interest in the borrower's personal property assets. Each U.S. state has adopted article 9 of the UCC, which governs secured transactions, with some non-uniform amendments. Under the UCC, a security agreement must, among other elements, describe the collateral and the obligations being secured in order for the lender's security interest in the collateral to attach to a borrower's personal property assets. Filing a UCC-1 describing the collateral in the appropriate filing office perfects the lender's security interest.

Perfection of rights in deposit accounts, money and letters of credit is achieved by control rather than by the filing of a UCC-1. Control in accounts is achieved by the lender (or its collateral agent) taking control of the deposit account under control and funding provisions in the security agreement or entering into an account control agreement.

Lenders usually also require a pledge of the ownership interests in the project company to give them the ability to own the project company (and all of its assets) in the event that they choose to foreclose.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security may be taken over real property, subject to the real property laws of the state in which the real property is located, through a mortgage, deed of trust, leasehold mortgage or leasehold deed of trust. If under a certain state's law these instruments do not cover fixtures, a UCC-1 fixture filing may also be required.

To create a security interest in real property by mortgage or deed of trust, such instrument will: (i) identify the legal names of the lender and the borrower; (ii) state the amount of the debt owed by the borrower to the lender and identify the promissory note evidencing the indebtedness; (iii) contain a granting clause conveying the mortgage to the lender; (iv) describe the secured property; and (v) be signed and notarised. In most states, a security interest is perfected when the instrument is recorded in the recorder's office of the county where the real property is located.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Yes, a consent to collateral assignment by the project company to the lenders provides the lenders with the right to collect receivables under an underlying assigned agreement.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Please see question 2.1 above.

### 2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Please see question 2.1 above.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Depending on the relevant state, city and county laws, recording fees and taxes for perfecting a security interest in real property will typically comprise a significant percentage of the debt obligations secured.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please see question 2.6 above.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Requirements for regulatory consents are specific to the location and nature of the project and the identity of the project parties.

## 3 Security Trustee

### 3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

In New York law-governed security documents where there are at least two lenders, a collateral agent is nearly always appointed to act on behalf of the lenders with respect to the collateral.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

New York law recognises the concept of a security trust, although it is not typically used.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

Regulatory approval varies greatly, as such elements are dependent on the type of collateral involved. For example, a direct or indirect change in control over electric power assets subject to the jurisdiction of FERC must be approved by FERC. FERC has jurisdiction over most sellers into wholesale electric markets and electric power transmission facilities in the contiguous U.S. states other than in the ERCOT region, which is subject to state jurisdiction. Certain small power generators known as "qualifying facilities" may qualify for exemption from FERC approval of changes in control. Moreover, if the remedies to be exercised involve direct taking of assets subject to FERC hydroelectric licensing rules, or an interstate natural gas pipeline or underground gas storage facility that holds a FERC certificate of public convenience and necessity, transfer of the licence or certificate may be required. Certain state laws and regulations may also require approvals, such as New York State, which generally parallels FERC regulations. Most states, however, require approval only if the assets are in the nature of a "traditional" public utility serving captive customers under cost-based rates or are subject to a certificate of public convenience and necessity issued under state law.

Similar considerations arise with nuclear facilities, for which the operator will hold a licence from the Nuclear Regulatory Commission ("NRC"), and any transfer of such licence that might need to accompany an enforcement action would require separate NRC approval, recognising that only the licensed operator may operate a nuclear power plant. It should be noted that foreign entities are not allowed to hold an NRC nuclear power plant operating licence or to exercise control over the licensee.

Many energy facilities include a radio communication system licensed by the Federal Communications Commission ("FCC"), and a transfer of ownership of the FCC licence related thereto will require prior approval from the FCC. In addition, there are restrictions on the grant of a security interest in an FCC licence; generally, such security interests are limited to an interest in the proceeds thereof rather than the licence itself.

Any foreclosure or enforcement action is also subject to the possible imposition of: (i) the automatic stay under the Federal bankruptcy code, title 11 of the United States Code ("Bankruptcy Code"), if the title-holder commences a case under the Bankruptcy Code; and (ii) more generally, for any non-judicial foreclosure, the obtaining of a specified injunction halting the auction or other proceeding.

**4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?**

See section 6 below.

## 5 Bankruptcy and Restructuring Proceedings

**5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?**

Once a bankruptcy case is commenced under the Bankruptcy Code in respect of a project company, the Bankruptcy Code imposes an "automatic stay", or statutory injunction, which immediately stops all enforcement actions outside of the Bankruptcy Court against the debtor project company or its property. The automatic stay applies to secured creditors, although it is possible for a secured creditor to obtain relief from the automatic stay in certain circumstances, but only through an order of the Bankruptcy Court. In addition, in certain limited circumstances, the Bankruptcy Court may extend the automatic stay to protect entities that are not debtors in a bankruptcy case, or assets of such non-debtor entities.

A secured creditor is not, however, without protection in a case under the Bankruptcy Code. For instance, a secured creditor is generally entitled to "adequate protection" of its interest in a debtor's collateral, and there are limits on the ability of the project company to use some types of collateral, or to dispose of collateral, without the secured creditor's consent. In particular, the project company will not be permitted to use cash collateral (cash and cash equivalents) without the agreement of the secured party or an order of the Bankruptcy Court. In any sale of collateral (other than ordinary-course-of-business sales, such as sales of inventory in normal business operations) during a bankruptcy case, the secured creditor generally has the right to "credit-bid" its claim against the debtor, although that right can be limited by the Bankruptcy Court for cause. The determination of cause is fact-intensive, and in several recent cases Bankruptcy Courts have found that such cause existed, in order to facilitate an auction with active, competitive bidding. It should also be noted that in the context of a plan of reorganisation, a secured creditor cannot be compelled to accept a plan through a "cramdown" when the plan provides for the auction of the secured creditor's collateral without giving the secured creditor the right to credit-bid. But it is still possible to cramdown a secured creditor by providing it with the indubitable equivalent of its secured claim, which can include substitution of collateral.

**5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?**

Generally speaking, the holder of a perfected security interest is entitled to payment from its collateral ahead of all other creditors (other than the holder of a security interest that is prior in right to it). Although particular creditors, such as taxing authorities or employees, may be entitled to priority claims under the Bankruptcy Code, such claims do not come ahead of a secured claim with regard to the collateral. Under certain circumstances, a debtor (or trustee) may surcharge collateral for the costs of preserving or disposing of it.

Under the Bankruptcy Code, the term "transfer" is broadly defined, and includes the grant or perfection of a security interest. The grant of a security interest to a lender may be "avoided", or set aside, if the security interest is unperfected. In addition, a lender's perfected security interest may be avoided as either a "preference" or a "fraudulent transfer". It is important to note that there is no requirement for there to be actual fraud or wrongdoing for a transfer to be avoided under either of these theories. A lender's security interest in a project company's property may be avoided as a preference if (i) the lender perfects the security interest during the 90 days (or one year, if the lender is an "insider" of the project company) preceding the commencement of the project company's bankruptcy case, (ii) that transfer is made for or on account of an antecedent debt owed by the project company to the lender, (iii) the transfer enables the lender to receive more than it otherwise would have received in a liquidation of the project company, and (iv) the lender has no affirmative defence (which include that the transfer was a contemporaneous exchange for new value, that the lender gave subsequent new value, or that the transfer was in the ordinary course of business) to such preference. Under the Bankruptcy Code and applicable state laws, a constructive fraudulent transfer claim can be asserted to avoid a transfer that the project company made to the lender if both (i) the project company made the transfer in exchange for less than reasonably equivalent value, and (ii) the project company at the time of the transfer was, or was thereby rendered, insolvent, inadequately capitalised, or unable to pay its debts as they matured. For this purpose, the securing or satisfaction of a present or antecedent debt of the project company will generally constitute reasonably equivalent value (although it may be an avoidable preference). Under the Bankruptcy Code, the look-back period for constructive fraudulent transfer claims is two years before the commencement of the bankruptcy case. Under state laws, the look-back period can vary, depending on the state, and can be up to six years. If a transfer is avoidable as either a preference or a fraudulent transfer, the project company may be able to cancel the security interest and force a return of the property, which may be used to pay all creditors. It should be noted that not all transfers made during the applicable look-back period are avoidable, and these inquiries are generally fact-intensive.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Bankruptcy Code excludes from the category of entities that are eligible to be debtors in a bankruptcy case: governmental entities (other than municipalities); domestic insurance companies; domestic banks; foreign insurance companies engaged in such business in the U.S.; and foreign banks with a branch or agency in the U.S. In addition, the Bankruptcy Code has special provisions for particular types of eligible entities, such as railroads, municipalities, stockbrokers and commodity brokers.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Outside of court proceedings, creditors may be permitted to exercise self-help remedies depending upon the nature of the collateral, provisions of the applicable security agreements, and the governing law. For example, the UCC generally authorises a secured creditor, after default, to take possession of, to collect on, and to dispose of (such as by public or private sale), personal-property collateral without first commencing a court proceeding, provided that the secured creditor complies with particular formalities and proceeds without breach of the peace.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

One possibility is a consensual, out-of-court debt restructuring, which can be used to recapitalise or reorganise the capital structure (debt and/or equity) of an entity and its subsidiaries outside of a bankruptcy case. Under such a debt restructuring, cramdown of dissenting creditors is not available.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

The United States does not impose personal liability on directors for insolvent trading. Under the law of some states, however, directors of an insolvent company may be found to have fiduciary duties not only to the company's shareholders, but also to its creditors, and a director's breach of those fiduciary duties may give rise to personal liability.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

While the United States generally has a liberal policy toward foreign direct investment, there are certain restrictions with respect to ownership of land with energy resources, as well as energy production facilities, assets and transmission infrastructure, under both state and Federal laws. For instance, mining of coal, oil, oil shale and natural gas on land sold by the Federal government is permitted by U.S. citizens, corporations and other U.S. entities only. Ownership and control of nuclear power facilities and leasing of geothermal steam and similar leases of Federal land, or licences to own or operate hydroelectric power facilities, are also generally restricted to U.S. persons only. However, a U.S.-registered corporation that is foreign-owned or -controlled may own hydroelectric power facilities.

Under the Exon-Florio Act of 1988, as amended ("Exon-Florio"), which is administered by the Committee on Foreign Investment in the United States (an inter-agency committee coordinated by the Department of Treasury), the President may block an investment or acquisition (or order that such investment or acquisition be unwound) after conducting an investigation that establishes that a foreign interest exercising control or influence on relevant U.S. resources, assets, infrastructure or technology "might take action that impairs the national security" that cannot be adequately addressed by any other provision of law.

As noted above in question 4.1, a foreign entity cannot hold a U.S. nuclear plant operating licence issued by the NRC or otherwise control the licensee. A foreign entity cannot directly hold a FERC hydroelectric licence, but may own or control a U.S. company that holds such a licence.

**6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?**

The United States has concluded a number of bilateral treaties that protect investor rights to establish and acquire businesses, freedom from performance requirements, freedom to hire senior management without regard to nationality, rights to unrestricted transfer in convertible currency of all funds related to an investment, and, in the event of expropriation, the right to compensation in accordance with international law.

**6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?**

Under the doctrine of eminent domain, the U.S. Federal government or any of the U.S. state governments may take private property without the property owner's consent, so long as just compensation is paid to the property owner.

## 7 Government Approvals/Restrictions

**7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?**

Regulatory jurisdiction over the electric power sector in the United States is bifurcated between Federal and state authorities. State regulatory authorities retain jurisdiction over the siting of electric power generation, transmission and distribution facilities. In most of the United States, FERC has authority over wholesale sales of electric power, and power may not be sold at wholesale until FERC has granted authority to sell at negotiated, "market-based rates" ("MBR Authority"). The owners of certain small (not larger than 20 MW) qualifying facilities are exempted from the need to obtain MBR Authority, although owners of facilities larger than 1 MW must file a form with FERC in order to qualify. As noted in question 4.1, FERC lacks jurisdiction in the non-contiguous states (Alaska and Hawaii) and in the intrastate-only ERCOT region.

Dams and hydroelectric facilities on navigable waters are also subject to licensing by FERC, subject to exemption for very small projects. Interstate natural gas pipelines and underground natural gas storage projects are subject to FERC certificate authority.

FERC has jurisdiction over the rates charged by petroleum pipelines for interstate shipments. The states retain jurisdiction over petroleum pipeline permitting and over rates for intrastate shipments. A separate Federal authority, the Pipeline and Hazardous Materials Safety Administration, under the Department of Transportation, has jurisdiction over pipeline safety regulation for both natural gas and petroleum pipelines.

Nuclear energy projects and the operators of such projects are subject to licensing by the NRC.

The Environmental Protection Agency ("EPA") governs the issuance of most Federal environmental permits. Environmental permits can also be required by state, local and other Federal governmental authorities.

**7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?**

There are a number of registration and filing requirements for financing or project documents that depend on the nature of the project and identity of the parties. For example, FERC requires approval of issuances of securities or assumptions of liabilities (e.g., incurrence of debt), subject to certain exceptions, for companies subject to its electric power jurisdiction. FERC customarily grants electric power generators with MBR Authority blanket approval for jurisdictional financings, and the owners of qualifying facilities that are exempt from FERC rate regulation are also exempt from FERC regulation of financings.

Please refer to question 18.2 for SEC-related requirements.

**7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?**

Please see questions 6.1 and 7.1 above. In addition, the operation of certain U.S. telecommunications infrastructure that is licensed by the FCC may be subject to direct or indirect foreign ownership restrictions, and, with the exception of broadcast radio and television assets, in many cases waivers of such foreign ownership restrictions are available for investors that are domiciled in countries that provide reciprocal market access for U.S. investors to own or invest in similar telecommunications infrastructure.

**7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?**

Federal, state and private royalties are payable on the extraction of natural resources, as applicable.

In general, no specific Federal taxes are imposed on the extraction of natural resources, although income taxes are imposed on profits from sales. Domestic crude oil used in or exported from the United States is also subject to Federal tax. Income taxes may apply to sales outside of the United States to the extent such sales are related to business conducted in the United States.

**7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?**

The United States does not generally impose controls or fees on foreign currency exchange. However, U.S. persons, which include U.S. companies and their foreign branches, are prohibited from engaging in transactions with individuals or entities that the Office of Foreign Assets Control of the U.S. Department of Treasury designates as individuals or entities owned or controlled by countries against which the United States has imposed sanctions, or that the United States has designated as terrorists, narcotics traffickers, cybercriminals, transnational criminal organisations or proliferators of weapons of mass destruction. In addition, U.S. persons and foreign persons engaged in business in the United States are subject to U.S. Federal and state income taxes on foreign currency exchange gains.

**7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?**

Other than the withholding taxes discussed in question 17.1, there are no such generally applicable restrictions. However, under new law, there is an additional tax called the Base Erosion and Anti-abuse Tax that may apply to certain very large U.S. companies that make payments of interest, which are deductible against their U.S. income, to foreign affiliates.

**7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?**

Yes, they can.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?**

Apart from the withholding taxes discussed under question 17.1, New York law financing documents, which often impose restricted payment conditions on the issuance of dividends, and shareholders' agreements, typically contain restrictions. In addition, project companies subject to FERC regulation of issuances of securities and assumption of liabilities under Section 204 of the Federal Power Act, other than blanket authority under MBR Authority (discussed at 7(a) above), are subject to certain restrictions, such as restrictions requiring parent debt obligations to follow up to the parent company if a project company borrows at the public utility level and "dividends up" the proceeds to its non-public utility parent.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

The Clean Air Act and the Clean Water Act are generally the most material Federal statutes that would impact power projects. Permits related to air emissions and water discharges under these statutes and similar state laws may be required by the EPA or by state or local governmental authorities prior to the start of construction and for operation. In addition, known or likely contamination could be governed by the Federal Superfund statute and other laws.

Any major Federal action or decision, including the granting of certain permits by the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, or the approval of a loan guarantee by the DOE, is subject to comprehensive environmental review under the National Environmental Policy Act. Some states, notably California, require similar state-level comprehensive environmental review of discretionary governmental actions relating to power project permitting and siting.

In terms of international frameworks, the Equator Principles are voluntary and would only be used with respect to a project if required by the applicable financial institution. Since the U.S. has comprehensive environmental laws and is a designated country, covenants to comply with environmental law in conjunction with the performance of standard due diligence are often deemed sufficient for projects located in the U.S. As a result, representations and warranties and covenants expressly related to the Equator Principles are often either not included in the applicable project agreement or limited to a general statement of material compliance with the Equator Principles. Note that the Equator Principles may be currently under review for amendment by the Equator Principles Association.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

Outside of the nuclear industry, privately owned and financed project companies are not subject to governmental oversight for procurement.

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Such restrictions are applicable on a case-by-case basis depending on the location and nature of the project, the type of project and the identity of the project parties.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Such restrictions are applicable on a case-by-case basis depending on the location and nature of the project, the type of project and the identity of the project parties.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

Foreign workers employed by a project company within the United States are required to have work authorisation in accordance with U.S. immigration laws. This can be achieved via various "non-immigrant" or temporary visa categories which are typically based on employer sponsorship. In addition, work authorisation might be obtained via permanent resident status (also known as green card or immigrant status), often through sponsorship from an employer (which can be a difficult and lengthy process) or from sponsorship by an immediate family member who is a U.S. citizen (which may be less difficult than employer sponsorship but is generally a lengthy process).

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

There may be customs duties on imported project equipment, which are determined based upon the country of origin of the equipment unless a relevant trade agreement eliminates or reduces certain of these tariffs.

**10.2 If so, what import duties are payable and are exceptions available?**

The Harmonized Tariff System provides duty rates based on the classification of the imported equipment.

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

Yes, *force majeure* exclusions are available and enforceable and are applied such that one or both parties are excused from performance of the project agreement, in whole or in part, or are entitled to suspend performance or claim an extension of time for performance. Invocation of a *force majeure* clause can trigger *force majeure* across other related project agreements, and thus it is important to ensure that the *force majeure* provisions "mesh" with those found in related project agreements. Some *force majeure* provisions, however, typically will not excuse parties from any monetary payments that mature prior to the occurrence of the *force majeure* event.

A typical *force majeure* provision will set forth a non-exhaustive list of events that constitute *force majeure*, which often include natural *force majeure*, such as acts of God, and political *force majeure*, such as war or terrorism, as well as the effect on the parties' rights and obligations if a *force majeure* event occurs.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Foreign Corrupt Practices Act of 1977 ("FCPA") prohibits the bribery of foreign government officials. The law contains two sets of provisions: (i) it prohibits corrupt payments to officials and agents of foreign governments by U.S. persons; and (ii) it requires accounting practices to accurately reflect payments to foreign officials and agents.

Among other penalties, (i) for violations of the FCPA's anti-bribery provisions, the U.S. Department of Justice ("DOJ") may impose criminal penalties of up to $2,000,000 against offending firms and fines of up to $250,000 and imprisonment for up to five years for offending officers, directors, stockholders, employees and agents, and (ii) for violations of the FCPA's accounting provisions, the DOJ and the Securities and Exchange Commission may bring civil and criminal actions, which include criminal penalties of up to $25,000,000 against offending firms and of up to $5,000,000 and imprisonment for up to 20 years for offending directors, officers, employees or agents of such firm.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements may be governed by the law of any state but may be subject to the doctrine of *lex situs* (i.e., the rule that the law applicable to proprietary aspects of an asset is the law of the jurisdiction where the asset is located).

### 13.2 What law typically governs financing agreements?

New York law typically governs financing documents since the commercial laws and legal precedents in the state of New York tend to be more settled than in other states, making lenders more comfortable. Security documents, such as the mortgage, may be legally required to be governed by the law of the state in which the collateral is located.

### 13.3 What matters are typically governed by domestic law?

Please see questions 13.1 and 13.2 above.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes, foreign law may govern a contract. However, the Foreign Sovereign Immunities Act provides an exception to immunity through waiver, which may be explicit or implicit.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, they are typically recognised by local courts.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes, the United States is a contracting state to the New York Convention, which requires courts of contracting states to give effect to arbitration agreements and recognise and enforce awards made in other states, subject to reciprocity and commercial reservations. The United States made a reservation that it will apply the New York Convention only to awards made in the territory of another contracting state and only to disputes arising out of legal relationships (whether contractual or not) that are considered commercial under the relevant national law.

The United States is also party to: (i) the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), which governs international arbitral awards where expressly agreed by the parties or where "a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified or acceded to the Panama Convention and are member States of the Organization of American States" only; and (ii) the International Convention on the Settlement of Investment Disputes ("Washington Convention"), which is applicable to disputes between a government entity and a national of another signatory state.

### 15.3 Are any types of disputes not arbitrable under local law?

Yes, certain disputes involving family law and criminal law are not arbitrable. Claims under securities laws, Federal antitrust laws and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act have been found by the U.S. Supreme Court to be arbitrable.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

With few exceptions, such as small disputes at the local court level, there are no broad categories of commercial disputes that must be resolved by arbitration, absent an agreement of the parties to that effect.

## 16 Change of Law / Political Risk

**16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?**

Generally, no.

## 17 Tax

**17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Withholding of U.S. Federal income tax at a rate of 30% is generally required on payments of interest, dividends, royalties and other amounts (not including principal on loans or distributions by corporations that are treated as returns of capital) to foreign persons unless attributable to a branch office maintained by the recipient within the United States. The United States maintains treaties with numerous jurisdictions that reduce or eliminate these withholding taxes on amounts paid to qualified residents of the counterparty treaty country. In addition, interest paid to foreign persons, other than banks on loans made in the ordinary course of business, is exempt from this withholding tax if certain requirements are satisfied, including that the loan is not in bearer form and the lender is unrelated to the borrower.

Even where an exemption may be available, under the Foreign Account Tax Compliance Act ("FATCA"), interest paid and, beginning after December 31, 2018, the gross proceeds of a sale or other disposition of any loan that can produce U.S.-source interest paid to a foreign financial institution (whether such foreign financial institution is a beneficial owner or an intermediary) may be subject to U.S. Federal withholding tax at a rate of 30% unless: (x) (1) the foreign financial institution enters into an agreement with the U.S. Internal Revenue Service to withhold U.S. tax on certain payments and to collect and provide to the U.S. Internal Revenue Service substantial information regarding U.S. account holders of the institution (which includes, for this purpose, among others, certain account holders that are foreign entities that are directly or indirectly owned by U.S. persons), or (2) the institution resides in a jurisdiction with which the United States has entered into an intergovernmental agreement ("IGA") to implement FATCA, and complies with the legislation implementing that IGA; and (y) the foreign financial institution provides a certification to the payor for such amounts that it is eligible to receive those payments free of FATCA withholding tax. The legislation also generally imposes a U.S. Federal withholding tax of 30% on interest paid and, beginning after December 31, 2018, the gross proceeds of a sale or other disposition of loans that can produce U.S.-source interest paid, to a non-financial foreign entity (whether such non-financial foreign entity is a beneficial owner or an intermediary) unless such entity (i) provides a certification that such entity does not have any "substantial United States owners", or (ii) provides certain information regarding the entity's "substantial United States owners", which will in turn be provided to the U.S. Internal Revenue Service.

From a U.S. tax perspective, amounts received from a guarantor or from the proceeds of property pledged as collateral are characterised and taxed in the same manner as amounts paid on the underlying claim would have been taxed.

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There are very few Federal incentives targeted at foreign investors or lenders.

No Federal taxes are required for the effectiveness or registration of an agreement. Various documentary recording and transfer taxes apply at the state level.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

The above questions and answers address most of the main material considerations for project financings governed by New York law in the United States.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Project bonds are securities and therefore are subject to the various U.S. securities offering and fraud laws (principally the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934). Under the Securities Act, securities in the United States must be sold pursuant to an effective registration statement filed with the U.S. Securities Exchange Commission ("SEC") or pursuant to an exemption from filing. Very few, if any, project bonds are sold in SEC-registered offerings. The most common exemptions are offerings pursuant to Section 4(a)(2) of the Securities Act and Rule 144A and Regulation S thereunder. Rule 144A project bond offerings require a comprehensive offering document that describes in detail the project, the project and finance documents, the risks associated with the project along with a summary of the bond terms, a description of project modelling, limited information about the sponsors and offtakers and various other disclosures. The underwriters and their legal counsel perform due diligence (in order for counsel to provide 10b-5 statements) to mitigate securities law fraud liability. Offerings solely under Regulation S and Section 4(a)(2) typically have much less disclosure and diligence and the disclosure is more similar to that used in a typical bank deal.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

While Islamic project financing is relatively new to the U.S. market, there are generally three types of financing structures used in Islamic project financing globally: (i) *Istisna'a* (or *Istina'a*)-*Ijarah* (construction contract-lease); (ii) *Wakala-Ijarah* (agency-lease); and (iii) *Sharikat Mahassa-Murabaha* (joint venture-bank purchase and sale) structures.

Under the *Istisna'a-Ijarah* structure, which is believed to be the more popular structure in Islamic project financing, an *Istisna'a* instrument (similar to a sales contract) is usually applied to the construction phase and an *Ijarah* instrument (similar to a lease-to-own agreement) is usually applied to the operations phase. During the construction phase, the borrower procures construction of project assets and then transfers title to assets to the lenders. As consideration, a lender makes phased payments to the borrower (equivalent to loan advances). During the operations phase, the lenders lease project assets to the borrower. The borrower, in turn, makes lease payments (equivalent to debt service). Unlike in traditional project financing, the lender, as the owner of the underlying assets, can be exposed to a number of potentially significant third-party liabilities, including environmental risk.

The *Wakala-Ijarah* structure differs from the *Istisna'a-Ijarah* structure as the borrower is employed as the lender's agent *per* an agency (*Wakala*) agreement. The borrower/lender relationship is different from the *Istisna'a-Ijarah* structure in that the borrower procures the construction as the lender's agent.

A less commonly used structure is the *Sharikat Mahassa-Murabaha* structure. Under this structure, the borrower and the lenders enter into a joint venture (*Sharikat Mahassa*) agreement which is not disclosed to third parties. A *Murabaha* transaction is one in which a bank finances the purchase of an asset by itself purchasing that asset from a third party and then reselling that asset at a profit to the borrower pursuant to a cost-plus-profit agreement, akin to a loan. Each member of the joint venture holds *Hissas* (shares) in the joint venture purchased by capitalising the *Sharikat Mahassa*. The *Murabaha* portion of the transaction involves sales of *Hissas* from time to time by the lenders to the borrower in compliance with *Shari'ah* law.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Generally, under U.S. state and Federal law, contracting parties may select any law as the governing law of the contract so long as it is sufficiently defined and capable of enforcement. However, there is limited case law and no conclusive rulings by U.S. courts on whether *Shari'ah* law would be recognised as a system of law capable of governing a contract.

In the U.S. bankruptcy court case of *In re Arcapita Bank, B.S.C.(c), et al.*, Case No. 12-11076 (SHL) (Bankr. S.D.N.Y.), an investor of the debtors objected to the debtors' motion to approve debtor-in-possession and exit financing, asserting, among other things, that the financing was not *Shari'ah*-compliant. In statements made on the record, the court noted that the financing agreement was governed by English law and expressly provided that no obligor was permitted to bring a claim based on *Shari'ah* compliance of the finance documents. The court then appeared to adopt the English courts' approach of avoiding ruling or commenting on compliance of an agreement with *Shari'ah* law, citing a recent English court case that found that, irrespective of *Shari'ah* compliance, *Shari'ah* law was not relevant in determining enforceability of a financing agreement governed by English law, and that *Shari'ah* principles are far from settled and subject to considerable disagreement among clerics and scholars. However, the precedential value of the *Arcapita* bankruptcy court's refusal to consider whether the financing was *Shari'ah*-compliant may be limited, given that the district court dismissed the objector's appeal of the bankruptcy court's approval of the financing (along with an appeal asserted by the objector of confirmation of the debtors' chapter 11 plan of reorganisation) as equitably moot.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Generally, no.

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