PROJECT FINANCE 2023

Contributing editors
Ayesha Waheed and Tori Weir

LEXOLOGY
Getting the Deal Through

Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Matthew Bridgewater
matthew.bridgewater@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

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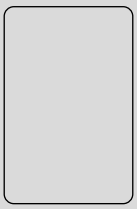

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Morgan, Lewis & Bockius LLP

Lexology Getting the Deal Through is delighted to publish the sixteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Mozambique.

Lexology Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ayesha Waheed and Tori Weir of Morgan, Lewis & Bockius LLP, for their assistance with this volume.

LEXOLOGY
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Global overview

Ayesha Waheed and Tori Weir

Morgan, Lewis & Bockius LLP

The infrastructure investment gap: can institutional investors save the day?

The covid-19 pandemic has exacerbated an already dire situation that emerging markets and developing economies face: inadequate infrastructure – not just in terms of transportation networks, but also in power and heat generation, water and sanitation systems, and all related infrastructure.

Infrastructure development is not only a key driver for economic growth and social progress, it is essential for the advancement of global sustainability, reduction of poverty and global reduction of carbon emissions. The investment gap in the infrastructure and sustainable-development sectors in developing countries, however, is enormous, with the covid-19 pandemic making things even worse by limiting the investment capacity of governments.

According to Global Infrastructure Hub's Infrastructure Monitor 2021, high-income countries currently attract 75 per cent of all private investment in infrastructure projects. Further, a 2021 report by the Swiss Re Institute suggests that the infrastructure investment gap is expected to be US$10 trillion for emerging-markets countries during the period 2021 to 2040; whereas the gap for advanced markets is expected to be only US$5 trillion over the same period. (See https://www.swissre.com/institute/research/topics-and-risk-dialogues/economy-and-insurance-outlook/swiss-re-institute-publication-closing-the-infrastructure-gap-2021.html.)

Development banks and export credit agencies play a valuable role in financing, and mobilising bank funding for, capital-intensive projects in developing countries. However, there is clearly insufficient liquidity in the commercial bank markets to meet soaring infrastructure demands, especially due to increased funding costs now borne by banks because of the introduction of more stringent capital requirements imposed by regulatory authorities in an attempt to make financial institutions safer (such as under Basel III). Tapping a broader range of debt providers may be the only way to bridge the infrastructure investment gap, and there are growing calls for long-term institutional investors such as pension funds and insurance companies to become more involved in funding infrastructure projects in developing countries.

Capital markets or private placements?

Capital markets issuances targeting a wide range of investors and offering tradeable bonds sold in the United States under Rule 144A of the US Securities Act of 1933 and (or) sold outside the United States in accordance with Regulation S under the US Securities Act of 1933 (namely, project bonds) are often touted as being the knight in shining armour that can rescue cash-hungry projects. However, project bonds are unlikely to be an option for most emerging-market infrastructure projects because they require extensive due diligence to be carried out in relation to the scope of the project and the preparation of a substantial disclosure document meeting applicable legal requirements, and they are also typically required to be rated by third-party rating agencies such as Moody's, S&P and Fitch. As a result of all these requirements, project bond offerings are very time-consuming and labour-intensive – thereby giving rise to significant transaction costs.

Private placements of debt securities, on the other hand, which typically involve a small group of institutional investors such as insurance companies, pension funds, and, increasingly, infrastructure funds and other asset managers, can be more nimble; the process is simpler, as there are no underwriters involved and no formal offering circular or prospectus that requires extensive diligence or disclosure opinions to be issued, and the investors are able to negotiate the documentation directly with the borrower. Institutional investors active in the private-placement market, therefore, could potentially be a more attractive option to fill the investment gap.

Institutional investors potentially represent a major source of long-term financing to support sustainable growth in developing countries and could be the answer.

Over the past decade, the asset allocation of institutional investors to infrastructure assets has soared, but the focus has been primarily on assets in Organisation for Economic Co-operation and Development (OECD) countries. Only a very small proportion of institutional investors' global assets are allocated to developing countries – and, even there, they tend to be concentrated in middle-income economies with well-developed investment climates (see the July 2021 OECD Report 'Mobilizing institutional investors for financing sustainable development in developing countries').

However, providing long-term financing to infrastructure assets in developing countries could provide several benefits to institutional investors, namely:

- asset-liability matching: emerging-market power projects (both renewable and conventional power), liquefied natural gas (LNG) projects, transportation infrastructure and social infrastructure projects are typically structured to benefit from stable and long-term cash flows, often backed by long-term concession agreements or offtake contracts. Such cash flows are critical for raising long-term project finance, which should suit the long-term investment horizons of institutional investors such as pension funds and insurance companies by offering asset-liability matching;
- higher yields and inflation protection: given the current relatively low interest-rate environment in OECD countries, investors are having to rethink their investment strategies in a search for higher yields; as a result, diversified portfolios that include higher-risk assets, such as developing-country investments, could have a role to play. In addition, increasing inflation is making investments in infrastructure assets even more attractive since these assets tend to retain their value;
- less-risky asset class: as an asset class, infrastructure debt has demonstrated lower default rates than, and consistently outperforms, non-infrastructure debt, and this is true not just of developed countries but also of developing countries (see Global Infrastructure Hub's Infrastructure Monitor); and

- furthering environmental, social and governance (ESG) goals: it is clear that the Paris Agreement and the UN Sustainable Development Goals can only be met if progress in reducing carbon emissions is made not just in OECD countries but also in emerging-markets countries. Investing in clean infrastructure and climate-focused projects in developing countries could go a long way to help institutional investors meet their ESG and sustainable-investment targets in a meaningful way.

Challenges to overcome

However, lending to infrastructure projects in emerging markets presents a number of challenges for institutional investors, particularly US insurance companies, which are subject to National Association of Insurance Commissioners (NAIC) capital requirements. These requirements, similar to the capital adequacy rules applicable to banks, are designed to ensure the financial health of insurance companies so that they are able to fulfil their financial obligations to their policyholders. NAIC capital requirements are based in part on the riskiness of the insurance company's assets, and therefore riskier investments are more expensive for US insurance companies to hold.

Country risk

Institutional investors looking to invest in debt securities frequently rely on credit ratings by third-party rating agencies to supplement their own credit analysis of the riskiness of the investment. Perhaps the biggest hurdle to overcome is the sovereign credit rating of the project's host country. Even countries rich in natural resources and (or) other sources of revenue can have poor credit ratings, especially if they are considered to have a high degree of political and regulatory risk because of weak legal and institutional protections for investors. Indeed, some developing countries may not have an external foreign-currency debt rating at all because country ratings need to be requested and paid for by the countries themselves.

Due to NAIC capital requirements and (or) an investor's internal credit committee requirements, a below-investment-grade rating of the host country can immediately rule out an investor, regardless of the structure of the underlying project. While a number of developing countries currently have investment-grade credit ratings, most are one, or even several, notches below investment grade, and many are unrated, thus limiting institutional-investor access to projects in these countries. The long tenors typically sought in infrastructure financings make it even more difficult to assess and therefore price the associated political and regulatory risk over the life of the investment. Although there are a handful of examples of well-structured export projects that have been able to pierce the sovereign rating ceiling and achieve a higher rating than that of the host country, to date these have been limited to the oil and gas sector (in particular, LNG projects).

Currency risk

Many US-headquartered institutional investors operate in US dollars, and while they may be able to lend funds in a range of currencies, they usually need to be able to swap such other currency into US dollars to hedge their currency risk. If an infrastructure project's revenues are in a local currency in respect of which the investor is not able to hedge its risk, then the project may be required to borrow in US dollars and take the currency risk – something that some projects will be unable or unwilling to do. Infrastructure projects that have revenues payable in, or pegged to, the US dollar or another hard currency such as the euro or sterling can overcome this hurdle. This is the case with public-private partnerships in which the concession agreements call for payments to be made in a hard currency or pegged to a hard currency, thereby passing on the currency risk to the state or state-owned counterparty to the concession agreement. Additionally, certain sectors, for example, international airports or ports, have a natural hedge because of revenue streams that are typically denominated in hard currencies, such as from duty-free sales or international passenger or terminal fees.

Taking security over foreign assets

Although the core finance documents typically will be governed by English law, or, less frequently, New York law, both of which are well-established bodies of law with which institutional investors are familiar and comfortable, the documentation for the collateral package underpinning the financing frequently will be governed by the law of the jurisdiction in which the assets are located, namely, of the host country. Depending on the jurisdiction, the local legal system may be less well developed than the English and New York legal systems, provide less consistent judgments, be more open to judicial interpretation, and (or) be (or be perceived to be) subject to corruption and undue influence. There may also be peculiarities of local law that are unfamiliar to foreign investors. Additionally, the security documents may be required to be executed in a language other than English. Even if there are English translations of the documents available, there could be concerns about the accuracy of the translation or even unintended gaps in the scope of the security as a result of language differences, thereby raising questions regarding the enforceability of the security, resulting in investors being reluctant to lend to the project. Retaining experienced and reputable local counsel in such jurisdictions to help investors navigate the local law landscape will be essential.

Internal constraints

Different institutional investors have different investment mandates, some of which may restrict the investor from looking at certain types of projects and (or) certain jurisdictions. Unlike multilateral development banks and commercial banks that have a long history of lending to greenfield infrastructure projects in emerging markets, and therefore have in-house teams that are experienced in lending to such projects, institutional investors may not have the ability or the desire to undertake the more complex diligence and credit analysis required, such as in respect of the construction and development risk. Additionally, an investor's credit committee may require the financing to contain certain credit enhancements, covenants, or other safeguards that a project cannot or may not want to provide.

The way forward

One of the complaints that institutional investors often have about the emerging-markets infrastructure sector is the paucity of well-structured, bankable deals. However, there are steps that can be taken to mitigate the challenges described above.

Projects that have lump-sum, date-certain engineering, procurement and construction contracts with creditworthy and experienced construction contractors, and long-term 'take or pay' offtake contracts with creditworthy offtakers, with project revenues payable in hard currency and paid into offshore bank accounts, namely, structures that are typically considered to be bankable in the bank market, should also be attractive to institutional investors. In concession-based projects or public-private partnerships in which the key counterparty is the state or a state-owned entity and the state does not have an investment-grade rating, credit enhancement and (or) protection provided through political risk-insurance products, either from commercial insurers or through multilateral development institutions, could assist in improving the credit rating of the project or, if it is unrated, alleviating investor concerns. These institutions are often better placed than institutional investors to understand, analyse and cover such political and regulatory risks. Potentially, such enhancements could even address the sovereign debt-rating concern by improving the rating of the project to above the country ceiling (although, as noted above, for those investors that have a

hard and fast rule requiring the host country to be rated at least investment grade, this may not be sufficient).

Blended or multi-sourced finance, which involves the inclusion in the debt mix of de-risking structures such as co-financing from multilateral institutions, export credit agencies, or commercial banks, and the use of mezzanine or subordinated debt to pass more of the risk down to other lenders such as public-sector institutions could also be used to attract institutional investors to emerging markets.

Even if institutional investors may not be prepared to take construction risk and lend to greenfield projects, if they are available to refinance such projects when the projects have been completed and are operational (namely, when the riskiest phase of the project's life cycle is over), institutional investors can help free up capital provided by commercial banks and multilateral institutions for the construction phase, which funds can then be re-lent by such banks and institutions to new greenfield projects.

Further, the institutional-investor market has recently seen an influx of new participants. These entities largely consist of asset managers, hedge funds, private equity firms, and other non-insurance company investors, which are not constrained by NAIC capital requirements. Some of these investors have specific internal mandates to invest in financings with higher-than-average returns, demonstrating certain ESG credentials, and (or) in emerging markets. With institutional investors touting ESG credentials becoming ever more exposed to greenwashing allegations, infrastructure projects in developing countries may be ideal investments for these investors. As new market participants become more active and engage in these types of transactions, the more traditional institutional investors may in turn come under pressure to find ways to participate as well.

Australia

Ben Farnsworth and Michael Ryan

Allens

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

It is generally possible to take all assets security in Australia, subject to contractual restrictions and, if applicable, restrictions under certain statutory licences.

Any security interest in 'personal property' is governed by the Personal Property Securities Act 2009 (Cth) (PPSA), which expressly allows for security interests over all present and future (namely, after-acquired) property including proceeds from investments and sale of collateral. The PPSA will apply if the secured property is located in Australia or if the grantor of the security interest is an Australian entity.

However, 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 – although these exclusions are on a state-by-state basis, pursuant to state legislation). Security interests over these assets are generally subject to applicable state (or federal) legislation.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Perfection of a security interest under Australian law is usually relatively simple. For most personal property, perfection will usually be by way of registration on the Personal Property Security Register (PPSR), which involves an online registration by the secured party. Security over personal property can also be perfected by the secured party having possession of the secured property (eg, share certificates and blank transfer forms or other certificates of title) or the secured party having control of the property over which the security interest was granted (eg, the secured bank account is held with the secured party). It is common for a PPSR registration to be made even if the secured party has possession or control over the secured property.

However, the following types of collateral may require separate perfection steps:

- certain assets that the PPSA stipulates can be registered by serial number (eg, motor vehicles and certain intellectual property);
- real property requires registration on the relevant state land titles office and may require the grantor to provide the certificate of title to the property; and
- some asset classes require separate registration on the relevant federal or state register (eg, statutory licences such as mining tenements and petroleum licences).

Assuring absence of liens

3 | How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Usually, a creditor would check the PPSR and other relevant registries in respect of particular material assets (eg, land titles or mining tenement registries) as well as seeking warranties from relevant security providers. While this provides a reasonable degree of protection, a creditor cannot comprehensively assure itself that there are no liens over an asset through searches, as these will not reveal the presence of unperfected or equitable liens, nor will the registry record security interests perfected by possession or control (although these should be evident through due diligence). Generally, unperfected liens will rank behind a creditor's perfected lien. However, common law or statutory liens (such as workman's liens), while unusual, are not subject to the PPSA so may have priority.

Enforcing collateral rights

4 | Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

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 2001 (Cth).

Under the PPSA, there are rules governing the 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 (namely, long enough in the particular 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 taking possession as mortgagee, although the latter right is less commonly exercised other than in respect of real property security. 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.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

In Australia, a company that is insolvent, or is likely to become insolvent at some future time, will often have an administrator appointed to it. Administration is a statutory process and while an administrator can be appointed by a liquidator, or a secured party with security over the whole, or substantially the whole of the company's property, most commonly it is the board of the relevant company that resolves 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 director personally, by creditors, liquidators 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 and 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 during 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 that it avoids the risk of a moratorium on security enforcement during administration.

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 that are the subject of 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 that a reasonable person in the company's circumstances would not have entered into, and aim, among other matters, to capture disposals of property at an undervalue. 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. Both unfair preferences and uncommercial transactions are voidable.

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. Other distributions that take priority over unsecured creditors (but behind secured creditors) are costs of winding up, employee entitlements, tax liabilities and floating charges. There are no relevant entities excluded from bankruptcy proceedings.

A creditor can usually appoint a receiver to take control of the secured property. Generally, a receiver is entitled to sell the property to realise the debt. Claims of foreign creditors are treated the same as Australian creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

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. The Financial Transaction Reports Act 1988 (Cth) requires significant cash transactions and international funds transfers of A$10,000 or more or suspicious transactions to be reported to the Australian Transactions Reports and Analysis Centre unless the transaction has been specifically exempted.

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) requires the sender or recipient of an international funds transfer instruction to give AUSTRAC a report about the instruction within 10 business days of sending or receiving an instruction.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

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, although parties may commercially agree that the payer will 'gross up' the payment.

Interest withholding tax applies at the rate of 10 per cent 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 is a similar public offer test exemption that may apply to widely offered bonds.

There are also double tax agreements with many other countries that exempt payments of interest to resident financial institutions.

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

Foreign earnings

8 | Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There is no requirement for Australian project companies to repatriate foreign earnings.

9 | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

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

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

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 FIRB 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: the financier must be registered as an authorised deposit-taking institution (namely, a bank) in Australia or licensed outside Australia as a financial institution and be listed on a stock exchange or have at least 100 holders of its securities. There are also limits on how long a security holder who is a foreign government investor can hold an interest post-enforcement of security.

The FIRB regime has different thresholds for classes of transactions, save for investments in national security businesses and national security land that attract a mandatory FIRB approval requirement. The exemption for financiers does not apply to such investments in national security businesses and national security land, so financiers taking security over such businesses will require FIRB approval.

Subject to this new requirement for investments in national security business and national security land, acquisitions under the applicable thresholds may not require FIRB approval. For 'agreement countries', these thresholds are higher and so capture a wider spread of transactions. Current agreement countries are Chile, China, Hong Kong, Indonesia, Japan, South Korea, New Zealand, Peru, Singapore and the United States and the additional countries for which the Trans-Pacific Partnership is in force, being Canada, Mexico and Vietnam. However, the increased thresholds do not apply where the acquisition is made by a subsidiary incorporated elsewhere, the acquirer is a foreign government investor or the target of the acquisition is in a sensitive sector. These assessments are complex and should be made on a case-by-case basis.

Also introduced from 1 January 2021 was a new 'last resort' power for the Australian Treasurer to unwind, on national security grounds, transactions that were previously granted FIRB approval, as well as a new 'call-in' power for the Australian Treasurer to review and make orders (including unwind orders), on national security grounds, in respect of a broad range of transactions that did not require nor were previously granted FIRB approval.

Insurance restrictions

11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Any person wishing to carry on an insurance business in Australia must be authorised by the Australian Prudential Regulation Authority, 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 businesses 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 taxable income based on gross premium derived under an insurance contract from the insurance of property situated in Australia or the insurance of an event that 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.

Worker restrictions

12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

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

There are three main streams available under the Temporary Skill Shortage (TSS) visa programme:

- short-term stream – this is for employers to source genuine temporary overseas skilled workers in occupations included on the Short-term Skilled Occupation List for a maximum of two years (or up to four years if an international trade obligation applies);
- medium-term stream – this is for employers to source genuinely temporary overseas skilled workers in occupations included on the Medium and Long-term Strategic Skills List or the Regional Occupation List for a maximum of four years, with eligibility to apply for permanent residence after three years; and
- labour agreement stream – this is for employers who have a Labour Agreement with the Australian Government to source genuine temporary overseas skilled workers in occupations specified in the Labour Agreement for a maximum of four years, depending on the terms of the Labour Agreement.

Temporary visas are available only to workers in a specified list of occupations. In addition, employers may first be required to demonstrate that they have sought to employ an Australian citizen in the role. Labour market testing will apply to all occupations nominated under the TSS visa programme unless an exemption applies under Australia's international obligations.

Visa applicants must clear a criminal records check, demonstrate English language proficiency, demonstrate at least two years of relevant work experience, and have a relevant skills assessment if required for the occupation. Under the TSS programme, employers will be subject to undertake a 'non-discriminatory workforce test' to ensure that Australian workers are not being actively discriminated against, pay the minimum Australian market salary rate and contribute more towards training Australian workers. In response to the covid-19 pandemic, the employers of TSS holders can reduce the working hours of TSS employees without breaching their obligations or the visa holder being in breach of their visa conditions. Applicants with an occupation listed on the Priority Migration Skilled Occupation List are given priority processing to assist with Australia's recovery from the pandemic.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

Australia offers a straightforward and undemanding platform for importation to the country. There is no general requirement for an importing entity 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 goods imported into Australia whether they are imported by air, sea or post. All goods imported with a value of more than A$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. Goods with a value equal to or less than A$1,000 generally do not attract duty or tax.

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

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Australia is a low-risk jurisdiction for the 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 for the land, generally based on the value of the land acquired. There has been no nationalisation of project companies in Australia in recent history.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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 incentives offered preferentially to foreign investors or creditors in Australia.

Generally, no stamp duty or other taxes are payable to ensure that a foreign investment, loan, mortgage or other security interest is effective or registered (although registration fees may be payable). In some situations, stamp duty may be payable if equity is being taken in a company that holds land assets. Tax may be payable on income, and interest. Dividend and royalty payments made by an Australian resident company to a non-resident may be subject to withholding tax unless an exemption applies.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these 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.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Regulation of rights to natural resources varies for each resource class but generally, title to natural resources can be acquired by foreign parties 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.

Exploration tenements authorise exploration activities and typically give a preferential right to apply for a mining tenement, which covers extraction and production. Some jurisdictions also grant retention tenements where a significant resource has been identified but is currently uneconomic to develop. Retention tenements protect investors in these circumstances from the 'use it or lose it' policy that underpins Australia's resources regulation regime. Also, in response to the covid-19 pandemic, several jurisdictions have offered financial relief to explorers in the form of exemptions to expenditure requirements, rent waivers or the deferral of exploration licence fees.

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, 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 particularly significant resource. This agreement overrides any other resource legislation and is negotiated on a case-by-case basis. A state agreement provides significant certainty to a developer, as it can only be amended by mutual agreement between the state and the developer. An agreed state agreement demonstrates clear government support for a project. While a state

agreement may override the state's mining legislation, the agreement will not dispense with obligations under environmental protection laws or federal legislation such as the Native Title Act 1993 (Cth).

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 regimes. Once it has been recovered, the titleholders own 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 could pass 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 (comprising of the responsible State Minister and Commonwealth Minister) 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 its 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.

Water, land and grown resources

Title to water is held by the states and territories. State legislation generally provides for the state to grant rights to use water in its jurisdiction. These rights may be subject to conditions, such as the holder complying with a water management plan. The Murray-Darling river system is the most economically important river system in Australia, and affects New South Wales, Victoria and South Australia. Rights to water from this system are governed by the Murray-Darling Basin Agreement, a complex set of agreements between the states.

Generally, rock, gravel, shale (other than oil shale), some sands and some clays are not governed by the mining legislation, but are administered by local government and can be privately owned.

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.

Native title

Native title describes the land rights of Aboriginal and Torres Strait Islander peoples under traditional laws and customs. Where a project takes place on land affected by native title, project participants must follow the procedures of the Native Title Act 1993 (Cth). This may involve compliance with the 'future acts' regime and negotiations with native title holders or claimants, and, in some cases, a project may require a more broad-ranging Indigenous Land Use Agreement before it can proceed. Projects affecting sites of cultural heritage must follow certain requirements. There is the risk of delays if significant areas of cultural heritage are identified. Protection of cultural heritage is an area of current focus in Australia and there are recent developments in state law (eg the Aboriginal Cultural Heritage Act 2021 (WA)).

Royalties and taxes

18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

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 Western Australia, 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 quantity 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 that has been subject to limited treatment and concentrate material that has been subject to substantial enrichment through a concentration plant and metal. Further, alternative royalty values sometimes apply (eg, nickel has an alternative value).

For petroleum, Western Australia has a straightforward royalties arrangement. This comprises a 60:40 revenue-sharing arrangement of the 10 per cent royalty rate of the well-head value, to be shared among the Commonwealth and the state respectively. Any royalty exceeding 10 per cent goes entirely to the state.

State agreements can specify different royalty rates, changing the royalty system for the particular company that 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 (but not onshore) oil and gas projects. There is no distinction between royalties and taxes on extraction payable by Australian and foreign parties.

Export restrictions

19 | What restrictions, fees or taxes exist on the export of natural resources?

There are few limitations on the export of natural resources from Australia, and no specific export taxes or fees on commodities.

The Western Australian government has a domestic gas reservation policy with a target of 15 per cent of production from each export

liquid natural gas project. The policy has been applied through conditions on land or petroleum tenure in a state agreement, rather than under specific legislation.

Australian export prohibitions or restrictions are designed to ensure quality control, administer trade embargoes and meet obligations under international arrangements. There are several Commonwealth-administered resources sector export controls. These include:

- rough diamonds, which may only be exported to countries participating in the Kimberley Process Certification Scheme, an international effort to eliminate the trade in diamonds used to fund conflict;
- uranium or related nuclear materials, to ensure compliance with Australia's non-proliferation policy obligations; and
- natural gas, which may be limited where there is an insufficient supply to meet the forecast needs of Australian energy users.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

No specific government approval is required for typical project financing arrangements, including loans and remittances. Approval may be required to take certain types of security, for example, security over mining tenements.

However, there is government regulation of common project finance areas such as infrastructure, transport, aviation, water and electricity. Federal, state and territory governments may be involved, and the requirements can be complex. Planning, environmental, health and safety, and native title laws will all apply. Further, approval is required to take an interest in some assets. Government approval is required for private acquisitions of critical infrastructure.

Registration of financing

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

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Arbitral awards are, subject to the usual grounds for challenge, generally enforceable in Australia, regardless of the country in which they are made. 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. However, 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. All Australian states have a version of the Model Law, creating a uniform framework for domestic arbitration. No statutory provisions require automatic domestic arbitration.

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

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Project agreements and financing agreements are typically governed by Australian law. Occasionally, financing agreements for projects are governed by foreign law, usually English or New York law. Security agreements generally are governed by domestic law regardless of the choice of law for the financing facility.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Australian courts generally will give effect to the submission by parties to a foreign law contract to the jurisdiction of the courts of that governing jurisdiction unless there are public policy reasons not to do so. The Australian courts will draw a distinction between exclusive and non-exclusive jurisdiction, so it is prudent to draft any jurisdiction clause clearly. Also, certain Australian statutes may allow actions in respect of contractual arrangements where the jurisdiction of Australian courts is prescribed.

Foreign state immunity is codified in Australia in the Foreign States Immunities Act 1985 (Cth). Such immunity may be waived by agreement and any such agreement will be generally effective and enforceable.

The Foreign Judgments Act 1991 and Foreign Judgments Regulations 1992 provide a statutory regime for enforcing foreign judgments in Australia. Whether a foreign judgment can be enforced depends on the type of judgment and whether it was issued in one of the countries specified in the Schedule to the Regulations. Generally, for the purposes of enforcement, once registered, a foreign judgment has the same force and effect as, and can be enforced as if it were an Australian judgment.

Where the statutory regime does not apply, the foreign judgment can be enforced under common law principles.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Financial services sector entities, such as banks, have obligations under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the AML/CTF Act).

The AML/CTF Act requires reporting entities to adopt, maintain and comply with an anti-money laundering and counter-terrorism financing programme. Reporting entities must keep records about their programmes, and may be required to keep records relating to transactions and identification checks.

Investors will likely find themselves subject to customer identification procedures, as reporting entities are obligated to conduct customer due-diligence processes, known as 'know-your-customer' procedures.

Reporting entities must submit a report to AUSTRAC detailing their compliance with the AML/CTF Act, regulations and rules each year. AUSTRAC officers have the power to enter the premises of reporting entities and exercise a range of monitoring powers, including searching for compliance records, inspecting documents and searching the premises.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 | 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

Most major projects require state, as well as federal approvals and ESG issues, which will be relevant for the assessment of both primary and secondary approvals.

Environmental approvals for resource projects are primarily regulated at the 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, owing to bilateral agreements in place between state and Commonwealth governments, depending on the nature of the impacts and location of the project.

Protection of cultural heritage issues, in particular, is currently a focus for resources sector projects in particular.

Work health and safety (WHS) 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 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 or minimise health and safety risks in their workplace. Part of this duty requires them to monitor and assess, on an ongoing and continuous basis, all risks to health and safety that exist in their particular workplace.

The resources sector is subject to further industry-specific WHS legislation. For instance, the Mines Safety and Inspection Act 1994 (WA) and the accompanying Mines Safety and Inspection Regulations 1995 (WA) apply to mining operations in Western Australia. These laws impose greater duty-of-care obligations on relevant stakeholders and provide penalties for their breaches, with the aim of protecting workers from unsafe environments and hazards.

Reporting

There is a growing expectation among Australian financial regulators that businesses will disclose climate-related risks and discussion of international frameworks such as that developed by the Taskforce for Nature-Related Financial Disclosures.

Companies should consider whether to disclose such risks in their standard corporate reporting, including Operating and Financial Reviews under section 299A(1) and company prospectuses under section 710 of the Corporations Act.

PROJECT COMPANIES

Principal business structures

27 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

A company is an attractive business structure because it provides limited liability for its shareholders. The most common Australian company is a company limited by shares, which can be either a proprietary company or a public company. Trust and partnership structures may be used but are less common project vehicles.

Joint ventures in Australia can be either incorporated (where the joint venturers come together to form a company) or unincorporated (which is a common structure for resources projects). Under an unincorporated joint venture, participants hold their interests and entitlements in the project assets separately as tenants in common and a joint venture agreement between the participants governs the project and the participants' obligations to each other.

Projects in Australia are typically funded by equity and debt. Many Australian project companies are publicly listed on the Australian Stock Exchange, which operates the primary securities exchange for Australia's strong equity market, although others are privately held. Common sources of debt finance include Australian and international banks and private equity firms as well as superannuation and other funds that are increasingly active investors in debt, as well as equity, in the infrastructure sector. Australian project companies have also increasingly turned to international and, to a lesser extent, domestic debt capital markets for financing.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Australia does not have a specific legislative framework for PPPs, although PPPs are regularly used for public infrastructure investment. The National PPP Policy and Guidelines set out the processes that authorities should follow in the investment, procurement, development and operations stages of PPPs, along with standard risk allocations and commercial principles to be adopted. State governments have their own jurisdictional requirements and departures that are read in conjunction with the National Guidelines. Virtually all categories of public infrastructure either have been, or are proposed to be, subject to PPP transactions. These include transport, social infrastructure, energy, water and telecommunications projects.

PPP - LIMITATIONS

Legal limitations

29 | What, if any, are the practical and legal limitations on PPP transactions?

A PPP model can be and has been used for a wide range of projects and services. However, the relevant level of government will review a PPP business case to ensure that it will deliver the best value for money to the government.

Government policy dictates that generally, only transactions above A$50–100 million will be considered for a PPP. Projects under this value threshold can also be considered if they represent significant value for money. Some jurisdictions allow projects to be bundled together to meet this value threshold.

Most Australian governments also require a public interest, public benefit or public policy test when considering a PPP delivery method. This usually involves conducting a business-case assessment, which includes considering the impact of the project on the public, especially on those stakeholders identified as being directly affected by the project. The National Guidelines recommend that project developers liaise with public interest groups and other relevant bodies, and consider possible outcomes of a qualitative or quantitative nature that may impact upon the value-for-money analysis.

PPP - TRANSACTIONS

Significant transactions

30 | What have been the most significant PPP transactions completed to date in your jurisdiction?

Year 2021 saw more activity for Australian PPPs.

Allens advised on the A$11.1 billion North East Link, being the largest PPP in Australia's history. The project provides three-lane twin tunnels that will complete the missing link in Melbourne's motorway network. The project will reduce congestion in the north-east while maintaining local roads for local trips, with up to 135,000 vehicles utilising this new public asset every day.

Allens also advised on the A$1.5 billion New Footscray Hospital Project and more recently on the Frankston Hospital redevelopment.

UPDATE & TRENDS

Key developments of the past year

31 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

The predominant theme across the project finance market over the past year continues to be the rebalancing of risk transfer among project participants across all sectors in the project finance market.

The drive for much of this rebalancing exercise has come from the ever-shrinking pool of contractors in Australia seeking to adjust risk transfer or reprice to mitigate supply chain and delivery constraints caused by the covid-19 pandemic and other global events that have affected the delivery timing of componentry on everything from solar projects to rolling stock, the availability of skilled labour on oil and gas projects and the mega transport projects, and the escalation in the global price of key commodities such as steel and concrete vital to so many projects and the ongoing escalation of freight costs. Government procurement authorities have recognised this challenge and are more open to sharing risk on cost overruns for particular risks to encourage sustained private contractor involvement in the current circumstances and, in time, to attract more foreign contractors to facilitate greater depth in the contractor market in Australia.

Running in parallel, Australia's energy sector is continuing its transition away from fossil-based fuels. Contractor appetite for participating in energy projects has not only been beset by the general risk transfer issues but also by the lack of a coherent federal policy framework, competing state and territory schemes and technical connection constraints to a transmission grid not yet sufficiently capable to manage the energy transition – all of which have stymied deal flow and the progress of that energy transition as projects take longer to develop, construct and finance.

In the resources sector, high commodity prices have driven a number of significant projects and associated project financing activity, and government (through grants and direct support), as well as strong investor appetite for 'battery' minerals, have seen project financing activity outside of iron ore, gold and oil and gas projects.

Allens › ‹ Linklaters

Ben Farnsworth
ben.farnsworth@allens.com.au

Michael Ryan
michael.ryan@allens.com.au

Level 11, Mia Yellagonga Tower 2
5 Spring Street
Perth WA 6000
Australia

Level 37
101 Collins Street
Melbourne VIC 3000
Australia
Tel: +61 3 9614 1011
Fax: +61 3 9614 4661

www.allens.com.au

India

Santosh Janakiram, Ruchira Shroff, Abhishek Khatri and Aditi Chopra

Cyril Amarchand Mangaldas

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Indian laws generally recognise the creation of security interests in respect of various kinds of property, including the following:

- immovable property such as land, mortgageable interest on land such as leasehold rights, buildings and some forms of plant and machinery that fall within the meaning of 'immovable property', etc. Security interest over immovable property is created under a mortgage. The most commonly used forms of mortgage in India are an English mortgage, under a registered deed, and an equitable mortgage, which is done by deposit of title deeds. However, the creation of a mortgage upfront on immovable property that is acquired subsequently is restricted. Movable property, both present and future, tangible and intangible, includes movable fixed assets, movable plant and machinery, bank accounts, receivables, cash flows including sale proceeds, contractual rights, permits, licences, proceeds of insurance policies, current assets, intellectual property and goodwill;
- movable property is usually secured in favour of lenders by way of a charge under a deed of hypothecation. Security interest over movable property can also be combined with a mortgage of land under a registered mortgage deed. However, for the creation of a legal assignment on contractual rights or licences, or a deed of assignment or mortgage (along with immovable property in the case of a mortgage) is required to be executed; and
- shares or securities of a company (usually the borrowing company), by way of a pledge of such shares or securities in favour of the lenders, under a pledge agreement. New shares issued after the creation of a pledge will require specific delivery. Restrictions or approval requirements for the creation or enforcement of a security interest, depending on factors such as the nature of the property, offshore ownership or location of assets, are provided for in different legislation, regulations and policies and are subject to existing contracts or permits applicable to the security provider. For instance, the creation of a security interest on Indian assets in favour of offshore lenders may require prior approval from the Reserve Bank of India (RBI) or an authorised dealer in India.

Additionally, while not in the nature of a security interest, lenders may also require corporate or personal guarantees under deeds of guarantee, from various entities to secure the loans.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

With reference to the perfection of security interests, the following applies:

- security interests created under all forms of security documentation, including mortgage and hypothecation, as well as a pledge, are required to be registered with the Registrar of Companies of the state in which the registered office of the security provider is located, if the security provider is a company. The order of filing of the security interest with the Registrar of Companies determines the priority of the security interest as regards the present and future holders of the security (with the charge created beforehand and registered as such having been a priority charge), in the absence of specific security ranking provisions in the security documents;
- the creation of security interests over immovable property in the case of an English mortgage must be registered with the relevant sub-registrar of assurances of the jurisdiction within which the mortgaged land is situated, along with payment of state-specific registration fees, as applicable in the state of registration of such document. Equitable mortgages in some notified states are also required to be registered with the relevant sub-registrar of assurance in some states or intimated to the relevant sub-registrar of assurances in the case of a few states (eg, Madhya Pradesh);
- security interests (other than pledges) are also required to be registered by the holder of security with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India, along with the prescribed registration fees. However, this filing is for record purposes only and does not impact the priority of security interests. In most cases, priority of security, as between various lenders having the benefit of common security, irrespective of whether their security interest has been filed prior or later, is agreed under intercreditor or security sharing arrangements among the lenders for ceding of pari passu security interest; and
- any security interest created in terms of the security documentation is also required to be filed by the lenders or the trustee acting for the lenders in whose favour the security has been created under the security documentation, with the information utilities in terms of the Insolvency and Bankruptcy Code 2016.

Typically, all contractual (such as third-party consents), regulatory (such as approvals from the RBI, authorised dealer, government authorities where prescribed) and corporate authorisations (such as board and

shareholder resolutions) required for the creation of a security are to be obtained prior to execution of the security documents.

Documents executed in India are subject to payment of stamp duty, which is prescribed by each state and is usually applicable depending on the state in which the documents are executed. Documents that are unstamped or inadequately stamped are rendered inadmissible in evidence, thereby impacting the enforcement of such documents without payment of heavy penalties.

A pledge of shares or securities requires physical delivery, which is effected by way of physical delivery in the case of physical shares or securities and by way of appropriate instructions to the depository where the shares or securities are in dematerialised form. It is permissible and quite usual in India for a security trustee or agent, being a corporate entity, to be appointed under a trust deed or agency document to hold collateral on behalf of secured lenders to neutralise the impact of the composition of the secured parties over time. It is even mandatory in some cases of debenture issuance for a debenture trustee to be appointed to act on behalf of debenture holders. Other than the registration requirements prescribed for debenture trustees under regulations issued by the Securities and Exchange Board of India, no other specific licence has been prescribed for a corporate entity to act as a security trustee or agent. The appointment of a security trustee under a trust deed is usually preferred over an agency structure for the secured assets to be remote from the bankruptcy of the security trustee, given that a trust structure has legal recognition in India.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

While not conclusive as to the existence of prior charges or liens on property, since the absence of registration does not invalidate an existing security interest, a creditor (by appointing appropriate consultants) would usually undertake physical searches of the revenue records at the office of the relevant sub-registrar in whose jurisdiction the proposed mortgage property is located, online searches of the charges recorded in respect of the security providers with the Registrar of Companies of each state where the registered office of each security provider is located, and searches of the Central Registry of Securitisation Asset Reconstruction and Security Interest of India records in respect of each security provider. Separately, existing creditors would usually also require appropriate representations and warranties from the security providers in the loan documents as to the absence of previous liens or undisclosed security interest on the secured property.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Outside the context of bankruptcy proceedings, secured creditors can approach the Debt Recovery Tribunal established under the Recovery of Debts due to the Bank and Financial Institutions Act 1993 for enforcement of their security or file an ordinary suit under the Code of Civil Procedure 1908. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act 2002 (the SARFAESI Act) further provides special self-help remedies to secured creditors (only Indian banks, Indian branches of foreign banks, notified financial institutions and certain classes of government-owned financial institutions in India). Powers of obtaining possession, taking over the management of the borrowing company and other enforcement action are typically set out in the contract between the parties.

An English mortgage may be enforced through a private sale of property subject to compliance with the conditions prescribed under the Transfer of Property Act 1882. The mortgage deed would usually confer and express a power of sale without the intervention of the court on the mortgagee. However, the intervention of the court would usually be required for enforcement of an equitable mortgage or hypothecation, or both. In the case of a pledge, court intervention is not required for the sale of pledged shares and the creditor may sell the pledged shares after giving reasonable notice to the pledgor. Right of foreclosure is not available in respect of a pledge.

In the case of offshore lenders, any sale pursuant to enforcement and repatriation of proceeds would be subject to extant RBI and foreign exchange regulations. However, offshore lenders usually secure their right to be entitled to proceeds recovered by Indian lenders (including through avenues such as SARFAESI that are not available to foreign lenders) on a pari passu basis, by way of appropriate intercreditor arrangements.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Insolvency laws in India have been consolidated under a single unified code: the Insolvency and Bankruptcy Code 2016 (the Code). The Code provides a speedy insolvency process for companies, limited liability partnerships, partnership firms and individuals, and is intended to apply to both financial and operational creditors, whether domestic or international. The Code implements a process that identifies financial distress early and, at first, encourages the resolution of such distress by way of a corporate insolvency resolution process. Such resolution process is taken to commence from the date an application is admitted by the National Company Law Tribunal, and is generally required to be concluded within 180 days, but mandatorily within an extended period of 330 days from the date of admission. Once the resolution process is initiated, the Code requires a moratorium on all proceedings against the relevant debtor until the completion of such resolution process. If the resolution process fails, the debtor's liquidation is commenced. Upon initiation of the liquidation process, a secured creditor may choose to relinquish its collateral and receive proceeds from the sale of the debtor's assets or realise its security interest over specific assets outside of the liquidation process.

In terms of liquidation waterfall, after payment of liquidation costs and expenses, the Code requires the satisfaction of outstanding labour dues and outstanding debt payable to secured creditors who have relinquished their secured assets. This is followed by payment of wages to employees (other than labour) and then financial debt owed to unsecured creditors. After clearing these dues, the crown debt of the debtor is satisfied, with payments (if any) to other secured creditors who did not relinquish their specific secured assets. The remaining estate is then distributed towards satisfaction of any remaining debts and dues, preference shareholders (if any) and equity shareholders or partners of the debtor, in that order. Agreements contrary to the liquidation waterfall may be disregarded by the liquidator. Preference transactions effected within one year of the initiation of the insolvency proceedings for an unrelated party and within two years for a related party of the debtor may be reversed by a liquidator. Similarly, any extortionate

credit transactions undertaken within two years of preceding insolvency proceedings may also be reversed. With a view to bringing within its ambit the offshore assets of the debtor, the Code puts in place a mechanism whereby the government may enter into agreements with other countries for enforcement of the provision of the Indian Insolvency Code. Generally, there are no entities that are excluded from bankruptcy proceedings. The availability of certain processes to seek remedy or initiate recovery proceedings may depend on the sector of operation of the project company and the nature of the borrower and the creditor. One such instance is under the SARFAESI Act, whereunder Indian banks and certain financial institutions can institute enforcement proceedings as a statutory right without recourse to courts.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

Foreign exchange transactions are strictly controlled in India and are required to be routed through prescribed banking channels. The Foreign Exchange (Management) Act 1999 (FEMA) and the extant regulations under it constitute the relevant legal framework regulating the same. While the Reserve Bank of India (RBI) is the primary regulator in this regard, most foreign exchange transactions are required to either be approved by or reported to the regulator or its delegates, as prescribed.

While current account transactions are generally permitted and specially prohibited under the FEMA regulations for current account transactions, capital account transactions are generally restricted and specially exempted under the FEMA regulations for capital account transactions.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Inward foreign investments in India are regulated on a sector-specific basis. Remittance of proceeds of investment made by offshore entities in various sectors is generally permissible, unless specifically prohibited under the FEMA or by the RBI. Foreign investments are usually made after checking the restrictions applicable in respect of the sector in which such investment is proposed. However, returns on such investments, including in the form of dividends or interest, are subject to Indian income tax provisions and applicable deductions and withholding taxes as may be reduced or exempted under tax treaties among the relevant countries. As regards borrowing from offshore lenders, the Master Direction – External Commercial Borrowings, Trade Credits and Structured Obligations, dated 26 March 2019, as amended from time to time, prescribes specific caps, restrictions and approval requirements for the maximum principal, interest, costs and fees in respect of external commercial borrowings as well as the minimum average maturity for such loans, the nature of security that may be offered and other aspects relating to the availment of such loans.

Irrespective of the amount payable or paid, withholding tax will be applicable on the interest paid under a loan by a resident Indian company to a non-resident. A withholding tax rate of 5 per cent of the gross amount of interest is payable to non-residents by an Indian company or a business trust as per section 194LC of the Income Tax Act 1961 with respect to the monies borrowed by it in foreign currency from a source outside India under a loan agreement or by way of issue of long-term bonds including long-term infrastructure bonds or by way of issue of Indian rupee-denominated bonds, all to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by central government.

Further, section 115A of the Income Tax Act 1961 provides for a withholding tax rate of 20 per cent of the gross amount of interest payable by the government or an Indian concern to non-residents on moneys borrowed or debt incurred by it in foreign currency (other than, inter alia, interest covered by section 194LC of the Income Tax Act 1961).

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

The FEMA regulations provide that, barring specific exemptions, where any amount of foreign exchange is due or has accrued to any person resident in India (including project companies), such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within the period prescribed by the RBI. Foreign exchange earnings would usually be required to be converted to local currency or be used for discharge of a debt or liability denominated in foreign exchange, to the extent and in the manner specified by the RBI.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Locally, project companies are permitted to establish specified forms of foreign currency accounts as per the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations 2015 for limited purposes and specifically permitted debits and credits only. For example, an Indian company receiving foreign investment under the foreign direct investment route may open and maintain a foreign currency account with an authorised dealer if such company has impending foreign currency expenditure. The account must be closed immediately after the requirements are met and within a maximum of six months. Project offices of foreign companies may open non-interest-bearing foreign currency accounts in India for the project to be executed in India. Such accounts must be closed on completion of the project and will be subject to the prescribed rules on credits and debits. An Indian company may open foreign currency accounts outside India in the name of its foreign office or branch or its representative posted outside India for usual business purposes of such foreign office or branch, subject to RBI stipulations and the stipulations of such offshore jurisdiction.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Foreign investment in the infrastructure sector is under the automatic route in most cases and therefore does not require the prior approval of the Indian government. As a general rule, any foreign investment in India

is required to comply with relevant sectoral caps and applicable conditions of investment, if any. Further, certain sectors are still restricted and any investment proposal beyond the permissible limit requires the prior approval of the relevant ministry. For instance, foreign investment in nuclear and atomic energy projects is restricted, and investment in the defence sector requires security clearance from the Ministry of Defence. At the time of writing, there are no bilateral arrangements that may provide exemption to investments routed through a particular jurisdiction from sectoral caps applicable to sectors. However, India has signed bilateral investment protection treaties with about 86 countries. While no specific registration requirements are prescribed (other than where a foreign investment is made through avenues other than the foreign direct investment route, such as foreign portfolio investors and foreign institutional investors), each investment proposal or any proposed transfer of share capital of the investee company is required to be reported by way of completing and submitting the appropriate forms to the government.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Typically, assets situated in India cannot be insured by an insurer whose principal place of business is outside India without the permission of the Insurance Regulatory and Development Authority of India (IRDAI). Further, reinsurance arrangements must also be approved by the respective insurance company's board in consultation with the IRDAI. Any remittance of any claim under any insurance cover by an offshore creditor would be subject to exchange control regulations as prescribed by the Reserve Bank of India from time to time. Foreign investment in the insurance sector is regulated, and any investment presently above 49 per cent of the equity capital of an insurance company requires the prior approval of the government.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Foreign workers, technicians or executives are permitted to be employed by a foreign company engaged in the execution of a project in India subject to certain conditions for obtaining an employment visa as issued by the Ministry of Home Affairs from time to time. A foreign national being sponsored for an employment visa may be required to draw a minimum annual salary in excess of US$25,000 per annum (including salary and other allowances). Long-term visa recipients are required to register themselves with the concerned appropriate government authority within 14 days of their arrival.

The recipients of e-visas are protected under employment welfare laws as applicable to their Indian counterparts. From a taxation perspective, foreign employees are subject to Indian tax laws and if taken to be residents in India are required to pay the appropriate taxes.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

Import transactions are regulated by the Directorate General of Foreign Trade under the Ministry of Commerce and Industry, Department of Commerce. Banks are permitted to provide credit facilities and allow remittances for the import of goods unless the import of such goods is specifically restricted by the import policy in force.

In terms of applicable taxes, importing of project equipment is subject to applicable customs and import duties and goods and services tax (GST) under the new GST regime in India. Further, an anti-dumping duty may be levied if the government determines a good is being imported at below fair market price.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The Constitution of India enables the government to enact laws to acquire or appropriate any property or assets. All natural resources, such as airwaves, minerals or oil, are considered to be the property of the state and may be leased or licensed to private parties according to extant policies. For instance, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 specifies certain end uses for which land and property may be acquired by the government.

There are no specific protections for foreign investment from the government's ability to acquire or nationalise assets, except for judicial review of such acquisitions in light of prevailing laws in India. However, certain bilateral investment treaties entered into by India extend protection to relevant foreign investors in the event of expropriation or nationalisation. These treaties clearly reiterate that any appropriation of investments from a contracting country will not be made except in accordance with applicable law on a non-discriminatory basis coupled with a reward of fair and equitable compensation.

While India is not a signatory to the International Centre for Settlement of Investment Disputes (ICSID), the bilateral agreements occasionally provide for reference of disputes to ICSID, for example, the Comprehensive Economic Partnership Agreement between India and South Korea.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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 no specific tax incentives are provided to foreign investors, in certain cases, depending upon the nature of the investment and the constitution of the investment vehicle, tax-saving benefits may apply. For instance, real estate investment trusts and infrastructure investment trusts are exempt from payment of dividend distribution tax. As a general rule, taxation laws are applicable to an entity that is determined to be resident in India.

India has signed double taxation avoidance treaties with about 95 countries, and foreign creditors belonging to any contracting party may avoid double taxation and may avail appropriate benefits in accordance with the terms of such treaties.

GOVERNMENT AUTHORITIES

Relevant authorities

16 | 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Most sectors falling within the larger umbrella of the infrastructure sector have a separate ministry and government agency overlooking the activities being undertaken in such sector, including by way of rules, policies and regulations that are binding on projects within that sector. The relevant ministries and governmental agencies are statutorily empowered to formulate, delegate and implement governmental policy in each of the sectors. Typically, regulatory authorities have a presence at both the state and Centre level. For instance:

- power: the Ministry of Power, Ministry of New and Renewable Energy and the Central and State Electricity Regulatory Commissions;
- telecommunications: the Ministry of Communication, Department of Telecom;
- ports: the Ministry of Shipping, Road Transport and Highways, Tariff Authority for Major Ports (soon to be abolished) and the state-level maritime boards;
- minerals: inter alia, the Ministry of Mines, the Ministry of Coal and the Indian Bureau of Mines;
- transportation: the Ministry of Shipping, Road Transport and Highways, the National Highways Authority of India and the National Shipping Board;
- oil and gas: the Ministry of Petroleum and Natural Gas and the Petroleum and Natural Gas Regulatory Board;
- chemicals: the Ministry of Chemicals and Fertilisers and the Department of Chemicals and Petrochemicals; and
- water treatment: inter alia, the Ministry of Environment and Forests, the Ministry of Water Resources, River Development and Ganga Rejuvenation and the Central Pollution Control Board and the State Pollution Control Board.

REGULATION OF NATURAL RESOURCES

Titles

17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

All natural resources are vested with the government of India. While surface rights over land and limited rights over water bodies are granted to private parties, a rich body of court-made jurisprudence confirms that natural resources (including oil and gas, minerals and coal) are held by the government in trust on behalf of the people, and therefore the government has the right to exploit the same or lay down laws that regulate the exploitation of natural resources by private parties.

Private parties can extract natural resources only with the appropriate government consent and approvals, usually in the form of a licence or concession. Foreign entities are generally restricted from directly acquiring land in India. Neither can such foreign entities directly undertake business operations in India except if the same is permitted as per the applicable foreign direct investment policy. However, if permitted under applicable laws, such as resident parties, foreign parties may also obtain the consent of the government to acquire such rights. Sector, area and land-specific approvals or compliances may additionally be required, such as if any mining activity is carried out in tribal areas, and companies are required to set aside a certain amount of their revenues for the welfare of tribal people.

Royalties and taxes

18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Royalties, cess and licence fees may be payable for the extraction of natural resources in accordance with the terms of the relevant licence granted, or concession entered into, with the government as per applicable law. Taxes on the income generated from the extracted natural resource, end product and sale of such assets may be payable based on the prevailing income tax laws.

Export restrictions

19 | What restrictions, fees or taxes exist on the export of natural resources?

Generally, goods and natural resources are freely exportable subject to sector-specific restrictions. However, the export of certain resources may be specifically restricted or prohibited, such as atomic energy, minerals and petroleum resources.

GENERAL LEGAL ISSUES

Government permission

20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

Typically, domestic lending for, or investment in, a project finance transaction in India does not specifically require any government approvals apart from project or concession-specific approvals or consents. However, foreign investments in equity instruments and loans availed from offshore lenders in the form of external commercial borrowings are regulated by the Reserve Bank of India (RBI) and Foreign Exchange Management Act 1999 rules and regulations. RBI approval may be required if the project finance proposed exceeds the limits or caps prescribed under the regulations or otherwise falls within restrictions as to end use, tenor, etc. Other than stamp duties, registration fees and filing fees as applicable, no other specific transaction fee is payable to the government for a project finance transaction per se.

Registration of financing

21 | 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?

The security documents are required to be registered or filed with the governmental authorities in India, including the Registrar of Companies and the Registrar of Assurances. However, such registrations or filings are less from a validity and enforceability perspective and more from a public notice perspective to establish priority and maintain a public record.

Additionally, loans availed in the form of external commercial borrowings are required to be assigned a specific loan registration number by the RBI for which an application is to be made prior to disbursement of the loan. In India, notarisation of documents is used to verify and attest the execution of documents. In respect of foreign documents, since India is a signatory to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, the issue

of an apostille certificate is usually sufficient to create a presumption under law that the party to the document has signed the document.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The Arbitration and Conciliation Act 1996 (the Arbitration Act) along with applicable procedural laws, governs dispute resolution by way of arbitration in India. Indian law recognises the right of parties to contractually submit their disputes to international arbitration. India is not a member of the ICSID Convention. However, India is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 as well as the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. Therefore, international arbitral awards passed in any of the convention member states are recognised by local courts in India. Such foreign awards are enforced as a decree of court but remain subject to certain conditions enumerated in the Arbitration Act. For instance, the subject matter of the dispute must be arbitrable in India and must not be contrary to the public policy of India. For awards that are passed in non-convention states, a fresh civil suit is required to be instituted in India.

Although Indian law does not specifically exclude any specific nature of disputes from arbitration, certain kinds of disputes have been excluded by the courts in India, such as suits for enforcement of a mortgage, criminal offences, insolvency, guardianship, antitrust or matrimonial disputes. Similarly, the Arbitration Act does not specifically set out any disputes that are mandatorily required to be arbitrated. Specific statutes and policies applicable to certain sectors may require or encourage the resolution of disputes by way of arbitration. For instance, the Micro, Small and Medium Enterprises Development Act 2006 provides for automatic conciliation and arbitration of disputes.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Where the project is located in India, generally, project agreements are governed by Indian law, as the functioning of the project and compliances are subject to Indian laws. Further, this makes it convenient to institute suits and seek necessary reliefs, including interim reliefs where required. Where there are non-resident parties to the agreement, and the transaction has a nexus with another jurisdiction, it is possible that the parties may opt for foreign laws as the governing laws for such agreements.

Project finance documentation for loans to fund project costs, where such loans are Indian rupee-denominated, are typically Indian law-governed. However, it is not unusual for certain contractual comforts (such as sponsor support documentation or guarantees) to be governed by foreign laws if the provider of such comfort is a non-resident entity.

In the case of offshore financing transactions, it is usual for the facility agreement for external commercial borrowings to be made subject to foreign laws, usually a neutral law such as English law or Singaporean law, which are very often laws of jurisdictions where the lender has a presence. Security documents for Indian projects are usually governed by Indian laws due to the location of secured assets and for ease of enforcement and interim reliefs and given the wider range of remedies available to Indian lenders under Indian regulations for enforcement.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

The parties can contractually choose to submit to the jurisdiction of foreign courts and Indian courts will usually honour the same. Despite being courts of natural jurisdiction, Indian courts do not normally grant relief on matters where the parties have submitted to the jurisdiction of foreign courts. If approached, however, Indian courts may exercise their inherent jurisdiction, based on the cause of action having arisen within their territorial jurisdiction, or to prevent injustice where such a choice of jurisdiction is oppressive, unfair or inequitable and does not bear any real or substantial connection to the subject matter of the dispute in reliance on the doctrine of forum non conveniens. Once a foreign jurisdiction has been chosen, the burden of establishing that the forum of choice of the parties is a forum non conveniens or proceedings therein are vexatious is on the party so contending.

Any judgment obtained in a court in a 'reciprocating territory' arising out of or in connection with the obligations of the parties contemplated under the contracts which are governed by the laws of such reciprocating territory will be recognised and enforced by the courts in India without re-examination of the issues, subject to certain exceptions such as if the judgment was obtained by fraud or has not been given on the merits of the case or is founded on an incorrect view of international law.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

In India, the Prevention of Money Laundering Act 2002 (PMLA) is the anti-money laundering legislation that prevents and penalises the acts of money laundering. The PMLA and Rules framed thereunder are applicable to all persons, and are sector agnostic, which includes individuals, a company, firm, an association of persons or a body of individuals (incorporated or otherwise), and any agency, office or branch owned or controlled by any of the above persons. Under the PMLA, a person shall be guilty of the offence of money-laundering if he or she is directly or indirectly involved in or knowingly assists any process or activity connected with 'proceeds of crime', which includes its concealment, possession, acquisition or use and projecting or claiming it as untainted property. In the event the country in which the investor or lender is domiciled has an agreement with the Indian government that the Prevention of Money Laundering Act 2002 shall apply to their residents, such investors can be held liable under the specific provisions of the act for its non-compliance.

In addition to the above, there are different regulators empowered to issue guidelines for preventing money laundering activities related to that specific sector. For instance, the regulator for Capital Markets – the Securities and Exchange Board of India has introduced the 'Guidelines on Anti-Money Laundering (AML) Standards and Combating the Financing of Terrorism (CFT) /Obligations of Securities Market Intermediaries'. Similarly, the regulator for insurance – the Insurance Regulatory and Development Authority of India has introduced the 'Guidelines on Anti Money Laundering programme for Insurers'.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 | 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

Most infrastructure projects, such as power generation, transmission, oil refineries, road projects and water projects, require environmental clearance from the Ministry of Environment and Forests. Depending upon the location of the project, forest clearance and coastal regulation zone clearance are required to be obtained prior to the construction of the project. Under the pollution control laws, projects are required to obtain 'consent to establish' and 'consent to operate' from the relevant state pollution control board. Further, no-objection certificates from the Ministry of Defence, Airport Authority of India and the local land development authority may be required to be obtained depending on the location and impact of the project. If the project's special purpose vehicle employs labour and employees, then compliance with industrial and labour legislation is to be ensured, and appropriate statutory licences may be required to be obtained from the government authorities. Typically, the list of approvals and consents across India is similar; however, certain additional statutory clearances may be required to be obtained under state-specific legislation.

There is no presently centralised ESG reporting requirement for project companies in India. There are specific statutes that deal with environmental protection and labour standards. Project companies generally have to comply with the provisions of such statutes including with any conditions (including reporting requirements) that have been specified in the approvals or registrations that the companies have obtained under the relevant laws. Similarly, corporate governance measures such as audit reports, independent directors, related parties, risk management, independent directors, director compensation, codes of conduct and financial disclosures are provided under the Companies Act 2013 and applicable to companies in general.

From the financial year 2022 to 2023, the top 1,000 listed companies in India (by market capitalisation) are required to prepare a 'business responsibility and sustainability report', containing detailed ESG disclosures.

PROJECT COMPANIES

Principal business structures

27 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Usually, project companies are constituted as special purpose vehicles. A considerable source of finance is supplied by the banks, foreign portfolio investors and financial institutions in the form of debt. Both onshore and offshore funds are available to project finance companies. For domestic lenders, Indian rupee loans and Indian rupee-denominated bonds remain the popular funding structures. For offshore funds, the external commercial borrowing route remains the primary source in project companies. Some part of the funding requirement is met by way of plain equity or structured investments from the sponsors, domestic funds and international market participants.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The government has implemented various policies to regulate the PPP model, and constituted committees at multiple levels to review the functioning of the PPP model depending on the value of the underlying project. The regulatory framework, however, is rather fragmented and sector-specific. There is no legislation that specifically deals with PPP. Nevertheless, the guidelines and policies relating to PPP are broad and generic and are generally aimed at ensuring competitiveness and providing transparency in the bidding process.

PPP - LIMITATIONS

Legal limitations

29 | What, if any, are the practical and legal limitations on PPP transactions?

India's experience with the PPP model, which has largely been introduced in the infrastructure sector, has strong links with the commercial dynamics that govern the infrastructure sector. The legal regime needs to be modelled to ensure the minimisation of transaction costs and encourage optimal project risk allocation. The one-size-fits-all approach for project concession agreements is counter-productive, as it does not factor in project-specific risks. Further, a multi-disciplinary experts-led dispute-resolution mechanism is necessary to kick-start various stalled projects, and ensure that underlying systemic problems are taken into consideration in dispute adjudication. Land acquisition-related complications, lack of a single-window clearance mechanism from the government and a fragmented legal framework usually result in project delays and consequently an increase in project costs. Further, since concession contracts seek to encourage the exercise of substitution rights by the lenders, and not the liquidation or transfer of assets, lenders are tied into projects. For power projects, especially those awarded on a competitive bid basis, the issue of project delays owing to government actions and external factors, such as a rise in the cost of imported fuel resulting in increased costs and non-viability of the project, remain a cause of concern.

PPP - TRANSACTIONS

Significant transactions

30 | What have been the most significant PPP transactions completed to date in your jurisdiction?

Recently, the Indian government has pushed for reforms in the railways and healthcare sectors on a PPP model and expanded the ceiling for private participation in the food-grain storage sector.

In the railways sector, the government has stressed the redevelopment of railway stations through the PPP model. Indian Railways has also floated the model concession agreement for redevelopment of the railway stations along with real estate development on a 'design, build, finance, operate and transfer' model and has invited participation from interested private individuals. In July 2021, Gandhinagar railway station, the first railway station redeveloped under the PPP model, was inaugurated. Indian Railways has also invited tenders from the interested participants for the development of passenger trains.

Food-grain storage projects on a PPP model have also gained traction lately. To attract investment, the government has approved a policy that encourages the private players to bid for the construction of

249 state-of-art silos with close to 11 million tonnes of wheat storage capacity. The investment estimated for such projects is 92 billion Indian rupees.

In the healthcare sector, we are witnessing the development of policies for public-private participation. The government of Maharashtra recently developed its health policy that included setting up of new medical colleges and super speciality hospitals in the state of Maharashtra to provide critical care treatment to patients under a PPP model.

UPDATE & TRENDS

Key developments of the past year

31 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

There has been a fair degree of activity in the Infrastructure Investment Trusts (InvIT) space. Power Grid Corporation of India is in the process of monetising its assets through the InvIT route and has incorporated the PowerGrid Infrastructure Investment Trust (PGInvIT) with initial portfolio of assets comprising of five special purpose vehicles. Similarly, the National Highway Authority of India has also launched its InvIT having an initial portfolio of five operating toll roads with an aggregate length of 390 kilometres and additional three road assets aggregating 247 kilometres proposed to be added. There is also a push by private players to monetise their assets through the InvIT route.

On 12 May 2022, the Supreme Court, in a landmark judgment in *PTC India Financial Services Limited v Venkateswarlu Kari and Others*, has reiterated that the legal principles relating to the enforcement of the pledge of dematerialised shares are no different than a pledge of any other movable asset. The judgment is likely to bring to an end and discourage legal proceedings where pledgors have argued that invocation of the pledge itself amounts to the sale of the shares to the creditors. This will provide a fresh impetus to share-backed financing transactions.

In the energy space, green hydrogen is being seen as an effective supplement to ammonia for industrial application and an effective tool to reduce carbon emissions as well as foreign exchange preservation. Government undertakings such as the Indian Oil Corporation Limited and the Gas Authority of India Limited as well private-sector players such as Adani, Reliance and Greenko have shown activity in various green hydrogen initiatives.

There has also been tremendous growth in the field of electric vehicles from a policy and regulatory initiative as well as recent deals. Aspects relating to setting up EV charging infrastructure, business models for EV transportation, subsidies and exemptions for electric vehicles have been considered.

cyril amarchand mangaldas
ahead of the curve

Santosh Janakiram
santosh.janakiram@cyrilshroff.com

Ruchira Shroff
ruchira.shroff@cyrilshroff.com

Abhishek Khatri
abhishek.khatri@cyrilshroff.com

Aditi Chopra
aditi.chopra@cyrilshroff.com

Peninsula Chambers
Peninsula Corporate Park
GK Marg, Lower Parel
Mumbai 400 013
India
Tel: +91 22 2496 44 55 / +91 22 6660 4455
Fax: +91 22 2496 3666
www.cyrilshroff.com

Italy

Giovanni Scirocco

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CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

The most common security interests available are mortgages over real estate property (and certain registered movable assets) and pledges over movable assets, which in both cases cover existing and well-identified assets. In the case of receivables, as an alternative to the pledge, an assignment by way of security may be considered. Bank financings exceeding 18 months and notes issued by companies and subscribed by qualified investors may benefit from special liens over the enterprises' goods, including future assets, subject to the fulfilment of certain conditions. In 2016, a general right to create a non-possessory pledge over movable assets or credits has also been introduced in Italy. Moreover, Law Decree No. 18/2020 introduced the right to create that type of pledge over certain agricultural and food products. Owing to their nature, by law certain credits are granted priority over assets.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Pledges over bank accounts, shares and receivables as well as assignment of receivables by way of security in relation to private entities may be executed by way of private deeds, while mortgages, special liens, quota pledges and assignment of receivables by way of security in relation to public authorities shall be executed in notarial form. Mortgages, quota pledges and special liens are perfected through registration with the public registries, assignment or pledge of receivables (including the balance of the bank accounts) must be notified to – or accepted by – the relevant debtor, and movable assets' pledges are perfected through the delivery of goods or documents. Once the security interest is perfected, the secured creditor shall be preferred to other creditors in enforcement over the secured asset (except for some creditors preferred by law), but it cannot prevent other creditors from commencing an enforcement proceeding over the secured assets. Priority is established by law and according to chronological criteria, therefore advice on a case-by-case basis is recommended, also considering that certain credits are always preferred (eg, employees' claims).

Security interests can be subject to an ordinary tax regime or a special tax regime. The latter, an optional substitutive tax equal to 0.25 per cent of the loan's overall amount, may apply upon request in the case of financing when the lender is an Italian resident bank, an Italian permanent establishment of non-resident banks or a bank established in other EU member states, the loan has a maturity higher than 18 months and the relevant agreement is signed and executed in Italy. In this case, no indirect taxes shall be paid in relation to the facility agreement and the connected security interests (including registration tax, stamp duties, mortgage tax, cadastral tax and taxes on government concessions). If no substitutive tax regime is available (eg, there is no bank financing or its application is not requested), the ordinary tax regime would apply, taking into account also that, as a general rule, notarial security interests are subject to registration tax upon execution, while non-notarial security interests relating to transactions either falling within the scope of Italian value added tax (save for certain exceptions) or executed by exchange of correspondence are not subject to registration tax upon execution, but only if certain subsequent events occur (eg, in the case of enforcement). Under the ordinary tax regime, if no exemption applies, registration tax payable is calculated as 0.5 per cent on the secured amount (or on the nominal value of the assigned receivables in the case of assignment of receivables) if the security interests are granted by third parties or a fixed rate of €200 if granted by the borrower. In the case of execution of a mortgage deed, a mortgage tax equal to 2 per cent of the secured amount (as well as 0.5 per cent of the same secured amount upon release) applies in addition to the registration tax mentioned above. In addition to the registration tax and the mortgage tax, a stamp duty tax shall be paid. It is based on the number of the document's pages and it is usually not material. Moreover, in relation to the fulfilments connected to the notarial deeds (eg, filings with the competent offices, certified date), notarial costs shall be considered.

Pursuant to Law No. 9/2014, the optional substitutive tax regime also applies to security interests executed in relation to indebtedness structured as corporate bond issues.

Security trustees and parallel debt are not regulated under Italian law (for other purposes and with different legal connotations, Italian law recognises the 'common representative', a role aimed at protecting the common interests of bondholders). If governed by a foreign law, trusts should be recognised by the Italian courts. Instead, no case law confirms the validity of the parallel debt in Italy. Under Italian law, in the case of syndicated loans, the security shall be granted to, and perfected in favour of, each lender. The secured creditors may appoint an agent and confer to the latter the powers to act in their name and behalf.

Assuring absence of liens

3 | How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Public registries document that no prior liens, mortgages or other prejudicial encumbrances affect the relevant secured asset, as in the cases of real estate property, registered movable assets, quotas or an enterprise's goods. The notary public attests this upon, or in view of,

any notarial security. With reference to the pledge or the assignment of receivables, it is usually required that the assigned debtor confirm that no prior lien has been notified to it.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

It is worth noting that under Italian law the enforcement is triggered by payment default, not by any event of default. The secured creditors are then entitled to enforce the security interests and, depending on the nature of the secured assets and on the ranking of the security interest, the enforcement may occur through judicial enforcement proceedings or out-of-court procedures. Pledges over shares or quotas or movable assets, and pledges over receivables or bank accounts and the assignment of receivables by way of security can be enforced in both ways. Mortgages and special liens must be enforced through judicial proceedings, subject to relevant formalities and notice periods. Following the sale, the proceeds are distributed among the creditors in accordance with the priority of their respective security interests. During the judicial proceeding, the project lender can request the transfer of the given asset in its favour.

As a general rule, out-of-court methods (usually contractually regulated) are faster than judicial proceedings. However, they may be more likely to be subject to exceptions by the debtor in relation to the value of the underlying asset. Therefore, proper drafting of the relevant security document, as well as a proper check upon the decision of enforcement, is strongly recommended.

The financial collateral created pursuant to Directive 2002/47/EC, as implemented by Law Decree No. 170/2004 (pledge over shares or financial instruments or receivables), may be enforced through a simplified procedure. Moreover, pursuant to article 48-bis of Law Decree No. 385/1993, parties may secure the execution of a facility agreement stating that, upon a payment default, the ownership of real estate assets or another real estate right of the debtor or a third party shall be transferred to the creditor. Should the value of the asset be higher than the value of the payment default, the creditor shall pay an amount equal to the difference. An expert shall be appointed to estimate the transferred asset. Save for the appointment of such expert, the transfer does not require any judicial activity.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Certain thresholds related to assets, gross revenues and indebtedness are established by the law for Italian companies to be subject to bankruptcy. Companies that do not meet such requirements may be subject to minor proceedings, while special procedures apply to large companies, public entities, financial institutions and insurance companies. As a consequence of the commencement of an insolvency proceeding, the lender's ability to initiate an individual enforcement action is affected (except for certain cases, such as the enforcement of a security over financial collateral pursuant to Directive 2002/47/EC, as implemented by Law Decree No. 170/2004). In the case of insolvency proceedings, the equal treatment of each creditor applies, while secured creditors have priority subject to certain conditions and, owing to their nature, by law certain credits are granted priority also with respect to secured creditors (eg, tax and employees' claims). Moreover, security interests may be jeopardised by bankruptcy clawback actions if the underlying security interests have been perfected during certain periods before the declaration of bankruptcy, provided that the length of such period is set differently – from six months to two years – depending on the circumstances. Generally, acts and payments carried out by the debtor after the commencement of the bankruptcy proceeding are considered ineffective against the bankruptcy, while gratuitous acts and payments made by the debtor with respect to debts that expired on or after the declaration of bankruptcy are deemed ineffective against the relevant creditors, if such payments are made in the two years preceding the bankruptcy declaration. In compliance with the principle of par condicio creditorum, claims of foreign creditors are treated the same as the claims of local creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

Italy has not implemented foreign exchange controls or restrictions on currency transfers, except for limitations and reporting obligations related to anti-money laundering and terrorism financing.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

No restrictions are envisaged. There is no specific tax regime for foreign investments in an Italian project company. Payments of investment returns and interests or premiums in loans or bonds made by an Italian resident company to a non-resident company are generally subject to a 26 per cent withholding tax, which may be reduced, generally to 10 per cent, under the applicable double tax treaty (if there is one). Interest on medium- to long-term loans (exceeding 18 months) is exempt from withholding tax if paid to certain categories of lenders (eg, EU banks, EU insurance companies, white-listed institutional investors). Repayment of principal is generally exempt from Italian taxation.

Italian resident companies, as well as non-resident companies with a permanent establishment in Italy, pay a 24 per cent fixed rate tax on corporate income (plus regional taxes and local tax surcharges).

EU exemption regimes, under the Parent-Subsidiary Directive or the Interest and Royalties Directive, apply to payments made to EU-based shareholders when certain conditions are met.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

No obligation to repatriate foreign earnings is provided. With reference to anti-money laundering and terrorism financing, certain financial institutions are subject to reporting requirements.

9 | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

There are no restrictions on project companies establishing and maintaining foreign currency accounts. Generally, project companies open at least one domestic bank account.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

As a general rule, there are no restrictions on foreign investment in or ownership of a project and related companies. However, under Law Decree No. 21/2012 (the Golden Power Decree), the Italian government – if there is a threat of serious prejudice to the national interest – is entitled to exercise special powers (eg, to veto or impose prescriptions or conditions) in relation to certain transactions involving both public and private companies operating in strategic sectors for the country (such as defence and national security, 5G networks, cybersecurity and cloud, transport, energy, communication and high-tech).

Those transactions include the acquisition of participations higher than certain thresholds from extra-EU legal entities, mergers, demergers, transfers of business, relevant changes to the corporate purposes, etc. Therefore, should the transactions involve companies carrying out strategic activities or holding assets in those sectors, those transactions shall be communicated to the Italian government to allow the exercise of those special powers. A failure to communicate those transactions will result in the application of material fines against the legal entities involved in the transaction.

Owing to the covid-19 pandemic, to protect the national strategic assets from a hostile takeover of foreign entities, the Italian government enacted, under Law Decree No. 23/2020, a provisional regime (applicable until 31 December 2022), including EU legal entities and extending the relevant scope to additional sectors such as credit and insurance sectors, media pluralism, food safety and access to sensitive information.

This temporary regime has been established in the ordinary Golden Power Decree regime by Law Decree No. 21/2022 and will be applicable from 1 January 2023 even to transactions involving Italian companies. Moreover, Law Decree No. 21/2022 has further broadened the scope of Golden Power Decree regulation, including the awarding of concession contracts and the incorporation of companies carrying out strategic activities or holding strategic assets.

For the purposes of pursuing such aims, no bilateral investment treaties aimed at affording relief from restrictions have been executed.

Insurance restrictions

11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

There are no restrictions on insurance over projects provided by foreign companies as long as the relevant insurance company is authorised to operate in Italy. Proceeds are usually paid to the project company, which is the insured entity, but lenders often require the borrower to execute loss payee clauses, otherwise, the insurance proceeds are included among the receivables assigned by way of security. Notwithstanding such loss payee clauses and assignment of receivables, it is market practice – and in part, it may be a right of the project company by law – to allow the project company to use insurance proceeds below certain thresholds to restore potential damages of the trigger event. Finally, there are no restrictions on the payment of the insurance proceeds to Italian or foreign companies.

Worker restrictions

12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Restrictions depend on the nationality of the foreign workers, technicians or executives. In accordance with the principle of free movement of persons, goods, services and capital, no immigration procedures apply to EU and EEA nationals. However, should such workers, technicians and executives work in Italy for more than three months, a simple notification to the local authority (generally the local police station) should be transmitted. Non-EEA nationals shall comply with a specific procedure based on quotas for new entries on a yearly basis. Exemptions apply for highly skilled individuals who may work in Italy even in excess of such thresholds.

Equipment restrictions

13 | What restrictions exist on the importation of project equipment?

No specific restrictions apply on project equipment importations. Project equipment may be freely imported and exported in accordance with the right of free movement in the EU, EEA and Turkish area. Imports from outside the European Union are regulated by trade treaties with the relevant exporting country. Once entered into the European Union, products may be freely traded throughout the entire European Union.

Nationalisation laws

14 | What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The Italian constitution envisages the expropriation of private assets for public purposes, provided that fair compensation is paid to the expropriated owner. Under Italian law, for the purposes of the public interest, the public administration may revoke a concession subject to payment in favour of the concessionaire.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 | 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 particular incentives for foreign investors or creditors are envisaged. Most of the domestic incentive regimes (eg, the substitutive tax regime, withholding exemptions) are extended to foreign entities.

Foreign investors who invest at least €20 million may file an advance tax ruling to the Italian tax authorities requiring an advance

confirmation of the tax treatment of the entire investment plan. Those investment projects must have a long-lasting and significant impact on employment levels.

GOVERNMENT AUTHORITIES

Relevant authorities

16 | 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Historically, state ownership in these sectors has been particularly prominent (eg, ENI for oil and gas, and Enel in the electricity sector). Over the past 20 years, however, considerable efforts have been made to liberalise such sectors. At present, a number of authorities are involved in projects and they vary considerably depending on the stage of the project (development or operational) and whether it is a mere public procurement or a public-private partnership (PPP).

As a general rule, a key role in project finance transactions is played by the public authorities responsible for the relevant service or infrastructure involved in the PPP, which manage the tender process and act as grantors. Accordingly, the oil, gas and minerals extraction sector, and the power transmission and telecommunications sectors, are generally under the authority of the Ministry of Economic Development. Transportation (except for local transportation) and ports are under the Ministry of Infrastructures. The Transport Regulation Authority is also responsible for economic regulation in the field of transport, as well as the Inter-ministerial Committee for Economic Planning, which is a political decision-making institution headed by the President of the Council of Ministers with a function of coordination in the planning of the economic policy to be followed at national and international level. In the energy sector, power generation is a liberalised activity but PPPs are possible mainly in the energy efficiency sector. In this regard, the following must be mentioned:

- the National Operator for Energy Services, which, among other things, manages revenue deriving from renewable sources and efficiency projects; and
- the Authority for Energy, Network and Environment Regulation, which, among other things, ensures competition and efficiency with respect to public utilities, and defines fixed and transparent tariff systems based on pre-selected criteria to protect the interests of users and consumers.

In addition, other authorities responsible for issuing permits and authorisations during the structuring phase and for assessing the environmental risks of the project (eg, the Ministry of Ecological Transition – a new ministry, replacing the Ministry of Environment – introduced by Law Decree No. 22/2021 converted, with amendments, by Law No. 55/2021 in force since 30 April 2021 and authorities for the relevant regions and provinces), are involved.

The control and monitoring functions are attributed to the National Anti-corruption Authority, which is responsible for preventing corruption in Italian public administration by imposing transparency in management matters as well as supervising activities connected to a public contract.

Depending on the features of the project, other agencies and departments may have authority.

REGULATION OF NATURAL RESOURCES

Titles

17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Natural resources in Italy, whether located on land or at sea, are the property of the Italian state. The state may grant concessions to private operators for the purpose of exploration and exploitation.

There are no specific restrictions for foreign companies, other than those provided for in the foreign regulation, although certain exceptions under special laws can apply and such matters should be subject to specific due diligence on a case-by-case basis.

Royalties and taxes

18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The Italian regime for the exploitation of natural resources is based on the granting of a concession, in relation to which the beneficiary is required to pay a concession fee based on the extent of the area granted and a royalty based on the type of resource. Royalties on the extraction of natural resources range from 4 per cent to 10 per cent, depending on the conditions of extraction and the extracted resource, and are applied to the sales value of the quantities produced. These amounts are paid to the state for offshore concessions (ie, at sea) and, proportionally, to the state, regions and municipalities for onshore concessions. There is no distinction between royalties and taxes on extraction payable by domestic and foreign parties.

In addition, the extraction of natural resources is subject to corporate income tax, the regional tax on productive activities and value added tax. Moreover, environmental compensatory contributions to municipalities, as well as territorial compensatory contributions to regional administrations, can apply.

Export restrictions

19 | What restrictions, fees or taxes exist on the export of natural resources?

The export of natural resources is not subject to general restrictions, but since it is regulated by different special laws that can vary considerably, it should be subject to specific tax due diligence.

GENERAL LEGAL ISSUES

Government permission

20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

Except for the permits and authorisations necessary to perform the relevant activities (eg, the construction of buildings and infrastructure), no specific government approval is required for typical project finance transactions. However, in some cases, the award, subject to a public tender procedure, is required. Likewise, no specific fees and charges apply. As for the finance documents, charges related to their registration may apply.

Registration of financing

21 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?

Finance and project documents that have to be executed by notarial deeds shall be drafted in the Italian language and may include a courtesy translation.

If the relevant finance or document is to be signed by, or notified to, any public authority, normally the notarial form is required and further formalities should be complied with. In particular, for instance, the pledge of receivables towards public authorities shall be made in notarial form and, in most cases, be expressly accepted by the assigned debtor, while the assignment of receivables arising from the energy feed-in tariff convention with the National Operator for Energy Services shall be executed on the basis of a specific contractual model.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

With respect to international arbitration matters, Italy is a party to the following international treaties:

- the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);
- the European Convention on International Commercial Arbitration of 1961;
- the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927; and
- the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965.

Italy is no longer party to the Energy Charter Treaty (the withdrawal took effect on the 1 January 2016).

Italian courts fully recognise written international arbitration clauses and agreements, in line with what is provided under article II of the New York Convention. Indeed, Italian courts tend to have a very friendly approach to arbitration: generally speaking, if a party were to commence proceedings in apparent breach of an arbitration agreement, ordinary courts would tend to decline their jurisdiction in favour of the arbitral tribunal.

Under Italian law, contractual and non-contractual disputes are arbitrable, with some exceptions:

- employment disputes (unless an arbitration clause is provided within the applicable collective bargaining agreements);
- disputes relating to rights of which a party cannot freely dispose of; and
- further disputes that are not arbitrable by operation of law (eg, tax disputes and disputes concerning the public administration, under certain conditions).

Pursuant to article 824-bis of the Italian Code of Civil Procedure, arbitral awards issued within the Italian territory have the same effect as court judgments. In this case, the judicial enforcement of the award can be sought just after filing the award with the court of the seat of arbitration to obtain the judicial enforcement apostille.

Foreign arbitral awards are recognised and enforced on the basis of articles 839 and 840 of the Italian Code of Civil Procedure, which reproduce the requirements set forth under articles IV and V of the New York Convention. Recognition and enforcement of foreign arbitral awards are sought by filing an ex parte application with the competent court of appeal, together with the relevant supporting documentation as required under article IV of the New York Convention. The recognition and enforceability of the award are declared by the court of appeal by decree, which can be challenged by the counterparty within 30 days only on those grounds as provided under article V of the New York Convention (which are reproduced under article 840 of the Italian Code of Civil Procedure).

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Generally, project agreements are governed by Italian law, but it is possible for the parties to apply a foreign law upon the express choice made under the relevant contract. In any case, the 'overriding' mandatory provisions may not be derogated, upon penalty of disapplication by the Italian courts.

Financing agreements are usually governed by Italian law, but large cross-border syndicated loans are often subject to foreign law.

Italian law will always apply to project contracts where the counterparty is an Italian public entity. Moreover, as for the collateral created over movable and immovable assets located in Italy, they are subject to Italian law as the relevant security interest is governed by the law of the country where the asset is located.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

On the basis of the principle of contractual freedom, the submission to a foreign jurisdiction both in respect to the governing law and the jurisdiction to hear disputes is effective and enforceable under Italian law and enforced by Italian courts. In this respect, reference is also to be made to the provisions of Regulation (EC) No. 593/2008 (Rome I) on the law applicable to contractual obligations, Regulation (EC) No. 864/2007(Rome II) on the law applicable to non-contractual obligations and Brussels Regulation (EC) No. 1215/2012, for certain limitations to the above-mentioned general principle of contractual freedom.

Waivers of immunity are allowed under Italian law, save for certain matters where Italian sovereign immunity is of mandatory application.

As a general rule, Italian courts grant enforcement of foreign judgments without re-examining the merits of the case. Yet, the party against which the enforcement is sought may require the court to deny enforcement on the basis of certain grounds, mainly linked to:

- violation of the parties' right of defence;
- violation of due process;
- lack of jurisdiction of the court that issued the decision; and
- violation of Italian public policy.

As to the applicable procedure, judgments of foreign courts are recognised and enforced in Italy pursuant to the provisions of Brussels Regulation (EC) No. 1215/2012, if the judgment is issued by a court of an EU member state, and pursuant to the provisions of Law No. 218/95, if the judgment is issued by a court of any other state.

Also, a bilateral convention may provide for specific enforcement requirements.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

In Italian jurisdiction, the investors are subjected to anti-money laundering provisions and checks when they enter into ongoing relationships or carry out occasional significant transactions (amounting to €15,000 or more) with certain obliged parties such as banks, electronic money institutions, payment institutions and other entities identified by article 3 of Law Decree No. 231/2007.

In fact, in these situations, the investor assumes the status of 'customer' for the purposes of anti-money laundering provisions. As such, all the measures provided for in Law Decree No. 231/2007 and its implementing regulations must be adopted. In particular, with respect to the investor, customer due diligence must be carried out, which consists of identifying him or her and the beneficial owner and verifying his or her identity and that of the beneficial owner, acquiring and evaluating information on the purpose and nature of the ongoing relationship or the occasional transaction, and exercising ongoing monitoring of the relationship. As part of this, the customer must provide in writing, under his or her own responsibility, all necessary and up-to-date information to enable obliged parties to fulfil customer due-diligence obligations.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

In the sectors in which project finance operates, ESG issues might play a significant role. This is mainly because of the public interest in the projects that can potentially have positive (or negative) impacts on the environment and the communities. With regard to the environment – according to Regulation (EU) 2020/852 harmonising criteria to determine whether or not an economic activity is environmentally sustainable – the most relevant issues might be the use of renewable energies, the sustainable consumption of natural resources and the proper disposal of materials so that the project does not have negative effects on climate change, biodiversity, ecosystems, and the transition to a circular economy. With regard to the impacts on communities – taking into account the Final Report on Social Taxonomy, issued by the Platform on Sustainable Finance, an advisory body of the EU Commission – project companies should consider human rights, workers' rights and all the possible negative consequences on other social issues such as the safety of the company products or services. Currently, there are no specific sustainability disclosure requirements for project companies other than those provided, more generally, for large public interest companies by EU Directive 2014/95 (implemented in Italy by Law Decree No. 254/2016). Nonetheless, other sectors specific ESG laws are provided at the European level as, for example, Regulation (EU) 2017/821 (Conflict Minerals Regulation) that lays down supply chain due-diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. However, companies can voluntarily publish sustainability reports based on reporting standards and impact measurement tools issued by public and private organisations (namely, GRI standard, B Impact Assessment, OECD guidelines for multinational enterprises, UN Global Compact, etc).

PROJECT COMPANIES

Principal business structures

27 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

The principal business structures of project companies are special purpose vehicles incorporated on a limited recourse basis to keep the assets of the company clearly distinct from those of the shareholders or quota-holders, such as limited liability companies or joint-stock companies. In terms of financing, bank financing is predominant; however, the issuance of corporate bonds is increasing while recourse to the equity capital market remains limited. In some sectors of public interest (eg, energy, infrastructure, transport, energy efficiency projects, prisons, hospitals and toll roads) project companies may have access to forms of public grants for construction or access to certain subsidised tariffs.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Following the relevant EU Directives, new PPP legislation has been enacted in Italy at a state level through Law Decree No. 50/2016 (as modified from time to time) and supplementary legislation. In particular, much importance was given to the National Anticorruption Authority's Guidelines (some were considered soft law and some were considered to be binding) while a single regulation laying down the implementation and integration provisions is expected. It is worth mentioning that slightly different PPP legislation has been in place since the 1990s and it has been amended and integrated from time to time.

The regulation referred to above does not provide for any industry-specific provisions. The specific legislation foreseen in some PPP-sensitive sectors (eg, water, waste and transport) needs to be applied in coordination with the general legislation on PPP transactions.

PPP - LIMITATIONS

Legal limitations

29 What, if any, are the practical and legal limitations on PPP transactions?

PPPs in Italy are highly regulated. On one hand, this provides a guarantee function for the success of the projects; on the other hand, it results in procedural complexity that makes the development, contracting and implementation of the projects lengthy. Strict regulations are provided both for participation in tenders for the award of PPP projects, which translates, among other things, into an extensive list of reasons for excluding participants from tenders (among these, particular attention is given to compliance with the strict anti-mafia discipline), and for the criteria for awarding the PPP project itself. In addition, even before the call for tenders, the legislation requires the contracting authority to identify the general objectives to be pursued and the specific qualitative and quantitative requirements that must be

met by the implementation of the intervention itself to comply with the criteria of maximum efficiency and cost-effectiveness.

To this end, a phase of identification and accurate assessment of the risks associated with PPP contracts is planned before the call for tenders.

Indeed, the main characteristic to be checked and preserved in a PPP transaction is ensuring that the operational risk (ie, the risk for the economic operator of not being able to recover, under normal operating conditions, the investments made and the costs incurred for the transaction) is and remains with the private party for the duration of the project.

PPP - TRANSACTIONS

Significant transactions

30 | What have been the most significant PPP transactions completed to date in your jurisdiction?

In the past 20 years, there have been many PPP transactions. Among the most significant sectors involved were transportation (in particular, motorways, which, in some green-field projects, required the investment of billions of euros) and hospitals.

Among the recent main PPP transactions in 2020, we assisted Azzurra Aeroporti SpA in the issuance of two tranches of senior non-convertible secured notes having a nominal amount equal to, respectively, €360 million and €300 million. The notes have been listed on the Euronext Global Exchange Market in Dublin.

UPDATE & TRENDS

Key developments of the past year

31 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

Considering the global need for energy transition, the energy field is a new hot topic in project finance. Owing to reduced state support in terms of the feed-in tariff, an emerging trend is the development, and relevant demand, for the financing of renewable energy plants on the basis of pure merchant risk, along with the possibility of providing long-term power purchase agreements. Moreover, in light of the opening of the energy capacity market, new kinds of energy providers, including demand-side response and storage, are being studied by potential lenders and are expected to be financed on a project finance basis in the near future. As a general remark, in Italy, the hydroelectric sector seems to be growing in importance in the energy field: in 2020, there was a 60 per cent increase in installed power capacity with respect to 2019. Further, in the context of the green transition promoted by European policies, the main energy operators are also focusing their activities on the development of clean hydrogen systems' production.

Legance
AVVOCATI ASSOCIATI

Giovanni Scirocco
gscirocco@legance.it

Via di San Nicola da Tolentino, 61
Rome 00187
Italy
Tel: + 39 06 93 18 271
www.legance.com

Mozambique

Guilherme Daniel* GDA
Teresa Empis Falcão* VdA

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Various types of security and collateral may be given to secure loans, notably, mortgages on real estate and certain movable assets subject to registration (such as automobiles, ships and aircraft), and pledges on movable assets in general, including equipment, receivables, bank accounts, credits, deposits, quotas and shares (including new shares to be acquired).

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Movable assets

It is possible to provide security over movable assets and rights (movables) by means of a general security agreement.

The legal framework of security over movables changed considerably with the enactment of Law No. 19/2018, of 28 December 2018, which was further developed by Decree No. 7/2020, of 10 March 2020 (together, the Movables Security Law). The Movables Security Law applies to pledges, mortgages over vehicles subject to registration, assignments of credits by way of security, financial leases, conditional bills of sale or equitable charges, retention of title clauses and to other legal transactions tantamount to creating security over movables located in Mozambique by a Mozambican security provider.

Under the Movables Security Law, any type of movables, parts or ideal fractions of a movable or all movables owned by a security provider, either specific or generic, present or future (in the latter case, security only becomes effective when the security provider acquires rights over the relevant asset), tangible or intangible, may be given in security, provided that they can be disposed of for consideration at the time of the creation of security.

The security interests must be created by means of a written agreement between the security provider and the secured creditor. No public deed is required. Security interests may also be created verbally when publicity is completed upon transfer of possession. The security interests become effective between the parties immediately upon being created. As for the effectiveness of security against third parties, the new framework sets forth three publication methods:

- by filing the security with the Movable Security Registration Central for personal property and rights subject to registration of title;
- through bailment or a document transferring possession of the movable to the creditor or a third party; or
- through a control agreement, if the security is created over a bank account, a securities and brokered financial assets account, as defined in a separate regulation.

Specific perfection requirements may apply depending on the type of movable at stake.

The Movables Security Law also creates the Movables Security Registration Central, which is tasked with recording the information in connection with the security over movables and centralising the information in connection with certain property and rights subject to registration. The Movables Security Registration Central started operations in June 2021

Note that, as ruled by Portuguese Decree-Law No. 29 833, of 17 August 1939 (included in the Mozambican legislation through Charter No. 9:811, of 7 June 1941, issued by the Ministry of the Colonies and still in force), in the case of commercial pledge granted as security of banking credit facilities, the physical possession of the pledged assets is not required for the pledge to be fully valid and effective.

Real estate

Under Mozambican law, 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 No. 19/97, of 1 October 1997) grants private persons the right to use and benefit from the land (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 the case of immovable assets) and pledged (movable assets), including any machinery or equipment.

Mortgage of real estate assets are granted by means of a public deed before a notary and must be registered with the competent registration office,

Even though the Mozambican Civil Code does not expressly provide for the possibility of the creation of factory mortgages, reference to those mortgages is made in the Land Register Code and there are precedents of factory mortgages having been successfully created and registered in Mozambique, covering project facilities and all machinery, equipment and other movable property located therein.

Receivables

According to the Movables Security Law, security can be taken over current and future receivables by means of a written agreement between the security provider and the secured creditor under which, to ensure the effectiveness of the security against third parties, the possession of the receivables must be transferred to the secured creditor. Security

over receivables shall be registered with the Movables Security Registration Central.

It is common for the secured creditor to authorise the security provider to continue to collect the receivables in the absence of a default and the third-party debtor to continue to carry out the relevant payments to the security provider until notice to the contrary.

Bank accounts

Security can be taken over cash deposited in bank accounts by means of a written agreement between the security provider and the secured creditor. The execution of a control agreement with the depository bank will be required for it to be effective against third parties. Generally, the secured creditors will grant a mandate to the security provider for him or her to operate the relevant bank account in the absence of a default.

Security over cash deposited in bank accounts shall be registered with the Movables Security Registration Central. The bank records should also record the security interest and the mandate in favour of the security provider.

Share capital

In a limited liability company by shares, the creation of security is made by written agreement between the parties and, where shares are represented by physical certificates, requires the endorsement of the share certificates by the security provider, the registration of the pledge in the company's shares ledger book and the deposit of the share certificates with the financial intermediary used by the company to register itself and its shares. If the shares are bearer shares, the creation and perfection of security is made by the delivery of the shares to the secured creditor. Security must be registered at the Central Securities Depository operating in the Stock Exchange and at the Movables Security Registration Central.

In a limited liability company by quotas, where the shareholding is not materialised in share certificates, security is created by means of a written agreement and prior consent of the company in which quotas are being given in security is required. Security must be registered at the Legal Entities Register Office and at the Movables Security Registration Central.

Fees and charges

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 security is charged at 0.3 per cent 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 varies as follows:

- 0.03 per cent for loans with a maturity of less than a year;
- 0.4 per cent for loans with a maturity of more than a year; and
- 0.5 per cent for loans with a maturity equivalent to or more than five years.

Security agent

The concept of a 'trustee' is not recognised in Mozambique. It is, however, common to have security 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.

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 with proper intercreditor arrangements in place (setting up the rules for action by individual creditors and for allocation of the proceeds of security enforcement).

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

The Movables Security Registration Central intends to consolidate the relevant information regarding security interests over most moveable assets. Encumbrances over share capital can also be confirmed with the Central Securities Depository Office in relation to shares and the Legal Entities Registration Office in relation to quotas.

Regarding real estate assets, creditors can consult the corresponding Real Estate Registry Certificate, to verify the status of any liens and encumbrances over real estate assets. As such, the referred registries allow creditors to obtain the most relevant information concerning all existing encumbrances, as well as their ranking and amount.

Law No. 19/2018, of 28 December 2018, which was further developed by Decree No. 7/2020, of 10 March 2020 (together, the Movables Security Law) further foresees the possibility of executing a control agreement in relation to security interests provided over balances in bank accounts and registration in the Movables Security Registration Central not being mandatory. In such cases, pledges over balances in bank accounts will have to be verified directly with the depository bank.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

The enforcement of a mortgage by the creditor can only be achieved through a judicial proceeding.

As for security over movables, the sale can be completed judicially or, if previously agreed by the parties, through a private sale. The Movables Security Law allows for appropriation or foreclosure of movables by the secured creditors. The price may be fixed in foreign currency, however, payments between resident entities shall be converted, automatically, into meticais.

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 security provider and be paid from the proceeds of the referred sale.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Under the Insolvency Law, once insolvency is declared, all existing debts of the debtor shall become automatically due thus, limiting the secured lenders' or creditors' access to the secured asset. Such declaration prohibits the debtor from disposing its assets resulting in the unenforceability of some transactions in which the debtor is involved. Moreover, the creditors are paid with the proceeds of the sale in the following order:

- labour credits;
- secured credits;
- tax credits;
- ordinary credits;
- contractual and tax penalties; and
- subordinated credits.

When different security interests are granted over the same asset, the first (older or higher ranked) 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.

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 that are subject to specific insolvency rules and proceedings in the respective regimes.

The Insolvency Law also provides for the judicial and extrajudicial recovery processes.

The extrajudicial recovery is initiated by the debtor. This procedure is a special mediation procedure in which the recovery plan is negotiated with the creditors, according to the rules of conciliation and mediation provided for in the Arbitration, Conciliation and Mediation Regime (Law No. 11/99, of 8 July 1999).

If the plan is approved by creditors representing three-fifths 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. This regime is applicable to foreign and local creditors, and no special procedures or restrictions apply to foreign creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

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 that may or not require prior authorisation by, or registration with, the Bank of Mozambique (BoM), depending on the nature of the relevant transaction.

The transfer of foreign currency to a non-resident entity is classified as a capital transaction, and therefore is subject to prior authorisation by the BoM. To grant the authorisation, the BoM shall assess whether:

- all tax obligations related to the transaction have been complied with; and
- the transferor has registered its investment therein.

Mozambique has strict foreign exchange rules and regulations whereby foreign exchange (forex) transactions are classified as: current transactions and capital transactions.

Under the Forex Law (Law No. 11/ 2009, of 11 March 2009), all forex transactions classified as capital transactions thereunder require prior approval from the BoM. However, all capital inflows are free of the BoM prior authorisation. It will be the responsibility of the BoM inspectorate to confirm whether such verification has been done, and to apply any corrective measures. Therefore, among others, the following capital transactions do not require the BoM's authorisation:

- investment through loan or credit from a related company. In the case of shareholder loans, these are classified as capital transactions, thus being subject to prior authorisation should the amount being lent exceed US$5 million with an interest rate higher than zero per cent but below the base lending rate of the loans currency, a maturity higher than three years and free of commissions and charges; or a loan with an interest rate is equal to zero per cent and the maturity is equal to or above three years and free of commissions and charges;
- real estate investment by non-residents in the country should have the same treatment as foreign direct investment;
- guarantees related to current transactions and related to the circumstances provided under Notice No. 20/GBM/2017, of 27 December 2017; and
- opening and operating accounts with local financial institutions, in a foreign currency, by non-resident entities.

Further, the following capital transactions require prior authorisation of the BoM:

- real estate investment;
- transactions involving participation units of collective investment undertakings;
- opening and using bank accounts with financial institutions abroad;
- credits related to the transaction of goods or provision of services;
- financial loans and credits, when all the requirements listed below are fulfilled;
- if those requirements are not fulfilled, they won't need previous authorisation;
- guarantees;
- transfers in execution of insurance contracts;
- transactions on securities and other instruments traded on the money and capital markets;
- physical import and export of monetary instruments; and
- personal loans.

Financing contracts entered into with foreign entities are subject to prior authorisation of the BoM.

An exception is made to finance contracts for amounts equivalent to or less than US$5 million and which satisfy the following conditions:

- the interest rate is less than the base lending rate for the relevant currency;
- the sum of the relevant rate and margin is not more than the rate used in Mozambique; and
- 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:

- they are interest-free, the repayment period is at the latest three years and no fees and other charges apply; or
- 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 US$5 million.

In the aforementioned 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.

Finally, no fees are due for obtaining prior authorisation, or registration with, the BoM.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

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 per cent withholding tax is charged on both interest and fees paid to non-resident lenders. Where applicable, value added tax is also due at the rate of 17 per cent on the total income from services rendered for consideration in Mozambique.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Mozambican residents must repatriate foreign earnings and, as a general rule, such earnings must be converted into Mozambican meticais.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

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 legal entities requires prior authorisation by the BoM.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

The minimum value for foreign direct investment through the allocation of own capital is 7.5 million meticais, and the minimum value for annual exports of goods or services is 4.5 million meticais.

Dividend payments are subject to a 20 per cent withholding tax, unless said dividends concern shares listed on the Mozambique Stock Exchange, in which case the withholding tax is 10 per cent. 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 per cent or more of the share capital in an associated company in Mozambique for at least two years. Mozambique has tax treaties with India, Mauritius, Portugal, South Africa, the United Arab Emirates and others.

All transactions with and (or) between Mozambican and non-Mozambican persons or legal entities are subject to either registration or prior authorisation with the Bank of Mozambique (BoM) or both, depending on the transaction at stake. In the case of a foreclosure, the re-exportation of the invested capital is subject to authorisation by the BoM.

To relieve some of the restrictions, investors may elect to apply for an investment project to benefit from the incentives granted by the government. Such incentives include the hiring of a foreign workforce at a higher rate than the general regime, tax exemptions as well as capital incentives (loans or repatriation of invested capital).

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

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).

Special rules apply for insurances in connection with the exploration and production concession contracts in the Rovuma basin under Decree-Law No. 2/2014, of 2 December 2014.

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.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The regimes for the employment of foreign workers in Mozambique that generally apply are:

- the quota regime;
- the work-permit regime; and
- the investment projects regime approved by the government.

Under the quota regime, the allowed quotas for foreign employees are:

- 5 per cent of all workers in large companies;
- 8 per cent of all workers in medium-sized companies; and
- 10 per cent of all workers in small companies.

In all cases, prior notice from the Ministry of Labour of 15 days is required. In the case of the exploration and production concession contracts for the Rovuma basin 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 if 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 workers in the country is sufficient.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

Goods entering Mozambique for use in the country must be cleared through the appropriate customs procedures such as:

- temporary importation;
- temporary exportation;
- re-importation;
- re-exportation;
- customs transit;
- storage;
- industrial free zones; and
- customs warehousing.

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 Southern African Development Community countries. Authorised investment projects and activities under certain sector-specific legislation may benefit from import duties on the importation of capital assets (equipment and machinery).

Goods imported under the temporary importation regime benefit from a grace period 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).

Certain products are excluded from entry under some of these regimes. This 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.

Special rules apply for imports in connection with the exploration and production concession contracts for the Rovuma basin project under Decree-Law No. 2/2014, of 2 December 2014.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Nationalisation is governed by Decree-Law No. 5/76, of 5 February 1976, which determines the reversion to the state of all income from 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 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 the case of public necessity, utility and interest, and compensation shall be payable to the property owner.

Also, Land Law (Law No. 19/97, of 1 October 1997), establishes that the right to use and benefit from the land (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.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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. Legislation provides 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.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The governmental agencies or departments with authority over projects depend 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 entities over projects are:

- the National Institute of Mining;
- the National Institute of Petroleum;
- the Ministry of Land Environment and Rural Development;

- the Agency for the Promotion of Investments and Exports; and
- the Bank of Mozambique.

REGULATION OF NATURAL RESOURCES

Titles

17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Natural resources located in and beneath the soil, in interior waters, in the territorial sea, on the continental shelf and in the exclusive economic zone are the property of the state. Under certain conditions, the state may grant rights with respect to natural resources to private parties by means of licences and (or) concession agreements, provided that such rights are exercised in accordance with the applicable laws and for the benefit of the national economy. The rights granted by the state may include, among others, exploration, mining, treatment, processing and trade, or other forms of disposal of natural resources.

Besides customary obligations such as compliance with environmental and technical regulations, the mining law foresees obligations relating to the preservation of socio-cultural aspects of local communities as well as their adequate relocation.

There are no legal restrictions on the acquisition of natural resource exploration rights by foreigners. However, both the Public-Private Partnership (PPP) Law and the petroleum and mining laws contain provisions that seek to impose the participation of Mozambicans, either through the state or other public entities, or directly by Mozambican companies and individuals, in the structure of the project companies. Between 5 per cent and 20 per cent of the capital of the project company or consortium must be reserved for placement, on commercial terms, on the Mozambique Stock Exchange within five years of commencing the activity, for social inclusion.

Royalties and taxes

18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The extraction or export of natural resources is subject to the payment of corporate income tax, value added tax and other taxes levied under the tax regime applicable to mining and oil and gas activities.

Petroleum production tax is levied on oil and gas produced in each concession area and is due by corporate entities performing petroleum operations under a concession agreement. The tax rate is 10 per cent for oil and 6 per cent for gas and is levied on the value of the oil and gas produced and may be paid in cash or in kind.

The following rules and taxes apply to mining activities:

- the tax of mining production (IPM);
- surface tax (ISS);
- the tax in income deriving from mineral sources (IRRM); and
- special rules to determine the taxable income under the personal income tax corporate income tax.

IPM taxes rates vary between 8 per cent for diamonds, 6 per cent for precious metals, precious and semi-precious stones and heavy sands, 3 per cent for basic metals, charcoal, ornamental rocks, etc, and 1.5 per cent 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 17.50 meticais per hectare and 10,500 meticais per hectare, 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 (prospering licence, research, mining concession or mining certificate).

The IRRM tax rate is 20 per cent on the cash earnings accumulated during the year, determined according to specific rules.

Export restrictions

19 | What restrictions, fees or taxes exist on the export of natural resources?

Generally, the export of goods is exempt from taxes, duties and fees, and that applies to natural resources, however, the existing laws in the natural resources sector establish that at least 25 per cent of the country's oil and gas production should be reserved to the local market.

Further, from a foreign exchange perspective, all invested capital must be registered with the Bank of Mozambique, under the penalty of non-recognition of the right to export profits or dividends as well as the re-export of the invested capital.

GENERAL LEGAL ISSUES

Government permission

20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

With regard to the remittance of capital from a local company to foreign investors, the rules and procedures to be observed in carrying out forex operations provide that the foreign investors (shareholders) and lenders must register, before the commercial bank – acting as an intermediary of the Bank of Mozambique (BoM) – the import of capital within 90 days from the date of transfer of the funds, under the penalty of being filed an infringement proceeding. Further, without prejudice to the consequences foreseen as to the non-registration of forex transactions under the general terms, the non-registration of foreign direct investment after three years from the date of the effective inflow of the investment value determines the non-recognition of the right to export profits or dividends, as well as the re-export of the invested capital. The same applies to the disbursement of loans.

Other than the BoM, the Agency for Promotion of Investment and Exports (APIEX) is another relevant authority with respect to the implementation of an investment project. Depending on the investment amount the government or the APIEX are responsible for the authorisation, monitoring and supervision of investment projects. A fee of 0.1 per cent of the amount of the proposed investment is due for the authorisation of the investment project. With the issuance of the terms of authorisation of the investment project, project companies may benefit from tax, forex and labour incentives.

Registration of financing

21 | 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?

Besides the foreign exchange restrictions associated with cross-border financing structures and transfers of capital outside the jurisdiction, the Civil Code establishes that financing agreements of any amount must be notarised to be valid.

Further, the regulations on the execution of civil construction works (Decree No. 94/2013, of 31 December 2013) impose the obligation of construction contracts being ruled by Mozambican law. Moreover, contractors are obliged to register with the ministry in charge of public works the construction agreements they enter into.

As far as enforceability is concerned, local law project documents must be executed in Portuguese or translated into Portuguese, by a sworn translator. Mozambique is not a signatory of the Hague Convention; therefore, apostilled documents are not valid and cannot be used to instruct notary acts in Mozambique – all official documents issued abroad can be required to be legalised should the notary or registrar doubt the authenticity of the document. Therefore, it is advisable to legalise before the public notary and Mozambican consulate in the country of origin all official documents, issued abroad, to be used to instruct notary acts in Mozambique, and to be couriered to Mozambique for translation purposes.

To ease enforcement, it is advised that all signatures in project documents are notarised by a public notary.

Financing or project documents executed by public entities may be subject to approval by the Administrative Court to become effective.

Special rules apply in the case of the exploration and production concession contracts in the Rovuma basin under Decree-Law No. 2/2014, of 2 December 2014.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

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.

Mozambique is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1998. The Constitution of Mozambique 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 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.

Mozambican law establishes that all disputes are arbitrable, except disputes of a personal nature (eg, family matters) or disputes that are expressly subject to the exclusive jurisdiction of a judicial court.

Disputes about labour rights and disputes arising out of or in connection with administrative agreements are subject to domestic arbitration.

Special rules apply in the case of the exploration and production concession contracts for the Rovuma basin under Decree-Law No. 2/2014, of 2 December 2014.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

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.

If a foreign law is elected in accordance with those rules it will not be accepted if it violates the fundamental principles of Mozambican public policy, and certain Mozambican principles and rules that are mandatory for the projects sector.

Concession contracts and other project agreements entered with public entities are typically governed by general laws and regulations of Mozambique and by specific laws and regulations applicable to the sector where the project will be implemented. Construction contracts relating to works to be carried out in Mozambique must always be governed by Mozambican law.

Financing agreements are typically governed by English 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.

Special rules apply in the case of the exploration and production concession contracts for the Rovuma basin under Decree-Law No. 2/2014, of 2 December 2014.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Submission to foreign jurisdictions and waivers of immunity are generally 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.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Law No. 14/2013, of 12 August 2013, as amended, and related regulations provide upon certain entities the obligation to adopt and implement a compliance programme addressing money laundering/terrorist financing risks.

The investor status does not in itself trigger any anti-money laundering compliance checks or other compliance rules. Yet, while the relevant activity entails wiring money to the Mozambique financial and banking system, the investor may be subject to anti-money laundering (AML) checks. Moreover, should the relevant scope of business be related, notably, to financial, banking, insurance, legal, real estate, mining, automotive, import and export of goods and gaming sectors, the investor will be subject to AML checks from the relevant supervisory body and must implement a comprehensive AML compliance programme.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 | 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

Environmental challenges, including deforestation, declining fish stocks, and loss and degradation of wetlands and rivers, are always critical in typical project sectors and projects are subject to environmental laws and regulations, impact assessments and approvals (as applicable) as well as environmental monitoring.

Projects are facing higher scrutiny from communities and public opinion and social and governance issues are increasingly scrutinised. Companies are increasingly paying attention to gender diversity. The growing relevance of ESG issues is also reflected through the intended inclusion of ESG-related clauses in some agreements. Also, following the global pandemic, project companies are considering implementing carbon footprint control via hybrid working and digitalisation, with environmental benefits (reduced emission of CO_2).

As part of the government's commitment to becoming an inclusive middle-income country by 2030, by using its resources rationally to preserve its ecosystems and sustainable and effective development, the Green Economy Action Plan was developed and approved by the Council of Ministers on 15 October 2013, although ambitious progress remains limited.

As far as reporting and disclosure is concerned, some project companies make voluntary disclosures and created environmental and social management and monitoring plans that assess and manage projects' impact and risks. Particularly, their main focus is to ensure that the projects' environmental and social plans align with the International Finance Corporations Performance Standards and the Equator Principles.

PROJECT COMPANIES

Principal business structures

27 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

The commercial code enriches two commonly used types of business structures: private limited liability company by quotas and private limited liability company by shares. Although, in general, the shareholders are free to choose the form and structure of the company, the state requires entities created for the implementation of projects under the Public-Private Partnership Law to adopt the form of public limited companies.

In addition to funding from shareholders, either through capital contributions or shareholder loans, companies investing in Mozambique are financed almost exclusively through bank financing. There are no known examples of project companies in Mozambique that have financed themselves through the issuance of bonds, commercial paper or shares through the stock market capital. Sovereign financing – through subsidies or guarantees – is not readily available as a credit enhancement mechanism.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Mozambique enacted PPP enabling legislation in 2011, establishing the legal framework for the process of contracting and implementing large-scale projects and business concessions. Pursuant to the PPP Law, a PPP is defined as an undertaking in the public sector (excluding mineral and petroleum resources) or in areas of the provision of public services, in which under contract and with full or partial financing of the private partner, that partner undertakes to provide the necessary investment and perform the corresponding activity for the efficient provision of services or goods, whose availability to users is the responsibility of the state to guarantee.

Further, under the PPP Law, the supply of goods and provision of services to the state, including public works and consultancy in public works are excluded from the PPP Law as well as non-profit activities. Additionally, the PPP Law does not apply to natural resources ventures including the Oil and Gas Sector and the Mining sector.

PPP - LIMITATIONS

Legal limitations

29 | What, if any, are the practical and legal limitations on PPP transactions?

One of the most relevant legal limitations is related to the local content obligations foreseen in the law. In addition to the more 'traditional' local content measures, the PPP Law includes an obligation to sell equity interests in a PPP company in a regulated market as a means of fostering the capacities of the Mozambican capital market, as well as the creation of fixed or variable charges to be paid by the private partner in relation to the value of the PPP project or the revenues obtained, in the context of projects involving the use of natural resources. The appropriateness of these measures has been questioned in the light of the current size of the PPPs on which they are imposed – in the case of the requirement for the PPP companies to float on the capital markets – or simply because they were considered particularly onerous – in the case of the fixed and variable charges provided for in the law.

The hiring of foreign employees is limited and subject to government authorisation. Companies are required to create conditions for the integration of Mozambican employees in jobs of greater technical complexity and management and administration positions in the company. The hiring of foreigners may be done through:

- the quota system (10 per cent, 8 per cent and 5 per cent respectively for small, medium and large companies as defined in law;
- investment projects approved by the government;
- short-term hiring; and
- hiring with authorisation (outside the quota).

Although the legal timeframes for obtaining the above-mentioned registrations and authorisations are relatively short, in practice, these processes can stretch for longer periods.

Capital inflows and outflows are subject to forex control by the Bank of Mozambique.

PPP - TRANSACTIONS

Significant transactions

30 What have been the most significant PPP transactions completed to date in your jurisdiction?

Although the PPP core legislation was enacted in 2011, no PPP projects are currently in place. There was a direct awarding of a PPP structure for water supply, however, the project has not yet commenced.

Nevertheless, and although they do not meet the criteria set out by the PPP legislation, recently, important project finance transactions have been launched or completed.

In H2 2020, the largest project finance structure in African history – which includes public and private partners – reached its financial closing, amounting to around US$24 billion. It corresponds to the Mozambique liquified natural gas (LNG) project led by TotalEnergies and located at the offshore Area 1 of the Rovuma Basin. It encompasses more than 75 trillion cubic feet of gas reserves that has the potential to transform Mozambique into one of the world's top LNG producers. The first phase of the project involves the construction of two LNG trains that turn gas into liquid for transport, with an output expected to reach 12 million tonnes per year. The sponsors also include co-ventures from Mozambique (including the state-owned Empresa Nacional de Hidrocarbonetos EP), India, Japan and Thailand.

Other relevant transactions 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 financing 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 SA and Mitsui & Co, Ltd in connection with project finance loans totalling some US$2.73 billion. The project connects the Moatize coal mine developed by Vale SA 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 US$4.675 billion financing of the Coral South Floating Liquefied Natural Gas (FLNG) project in offshore Mozambique to be developed by Italian oil and gas firm Eni and its partners closed in May 2017. In this co-venture partnership, ExxonMobil owns a 35.7 per cent interest in Eni East Africa SpA (to be renamed Mozambique Rovuma Venture SpA), which holds a 70 per cent interest in Area 4, and is co-owned by Eni (35.7 per cent) and CNPC (28.6 per cent). The remaining interests in Area 4 are held by Empresa Nacional de Hidrocarbonetos EP (10 per cent), Kogas (10 per cent) and Galp Energia (10 per cent). 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 per cent of its entire cost. The financing agreement has been subscribed to 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 per cent share, the local state-owned ports and railways company with a 20 per cent share and the local private-sector consortium Zambeze Integrated Development Corridor (generally known by the acronym CODIZA), with a 20 per cent 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 US$2.7 billion (US$810 million for the port and the remainder for the railway)

GDA ADVOGADOS

Guilherme Daniel
gdd@gdaadvogados.com

Torres Rani, Av. Tenente Osvaldo Tazama/Marginal
Torre 1, Piso 02, Fracção 05
Maputo
Moçambique
Tel: +258 21 498 770
www.gdaadvogados.com

VdA VIEIRA DE ALMEIDA

Teresa Empis Falcão
tef@vda.pt

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 213 113 400
Fax: +351 213 113 406
www.vda.pt

UPDATE & TRENDS

Key developments of the past year

31 In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

The government recently amended the Petroleum Operations Regulation to exempt international concessionaires from registering with the Mozambique Stock Exchange, this obligation applies only to national concessionaires and, in view of the devaluation of the metical, updates the required value to equal to or higher than 40 million meticais for the purposes of a public tender, with the required value for the execution of operations now amended to 80 million meticais.

During the last five years, Mozambique has not witnessed any relevant developments in the project finance area. This was due to the International Monetary Fund (IMF) maintaining its 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.

However, on 9 May 2022, the Executive Board of the IMF concluded a consultation and approved a 36-month extended credit facility for an amount equivalent to 340.8 million special drawing rights (about US$456 million) for Mozambique. The Board's discussion was based on a staff report prepared by a staff team of the IMF, following discussions with Mozambiquan officials on economic developments and policies underpinning the extended credit facility. This outcome may represent a ratification of the IMF's confidence in the Mozambican economy.

The Mozambican economy maintained a gradual recovery, even after the covid-19 pandemic. Inflation declined from a peak of 26 per cent in November 2016 to about 7.9 per cent in April 2022, reflecting the tight monetary policy and exchange rate stability. In terms of real gross domestic product (GDP) growth, in 2020, real GDP variation amounted to a negative 1.23 per cent; whereas the projected real GDP for 2022 amounts to a positive 3.8 per cent. Inflation is expected to reach 8.5 per cent in 2022 (inflation remained at 5.6 per cent in 2021). Nevertheless, these forecasts will certainly be revised upwards given the significant impact of higher fuel and other essential commodities prices resulting mainly from the war in Ukraine. Moreover, the exchange rate is expected to remain stable in 2023, with one US dollar costing between 63 meticais and 65 meticais.

A review of the Electricity Law has been underway for a couple of years and is expected to have a significant impact on the implementation of projects in the energy sector. It is expected that the Electricity Law will still be approved and will enter into force in 2022 or early 2023.

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Portugal

Teresa Empis Falcão and Ana Luís de Sousa

VdA

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Under Portuguese law, various types of security and collateral may be given to secure loans, notably mortgages on real estate and certain movable assets subject to registration (such as automobiles, ships and aircraft), and pledges on movable assets in general, including equipment, receivables, bank accounts, credits, deposits and shares (including new shares to be acquired). It is then possible to create security over different assets through a single security agreement.

The law generally requires the secured assets to be determined (although security over future assets and credits may be permitted in specific situations) and the concept of a floating charge does not apply under Portuguese law. As an exception to those principles, the 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

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Immovable and movable assets

Mortgages are created by means of notarial deeds and must be registered as a condition for the validity (and not only perfection) thereof. Ranking of creditors is determined and evidenced by priority of registration of security at the relevant registry.

The law permits mortgages to cover fixtures (buildings, plants and machinery) not incorporated into the relevant property at the time of creation of security, a legal mechanism commonly used in the context of project financing of industrial premises (eg, factories and power stations). The creation of said security interests over plant and machinery may be made by means of a specific type of mortgage – the factory mortgage – which covers the property and surface rights over the land and buildings where the factory is located, and the equipment and the movable assets used in the factory's activity, which are identified in an inventory attached to the mortgage deed.

Pledges are the form of security interest entitling the beneficiary to be paid from the proceeds of a sale of movable (non-registered) assets or of credits. Pledges must generally be executed in writing and require the pledgor to make available to the beneficiary the relevant asset (transfer of possession, an exception being made to movable assets pledged in favour of banks under documents authenticated by a notary) or the documents enabling the beneficiary (or a relevant third party) to sell the asset or enforce the credit.

Receivables

A pledge over receivables qualifies as a pledge of credits under the law. Accordingly, in addition to the above-mentioned requirement, validity of this type of pledge requires that the counterparty of the pledgor (the credit of which has been granted in security to the pledgor financier) is served notice of the pledge.

A pledge of receivables covers all future payments to be made pursuant to the relevant contract. Save as otherwise provided for in the security agreement, the debtor will only be released from its obligations by making payments jointly to the pledgor and the pledgee. Pledge agreements generally permit payments to be made to the pledgor until enforcement of the secured debt.

Bank accounts

There may be a pledge over cash deposited in bank accounts, which also qualifies as a pledge of credits. This is typically achieved through financial pledges (ie, those created in accordance with the financial collateral regime (Decree Law No. 105/2004, of 8 May 2004, as amended, which implemented the Directive on Financial Collateral Arrangements into Portuguese law)), which allow the beneficiary to use and dispose of the deposited funds.

Shares

Security is created by means of a pledge, entailing a pledge declaration written by the pledgor on the certificates and a request for registration on the share ledge book (nominative shares represented by certificates) or an entry as to the creation of the pledge in the bank account of the pledgor (dematerialised shares). Share pledge agreements are also typically construed as financial pledges.

It is possible to create pledges over quotas (immaterial nominative representation of participation in the share capital of a company). These pledges must be made in writing, require registration with the Commercial Registry Office of the head office of the company and are not construed by law as financial pledges.

Trusteeship is not recognised under Portuguese law. Instead, security in Portugal is commonly held by a security agent on behalf of project lenders and the security agent is generally the only entity empowered to enforce security. The agency mechanism, sometimes coupled with parallel debt-type and similar arrangements, has to date proved sufficient to establish the value of the debt in the security agent's books for purposes of enforcement as well as to make parties comfortable as regards segregation of the agent in a bankruptcy context (however, no insolvency of a project's security agent has happened to date, and, therefore, no such contractual arrangements have yet been tested in that context).

Stamp duty is levied on security interests created in Portugal and the relevant rate applies to the secured amount under the relevant security interest (the amount of credit, the value of the asset or an agreed secured amount). Exemption of stamp duty over security interests applies when the security instruments are ancillary and simultaneous with the loan (ie, when they are executed concurrently with the documentation of the loan they purport to secure and such loan has itself been subject to stamp duty). Subjective exemptions may also apply, notably in relation to loans granted by or security granted to institutions such as the European Investment Bank.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Regarding real estate and certain movable assets (such as nominative shares), priority is established by means of registration, such registration becoming public record. As such, a creditor may receive information concerning all existing encumbrances, as well as their rank and amount.

With regard to assets not subject to registration, assurance over the absence of liens may only be obtained through possession or on the basis of representations and warranties by the pledgor.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

If a project company breaches its obligations under a loan facility agreement, the creditors may issue a formal demand for full repayment of the loan and further enforce any security that has been granted in relation thereto.

Mortgages are enforced by means of a sale of the relevant assets (normally by an auction system) within specific court proceedings, while a private (out of court) sale is permitted for enforcement of pledges. Appropriation or foreclosure as enforcement mechanisms are generally not permitted under Portuguese law, save in the context of financial collateral or (as authorised by the enactment of Decree Law No. 75/2017, of 26 June 2017) of pledges securing commercial obligations provided that the beneficiary of the guarantee shall reimburse to the guarantor the amount corresponding to the difference between the value of the pledged assets (valued in accordance with the criteria set out in the relevant agreement) and the amount of the obligation guaranteed.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Upon the opening of bankruptcy proceedings, all security other than financial pledges over the insolvent party'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.

The insolvency order from the court has the effect of suspending outstanding executory proceedings directed at the attachment or seizure of the insolvent's assets and preventing the enforcement of security (and any new executory proceedings) against the insolvent estate. Accordingly, once initiated, all creditors must claim their credits (and provide evidence of any security as collateral thereto) within the bankruptcy proceedings.

The law qualifies certain transactions as detrimental to the insolvent estate and to creditors' rights. Project lenders typically tend to establish arrangements leading to creation of security preferably at the outset of a project, and tend to avoid security arrangements that lead to the creation of security interests during the project company life, that is, within what they consider to be probable repudiation or clawback periods (to avoid discussions as to eligibility of security).

After payment of the costs of the insolvency proceedings (which must be settled prior to all other claims), creditors shall be paid in the following order:

- employees' claims over the specific company premises where they carry out their activity;
- property taxes;
- secured claims (those with security over assets that are part of the insolvent estate up to the value of those assets);
- preferential claims, including:
  - 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;
  - certain debts to the tax and social security authorities;
  - claims by creditors that have provided capital to finance the insolvent's activity during the proceedings over all movable assets of the insolvent; and
  - claims by the party that applied for the opening of the insolvency proceedings;
- unsecured claims; and
- subordinated claims (eg, the credits of related parties). Bankruptcy proceedings are generally applicable to all persons or legal entities, with the exception of the Republic of Portugal and public or 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).

No different rules apply to domestic or foreign creditors.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

There are no restrictions on foreign currency exchange or transfer, save those resulting from applicable EU money laundering controls and reporting obligations to the Bank of Portugal in the context of transactions.

No specific taxes apply to foreign exchange transactions, although general taxes – corporate income tax on income arising therefrom and stamp duty on banks' commissions – do apply.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Interest in relation to loans 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 per cent (this rate may, under certain circumstances, be increased to 35 per cent). Payments of interest in relation to loans and financial fees also attract stamp duty at a rate of 4 per cent.

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 to which Portugal is a party.

A participation exemption regime for dividends (and capital gains) also applies under Portuguese law. This has extended the cases in which dividends paid to entities in other jurisdictions are not subject to withholding tax.

No stamp duty or withholding tax applies in relation to interest payments made in respect of the bonds registered with the Portuguese central securities depository (Interbolsa) to bondholders who are not Portuguese residents and do not have a permanent establishment in Portugal.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no restrictions on the remittance of profits or investments abroad – in local or foreign currencies available in the market – and no such requirements for repatriation arise from Portuguese law.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Under Portuguese law, certain activities may only be exercised by private entities – whether national or foreign – pursuant to licencing or concessions granted by the state (as is the case of certain activities within the energy, water, waste management, postal services, telecoms, railways, commercial aviation and financial services sectors).

A specific framework is set forth with respect to strategic assets that allows the Council of Ministers to oppose transactions that may lead to the acquisition of control, direct or indirect, by a person or persons of a country outside the European Union and of the European Economic Area, to the extent that such transactions may put into question the defence and national security, or the country's security of supply of services that are fundamental for the national interest.

Portugal abides by the Law on Money Laundering and the Financing of Terrorism, which transposed the EU Money Laundering Regulations into Portuguese law, which may entail further restrictions on both national and foreign investors. There may also be temporary embargo situations applying to persons or entities from non-EU states.

There is no distinction regarding foreign investors or creditors in the context of foreclosure on a project and related companies.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

There are no restrictions on insurance policies being provided or guaranteed by foreign insurance companies and no specific taxes or charges apply in connection thereto.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The employment of workers from non-EU countries requires that such workers be granted a work visa, which includes a residence permit, to live and work in Portugal.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

There are no restrictions on imports, the import of goods being in general a taxable event for the purposes of value added tax and customs duties, applying at the time the goods pass customs.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Private property is a constitutional right, nationalisation or expropriation being only permitted on the grounds of public interest and subject to payment of compensation to private entities.

There is a specific legal framework setting out the terms for the expropriation process and calculation of indemnification payable in relation to immovable assets. No similar legal framework exists 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 is no distinction between domestic and foreign investors for this purpose.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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 implemented tax regimes directed at the promotion of foreign investment, comprising tax incentives to investment in specific business sectors (eg, the mining and manufacturing industry), under the form of corporate income tax deductions and exemptions or reductions in real estate tax, real estate transfer tax and stamp duty.

Foreign investment made in Portugal through a subsidiary or other form of local permanent representation will make the affiliate subject to the taxes generally applying to Portuguese companies and corporate activities.

Transactions made without a local presence will generally trigger payment of withholding tax on income and dividends.

Foreign loans and security instruments will be subject to the transaction taxes generally applying in Portugal, in particular, stamp duty at varying rates (typically 0.5 or 0.6 per cent depending on the maturity of the loan or the term of the security). Stamp duty will be levied on the value of the loan or the secured amount under the collateral instrument, and exemptions may be available for security created concurrently with taxable loans (eg, collateral granted to financial institutions).

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The ministers entrusted with the supervision of the relevant sectors (energy, infrastructure, transport, health) are in general responsible for the initiative as well as for licensing and regulation of projects in the sectors under their supervision. This may be done by the specific departments or agencies functioning under the relevant ministries (energy, roads, health, etc). The involvement of the Minister of Finance is also required for the launch of any PPP project.

Moreover, reference should be made to the Unidade Técnica de Acompanhamento de Projetos, an administrative entity under the supervision of the Ministry of Finance, created for the follow-up of PPP projects.

In addition to the governmental authorities, the independent regulatory authorities for each specific sector (eg, the Entidade Reguladora dos Serviços Energéticos, the Autoridade Nacional de Comunicações, the Entidade Reguladora dos Serviços de Águas e Resíduos and the Autoridade da Mobilidade e dos Transportes) are invested with regulatory and supervisory powers over the respective sectors, notably responsible for enforcing the applicable rules and regulations and monitoring the development of each respective sector, both in dealing with private companies acting therein and with consumers.

Additional ownership restrictions and authorisation requirements may apply with respect to exploitation of natural resources.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Mineral resources, as well as water, are generally in the public domain and may not be appropriated by private entities (whether national or foreign), although their economic use may be granted by means of concession or similar type of right of use that does not entail the transfer of property of the relevant assets or resources. 'Water' means not only the actual resource but the entire sea (within the boundaries of the Portuguese international jurisdiction), the riverbeds and other bodies of water, as well as the corresponding margins and shores.

With the exception of the above cases, land and other assets may generally be owned by private entities, as no distinction generally exists between national and foreign entities in this respect.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The extraction of oil (but not of natural gas) is subject to a specific taxation regime, also including the payment of fees on prospecting, research and production oil concessions, calculated by reference to the relevant concession area.

Excise duties also apply to the supply of petroleum and energy products to final consumers, in line with EU legislation.

With regard to mining resources, there are no general rules concerning royalties payable to the state. Royalties are, nevertheless, typically negotiated and included in prospecting and exploitation agreements, and they may be either excise- or profit-based.

The extraction of natural resources may also be subject to the general taxes applicable within the tax system, namely corporate income tax and value added tax.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

The export of natural resources may be subject to the general taxes applicable within the tax system, namely corporate income tax and value added tax.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Project finance transactions pertaining to agreements entered into with governmental authorities typically require the intervention of the relevant governmental body. In certain cases, sector-specific government approvals or authorisations may be necessary, as is the case with transactions within regulated areas (such as energy projects).

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.

Moreover, certain mergers, acquisitions or joint ventures may be subject to either EU merger control rules or Portuguese merger control

rules, in the latter case requiring the non-opposition of the Portuguese Competition Authority.

No fees or charges are typically applicable as a direct result of such transactions, without prejudice to amounts that may be contractually due under concession agreements as consideration for the rights granted thereunder.

Registration of financing

21 | 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?

Save for the references made above in the context of registration of security, project documents are generally valid and enforceable without any need for registration, authentication or filing with any governmental authority. However, powers of attorney and other notarial instruments executed abroad are required to be authenticated with an apostille (Hague Convention) or similar formality to be accepted by the equivalent Portuguese authorities.

To ensure swift enforcement of a private agreement acknowledging a payment obligation, or the appropriation of a commercial pledge created pursuant to the recently enacted Decree Law No. 75/2017, of 26 June 2017, it is advisable to have the same authenticated by a notary.

Arbitration awards

22 | How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

International arbitration clauses are generally recognised by Portuguese courts, irrespective of the rules applying – Portuguese arbitration law or the commonly chosen rules of international centres such as the International Chamber of Commerce, the London Court of International Arbitration and the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) – or of the seat of arbitration. Foreign arbitral awards are recognised and enforced in Portugal under the applicable international treaty or generally under the New York Convention.

Portugal is a party to the following international conventions:

- the Geneva Protocol on Arbitration Clauses of 1923;
- the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;
- the New York Convention, which entered into force in Portugal on 16 January 1995;
- the Inter-American Convention on International Commercial Arbitration, adopted in Panama on 30 January 1975; and
- 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.

The enforcement of foreign awards not covered by any of these international treaties will be carried out via the general provisions of the Portuguese Arbitration Act, which closely follow the principles of the UNCITRAL Model Law and the New York Convention.

On a bilateral level, Portugal has a number of bilateral agreements with Portuguese-speaking countries that are directed at equating arbitral awards to judgments by the national courts. There are treaties in force with Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and the Special Administrative Region of Macao (People's Republic of China). 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.

Law governing agreements

23 | Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Other than in the case of concession contracts and certain project agreements entered into with public entities – which are normally required to be governed by Portuguese law – parties are in general free to choose the governing law of contracts.

Project and finance documents for projects in Portugal are typically governed by Portuguese law, although finance documents in international syndicated loans or bond issues are not uncommonly governed by English law, with the associated security documents subject to Portuguese law. Irrespective of the governing law of the contract, Portuguese rules shall mandatorily apply to the creation and enforcement of security instruments, to insolvency and to certain company arrangements (for instance, in the context of shareholder agreements of Portuguese companies).

Submission to foreign jurisdiction

24 | Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

The parties may freely choose to submit any disputes to a foreign jurisdiction. Indeed, 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, eg, proceedings relating to local land, the validity of the incorporation or dissolution of companies domiciled in Portugal, the validity of entries in public registers or the registration and validity of patents.

Disputes concerning collective labour rights and sports regulation are subject to mandatory domestic arbitration (Decree Law No. 110/2018, of 10 December 2018, which altered the Code of Industrial Property, as well as Law No. 62/2011, of 12 December 2011, and, consequently, intellectual property rights related to medicines are now subject to voluntary arbitration, not mandatory arbitration).

In addition, waivers of immunity are generally 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.

Anti-money laundering rules

25 | Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Law No. 83/2017, of 18 August 2017, as amended (the AML Act), and related regulations establish the obligation of certain entities to adopt

and implement a compliance programme addressing money laundering or terrorist financing risks.

The investor status does not in itself trigger any anti-money laundering compliance checks or other compliance rules. Yet, while the relevant activity entails wiring money to the Portuguese financial and banking system, the investor will be subject to AML checks. Moreover, should the relevant scope of business be related, notably, with financial, banking, insurance, legal, real estate, mining, automotive and gaming sectors, the investor may be subject to AML checks from the relevant supervisory body and must implement a comprehensive AML compliance programme.

In this context, it is important to note that Decree Law No. 109E/2021, of 9 December 2021, on anti-bribery and anti-corruption (the ABC Law), which entered into force on 8 June 2022, imposes several ABC-related obligations upon entities with 50 or more employees as well as to local branches of foreign entities that fulfil that requirement. Entities subject to the ABC Law have the obligation to, inter alia, adopt and periodically revise corruption prevention plans, as well as to draft and implement specific instruments and procedures provided therein.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 | 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

ESG issues are quite relevant in all typical project sectors given the long-term nature of projects and the underlying nature of the special purpose vehicle credit risk mostly linked (if not wholly) to the project. Environmental issues are always critical in typical project sectors and projects are subject to environmental laws and regulations, impact assessments, approvals (as applicable) and environmental monitoring.

Projects are also facing higher scrutiny from communities and public opinion; social and governance issues are increasingly scrutinised. Companies are increasingly paying attention to gender diversity in boards and leadership positions, even though this is only mandatory under Portuguese law for large companies or public companies. Attention to supply chain considerations is also increasing.

Project companies which are part of larger groups usually abide by the sustainability strategy of the group – this is particularly relevant in the case of renewables.

As regards financings, we note the Equator Principles adopted by the financial institutions. Additionally, when projects resort to sustainable financings, projects are thoroughly assessed, including for the purposes of issuance of the Second party Opinions and subsequent monitoring – such as for the financing of some renewable energy projects.

The growing relevance of ESG issues is also reflected in new clauses being added to project and financing agreements, reflecting the concerns of sponsors and lenders in ensuring that ESG issues are complied with by counterparties (such as human and labour rights, anti-bribery, anti-corruption, etc). Also, new considerations are being added to all due-diligence processes.

As regards ESG reporting requirements, only large (500 or more employees) listed companies (and large banks and other financial undertakings) are subject to ESG reporting requirements:

- under Law No. 89/2017, of 27 July 2017 (that implements Directive 2014/95/EU (Non-Financial Information Reporting Directive) (NFRD) and, more recently;
- under Commission Delegated Regulation (EU) 2021/2178, of 6 July 2021, applicable as from January 2022 (only climate-related issues).

Some project companies make voluntary disclosures, the most common reporting standard being the Global Reporting Initiative. A few companies (mostly those that are carbon-intensive and (or) committed to carbon emissions reduction targets) also report on a voluntary basis under the Recommendations of the Task Force on Climate-Related Disclosures.

PROJECT COMPANIES

Principal business structures

27 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies are usually established as special purpose vehicles (SPVs) for a single project, which then subcontract works (namely, operation and maintenance or construction works) for the development of the project. Such SPVs typically secure financing primarily through national or international lending syndicates, but capital markets and EU-level or state subsidies may also be important sources of financing.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Portugal has enacted PPP legislation with a broad national scope. Decree Law No. 111/2012, of 23 May 2012, as amended, sets out the main principles applicable concerning the relationship between public and private entities, public procurement, risk sharing and transparency. There is also specific legislation for PPPs in the health sector (Decree Law No. 185/2002, of 20 August 2002, which was heavily amended by Decree Law No. 111/2012, of 23 May 2012).

Nonetheless, each individual project (and in light of any specifications thereof) remains subject to compliance with the regulatory framework that may be applicable.

PPP - LIMITATIONS

Legal limitations

29 | What, if any, are the practical and legal limitations on PPP transactions?

The principles and procedures set out in Decree Law No. 111/2012, of 23 May 2012, shall govern the relationship of the state with the private sector in these agreements.

Moreover, with regard to contracts between the state and private entities, the rules of public procurement set out in the Public Procurement Code must be complied with, PPP contracts being typically awarded pursuant to public tender procedures.

These agreements are normally required to be subject to the prior audit of the Audit Court for purposes of approval of the associated public expenditure. Further, any amendments to these agreements that may involve an increase in costs or obligations of the state or state-owned entities must also be subject to such audit.

PPP - TRANSACTIONS

Significant transactions

30 What have been the most significant PPP transactions completed to date in your jurisdiction?

Relevant PPP or project-related deals completed recently (some of which took place during the covid-19 pandemic) that are worth mentioning (both by size and relevance in this context) are the following:

- the consensual orderly handover of a road concessionaire to its project finance lenders ensuring the continuity of the road operation and the protection of the public interest after the first-ever step-in by project finance lenders in a concessionaire in Portugal;
- the refinancing of existing debt of the Vauban group incurred in connection with the acquisition of a road concessionaire and in Portugal;
- the financing by EIB and Banco BPI (CaixaBank) of a wind-farm portfolio with 125.25 megawatts (MW) of installed capacity;
- the financing by EIB and Banco BPI (CaixaBank) of a wind-farm portfolio with 96MW of installed capacity and benefitting from a feed-in tariff;
- the refinancing of the Finerge group debt and operations in excess of €700 million, one of the largest wind financings in Europe, and the longest tenor renewables deal and largest green loan deal in Portugal;
- the €150 million refinancing of existing debt of the Finerge group incurred in connection with the acquisition of two solar plant portfolios in Spain and Portugal;
- the €59 million refinancing of existing debt of the Finerge group incurred in connection with the acquisition of one solar plant portfolio in Portugal;
- the financing of 40 photovoltaic small-scale generation units, including several regulatory and real estate matters, which, due to the size and specificities of the project of each production unit, had led the project to be structured in such a way that carves out mechanisms to prevent contamination of projects and allow for long-term flexibility and solidity;
- the refinancing by an international syndicate of banks (including commercial banks and EIB) of the debt of approximately €240 million of six port operators, owned by the same shareholder;
- the refinancing of existing debt of a windfarm portfolio with 125.25MW of installed capacity and a wind farm portfolio with 96MW of installed capacity and benefitting from a feed-in tariff in connection with the exit of the European Investment Bank and Banco BPI, SA of the financing and the entry of Banco Santander Totta, SA; and
- the refinancing of a wind and hydro portfolio installed in Portugal, comprising 10 wind power plants with a total installed capacity of 423,4MW and nine hydro plants with a total installed capacity of 33,2MW developed by 14 SPVs, part of Generg's group.

UPDATE & TRENDS

Key developments of the past year

31 In addition to the above, are there any emerging trends or 'hot topics' in project finance 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 the new public-private partnership in the health sector, whose tender is ongoing, the ports sector has also been attracting the attention of investors.

VIEIRA DE ALMEIDA

Teresa Empis Falcão
tef@vda.pt

Ana Luís de Sousa
als@vda.pt

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 213 113 400
Fax: +351 213 113 406
www.vda.pt

The energy market also remains attractive with the new wave of merchant solar power plants under development in the context of the award through public tenders of 1.8 gigawatts (GW) of installed capacity in 2019 and 2020 and an additional 183MW of installed capacity in 2022 for the first floating solar power plants, as well as the announcement of an additional 17GW of capacity to be granted through agreements with the grid operators for reinforcement of grid capacity.

With the recent enactment of the new legal framework for the energy sector and the Portuguese government's willingness to accelerate the achievement of renewable generation targets proposed before the European Commission, it is expected that the overpowering, repowering and hybridisation of brownfield projects and financing thereof or refinancing of the existing portfolio takes place in the coming years.

Besides green loans and sustainable finance, mobility projects are also expected to bring new financing opportunities.

The activity in secondary market sales of participation in project companies in the road, ports, water and energy sectors continues. 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 were within the context of merger and acquisition deals, with recourse to bond issues by Portuguese issuers and registered with the Portuguese clearing and settlement house, Interbolsa. 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.

South Korea

Michael Chang, Sang-Hyun Lee, Yong Hwan Jeong and Se Ra Song
Shin & Kim

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

The types of collateral and security interests are as follows:

- *keun*-mortgage on real property;
- *keun*-mortgage on concession rights;
- *keun*-mortgage on factory assets;
- real estate mortgage trust;
- *yangdo-dambo* in relation to movables;
- *keun*-pledge over shares;
- *keun*-pledge over bank accounts;
- *keun*-pledge over insurances; and
- assignment of contractual rights (*yangdo-dambo*).

In a *keun*-mortgage, any existing lien would have a significant impact on the value of the security interest over the same collateral. In practice, it is unlikely that any existing lien would remain undiscovered during a due-diligence exercise on the project that would be complete prior to execution of the relevant finance agreements.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Keun-mortgage on real property

A *keun*-mortgage is registered with the relevant Registry Office of the Supreme Court of Korea.

Keun-mortgage on concession right

In relation to a private investment project under the Act on Public-Private Partnerships in Infrastructure (the PPP Act), by way of execution of a concession agreement between the government and the concessionaire, the concessionaire completes the construction of the facilities and transfers its ownership to the government, and the concessionaire is granted the concession right.

As the government retains the ownership, lenders cannot establish a mortgage on the relevant properties and this is an obstacle to obtaining successful project financing. To prevent this, the concessionaire is granted a concession right. The PPP Act treats the concession right as a real property right under the Civil Act, and the government maintains a register for the concession right granted, which is equivalent to the Registry Office's keeping of the registry. The lenders can establish a *keun*-mortgage on the concession right and the *keun*-mortgage is registered with the government's register.

Keun-mortgage on factory assets

Various assets, including real estate, movables, lease rights and intellectual property rights, among other rights, may be attached together as a collective 'factory asset', and a new ownership right can be initially established in relation to the factory asset (registration of the ownership right of the factory asset) and, thereafter, a *keun*-mortgage can be established on this ownership right. Various assets can be jointly mortgaged and, as such, creditors may find this convenient.

Power plants, terminals and waste management facilities are also recognised as factories and the concept of the factory asset may also be used in such projects. To preserve the ownership right, registration is required in advance with respect to a factory asset. In relation to a registration officer's acceptance of the application for registration for the preservation of ownership right, a public notice that requests a person entitled to the movables constituting the factory asset or a creditor under attachment or injunction procedure such as provisional attachment to report its rights, must be published in the Official Gazette. The reporting period is generally between one and three months (two months on average). The public notice is required since a new ownership right (the ownership right over the factory asset) is being created by attaching various assets.

Once the ownership right over the factory asset is created, a *keun*-mortgage on the factory asset may be registered with the Registry Office of the Supreme Court of Korea.

Real estate mortgage trust

The ownership right is registered under the name of the trustee for the purpose of entrustment of the collateral.

The original trust agreement is filed with the registry and, as such, the lenders are listed in the registry as preferred security holders.

Yangdo-dambo in relation to movables

A transfer of possession is required to establish a security (in the form of a pledge) with respect to a movable. However, no physical delivery is necessary if a *yangdo-dambo* is being established on a movable. For example, the *yangdo-dambo* method is used with respect to a movable property, such as a wind turbine, which is not recognised as a building. Accordingly, a *keun*-mortgage cannot be established over a wind turbine as it is not real property. However, the *yangdo-dambo* method is useful in this context as the borrower must continue to operate it and, accordingly, the lender cannot take its possession.

To establish a *yangdo-dambo* over a movable, the disclosure procedure known as a 'recognition method' must be used to notify the public that a *yangdo-dambo* has been established. In practice, this notice is printed, laminated and attached to the movable.

Keun-pledge in relation to the shares

Possession of the shares is transferred to the lenders. In practice, the security agent retains the share certificates.

The name of each pledgee (as opposed to the security agent) is recorded on the back of the share certificate.

The pledgee's name and address are recorded in the shareholders' registry maintained by the issuer of the shares.

The Act on Electronic Registration of Stocks, Bonds, Etc (the Electronic Registration Act) has been in effect since September 2019. Under the Electronic Registration Act, a *keun*-pledge can be created over electronically registered stock by registering the establishment of that *keun*-pledge and the pledgee's name in the pledgor's electronic registration account, pursuant to an application by the pledgor. While the Electronic Registration Act requires certain securities, including listed stock and the stock of Investment Companies (as defined under the Financial Investment Services and Capital Market Act), to be registered electronically, project companies that are established to develop a project seldom register their stock electronically in practice.

Keun-pledge in relation to a bank account

Establishment of a *keun*-pledge on the account is notified to the account bank and the account bank must provide its consent with a fixed date stamp.

The account passbook is retained by the lenders. In practice, the account passbook is held by the security agent.

Keun-pledge in relation to insurance

Establishment of a *keun*-pledge on the insurance is notified to the insurance company and the insurance company must provide its consent affixed with a fixed date stamp.

The insurance policy is retained by the lenders. In practice, the insurance policy is held by the security agent.

It is recorded in the insurance policy that a *keun*-pledge has been established on the insurance and the name of each pledgee (as opposed to the security agent) is also recorded.

Assignment of contractual right (*yangdo-dambo*)

Assignment of contractual right must be notified to the counterparty to the contract (eg, a construction company under an engineering, procurement and construction (EPC) contract or a government authority under a concession agreement) and the other party must provide consent affixed with a fixed date stamp.

The counterparty will consent to the lenders replacing the role of the borrower if a default is triggered and the lenders have enforced the assignment of contractual rights. On an additional note, the consenting party may defer its exercise of termination right after an event of default has been triggered to allow the lenders to cure the default. In particular, if a cause of termination set forth in the relevant contract subject to the assignment of contractual right (eg, an EPC contract) has been triggered, the consenting party may notify the security agent that a cause of termination has been triggered, but nevertheless refrain from terminating the contract for, say, three months, and allow the lenders a remedy period of three months. In this instance, the lenders will pledge that they will jointly undertake the project company's obligations.

With respect to the consent noted above, if the counterparty refuses to provide such consent despite the borrower making reasonable efforts to obtain consent (eg, if Korea Gas Corporation (KOGAS) is the off-taker under a gas purchase agreement for a liquified natural gas-fired power plant, KOGAS often declines to provide such consent), if the underlying contract does not have any restriction on the granting of security or assignment, in practice only notice of the creation of the assignment over contractual rights needs to be provided.

Formalities

A *keun*-mortgage that is established is registered in the register maintained by the Registry of the Supreme Court of Korea and the registration expense includes registration and licence tax, municipal education tax and the purchase of national housing bonds. Such expense is determined based on the maximum amount of the secured obligation. The registration expense cannot be deferred or reduced. However, national housing bonds are generally purchased and immediately sold off at a discount. If the maximum amount of the secured obligation is large, a real estate mortgage trust is often used. However, it should be noted that the trust scheme still incurs fees for the trustee, although it is generally cheaper than the costs involved in establishing a *keun*-mortgage. Generally speaking, lenders prefer a *keun*-mortgage over a trust scheme.

A *keun*-pledge created over electronically registered stock will be registered in the pledgor's electronic registration account.

Assignments of contractual rights (*yangdo-dambo*) and *keun*-pledges are not registered and do not incur any expenses.

How is its priority established?

A subordinated lender may have a subordinated security right (eg, a second priority *keun*-mortgage). A real estate mortgage trust may also have such subordinated security rights (eg, a second priority beneficial interest). A second priority *keun*-pledge may be established in favour of a subordinated lender over the borrower's right to request the return of share certificates, deposit certificate (passbook) or insurance policy. In the case of *yangdo-dambo*, a second priority security right can be established so that a security manager treats a senior lender and a subordinated lender with a different level of priority.

Subordination by contract is a frequently used mechanism. If there is a senior loan and a subordinated loan, a separate intercreditor agreement may be executed or creditors make an agreement on common terms. This intercreditor agreement or agreement on common terms is honoured by a rehabilitation or bankruptcy court under the Debtor Rehabilitation and Bankruptcy Act.

One of the major issues relating to an intercreditor agreement is whether subordinated creditors would be permitted to participate in the decision-making process of creditors. The creditors' agreement also includes provisions relating to:

- the order of application of amounts repaid by the borrower or proceeds from foreclosure or insurance;
- the declaration of acceleration by a subordinated creditor; and
- the conditions on amending a subordinated loan agreement, etc.

Structural subordination is frequently used in mergers and acquisitions financing transactions in South Korea, although it is not used often in project financing transactions. In most South Korean project financing transactions, the borrower is the project company and does not comprise numerous entities. That said, structural subordination is possible for project financing and can be enforced by a court. For instance, if a lender provided a loan to a parent company and another lender provided a loan to a subsidiary of the parent company, a creditor of the subsidiary would have priority over any of its shareholders (ie, the parent company) with respect to the operating income of the subsidiary. Therefore, the parent company would be subordinated to the creditor of the subsidiary with respect to the operating income of the subsidiary, meaning that the rights of the lender of the parent company would be structurally subordinated to those of the lender of the subsidiary.

One of the principles underlining the Civil Act is that of 'subordinate nature'. According to this principle, a security right may only exist subject to the existence of the relevant secured obligations, and a creditor must be the secured party; any creation of a security right in favour of a third

party that is not a creditor is invalid. Accordingly, it is not permissible to create a security right in favour of an agent or trustee that is not a lender.

While security agents are always involved in project finance transactions in South Korea, the security agent does not become a secured party because of the above principles, and secured parties are always the same as the lenders. For example, for the creation of a *keun*-mortgage, if there are 10 lenders, all of the 10 lenders must be registered as creditors and secured parties in the *keun*-mortgage register. The security agent conducts only administrative tasks, etc, relating to security management, execution of security and the distribution of the proceeds acquired through the enforcement of security.

For a real estate mortgage trust, the ownership of the mortgaged property will be transferred to the trustee for the purpose of establishing the security interest, and a lender will become a beneficiary of the mortgage trust. In the mortgage register, the trustee will be described as the owner of the mortgaged property and a lender will not be described as a creditor or a secured party in the register, although it will be specified as a preferred beneficiary as the trust ledger for the mortgage trust is described together in the register. Importantly, as the real estate mortgage trust is not registered as a right granted by way of security but as a transfer of ownership, the 'principle of subordinate nature' is irrelevant. However, because the trust ledger for a mortgage trust must be specified in the mortgage register, registration of a modification is required each time a preferred beneficiary is changed, meaning that it is difficult to enjoy the benefit of parallel debts. This is another reason why in practice lenders prefer a traditional *keun*-mortgage over a real estate mortgage trust.

In the event a security agent becomes a creditor owing to an assignment of receivables by a lender to the security agent and a security right is established in favour of the security agent; an acceleration event occurs; or the security agent enforces the security right and distributes the proceeds to the lenders, benefits similar to that of a parallel debt structure can be enjoyed, the lenders would only have rights to receivables against the security agent without any security rights. Accordingly, lenders rarely adopt the aforementioned parallel debt structure through the creation of rights to receivables against a security agent.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

There are liens that exist under law that may have priority (eg, worker's lien or lien for unpaid employee severances, etc). These are similar to those found in many jurisdictions. The following is subject to these liens.

In the case of a security that requires registration such as a *keun*-mortgage and a real estate mortgage trust, the list of security interests created on the secured asset is specified in the security register.

As a share, a *keun*-pledge is created by delivering share certificates, and the creditor can confirm that there is no other senior *keun*-pledge over the pledged shares by receiving and reviewing the relevant share certificates. That confirmation can be made more conveniently by reviewing the relevant electronic registration account in respect of a *keun*-pledge created over electronically registered stock.

In the case of a *keun*-pledge of insurance, the list of *keun*-pledge interests created over the insurance policies is specified on the relevant insurance policy in practice, meaning that the establishment of any other senior *keun*-pledge over the relevant insurance policy can be confirmed by reviewing it.

In the case of a *yangdo-dambo* in relation to movables, the practice is to publish the establishment of a security interest by the disclosure procedure known as a 'recognition method', although it is not as binding as registration.

Keun-pledge interests over deposits and *yangdo-dambo* over agreements are not separately disclosed. However, in completing the perfection steps, although any existing lien would have a significant impact on the value of the security interest over the same collateral, in practice, it is unlikely that any existing lien would remain undiscovered during a due-diligence exercise on the project, which would be complete prior to execution of the relevant finance agreements.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

If a default under a loan agreement has been triggered, a lender may enforce its security interest. The lender may apply to the court for a voluntary auction based on the security documents and the process may take one to six months depending upon the bidder's status and bidding price. There is no need to obtain a court's judgment or order as the application for a voluntary auction to the court is based on the security documents. However, in practice, application for a voluntary auction to the court is uncommon. A lender generally forecloses or appropriates the relevant asset. In other words, the lender will acquire or sell the assets to a third party.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

In the event that a bankruptcy procedure or a rehabilitation procedure has been commenced, a lender may not directly exercise its rights and should file its outstanding claim to the bankruptcy court or the rehabilitation court and comply with the court's procedure. However, any secured claims and status of claims with senior priority under an intercreditor arrangement are recognised by the court.

Any expenses related to the implementation of a bankruptcy or rehabilitation procedure, fees for the receiver or bankruptcy administrator, certain taxes, wages, severance pay and compensation for industrial accidents are given preferential treatment by the court.

A foreign person or entity will have identical rights to those of a domestic person or entity in a bankruptcy procedure.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer?

If a foreign person or entity acquires 10 per cent or more of the shares or equity in a domestic project company by investing 100 million won or greater, such foreign person or entity must comply with the relevant foreign investment reporting and registration requirements under the Foreign Investment Promotions Act (FIPA). Separately, if a domestic project company loans any amount from or provides any collateral to an offshore lender, the project company must comply with the reporting requirements in respect of the relevant foreign exchange transaction.

If a domestic person or entity acquires 10 per cent or more of the shares or equity in a foreign project company (or acquires less than 10 per cent of the shares or equity in a foreign project company but enters

into a construction or equipment building agreement or sends an executive on secondment to the foreign project company), such domestic person or entity must comply with the relevant reporting requirements under the Foreign Exchange Transaction Law. Separately, if a domestic parent company guarantees its foreign subsidiary project company's loan or provides collateral to a lender in respect of the loan, the domestic parent company must comply with the reporting requirements in respect of such foreign exchange transaction.

Currency exchange fees may differ depending on the relevant foreign exchange bank's policy.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

FIPA guarantees remittance of income, proceeds, principal, interest, fees and consideration by foreign investors to foreign countries as long as it is in accordance with the investment agreement between the parties and the report filed with the Ministry of Trade, Industry and Energy by the foreign investor for its foreign direct investment. For remittance, prior verification by a foreign exchange bank is required.

Foreign direct investment made pursuant to FIPA is not subject to possible suspension of foreign exchange transactions that may be taken by the Ministry of Economy and Finance pursuant to the Foreign Exchange Transactions Law in the case of wars, natural calamities, conflict of arms or critical and sudden changes in domestic or international economic circumstances. Foreign investors and foreign-invested companies are treated equally as South Korean citizens or Korean companies with respect to their business operations.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

In principle, foreign earnings generated from any dividend payout or liquidation of a foreign project company must be repatriated. If, however, the residual assets or funds are used for capital transactions recognised under the Regulations on Foreign Exchange Transactions, the domestic project company may operate such assets or funds overseas without having them returned to South Korea after completing the reporting of the relevant capital transactions. Any returned amount is not required to be in South Korean won.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies can establish:

- local foreign currency accounts with local foreign exchange banks and deposit foreign currency subject to completion of the relevant foreign exchange reporting requirements; and
- foreign currency accounts offshore subject to completion of the relevant foreign currency transaction reporting requirements with the designated foreign exchange banks or the Bank of Korea.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

There is no fee or tax imposed on foreign investment.

There are no special treaties only applicable to project finance. However, if a free trade treaty has been executed between South Korea and a specific country (eg, Chile, Peru, the United States and the member states of the European Union), a large project must involve an international bidding process and the bidding must be implemented in a fair manner to the international bid participants.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Under the Insurance Business Act, an insurance business licence must first be obtained to sell insurance policies in South Korea and, as such, a foreign insurer without a South Korean insurance business licence cannot sell insurance policies in South Korea. Generally, the process used is where a South Korean insurance company that has obtained an insurance business licence in South Korea sells insurance products to the project company and the South Korean insurance company buys reinsurance from a foreign insurance company. In fact, South Korean insurance companies sell insurance products in South Korea by using the terms of the insurance policies of foreign insurance companies as they are.

There is no discrimination per se in relation to a foreign lender being paid with insurance proceeds. There is no restriction on overseas remittance of insurance proceeds. However, this may be subject to a prior foreign exchange report being filed with the relevant authorities.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

A foreign worker coming to South Korea must obtain a residence visa under the Immigration Control Act. A foreign investor or foreign worker of an invested company (officer, senior manager, specialist, etc) may obtain a company investment visa. A company investment visa may be issued to specialised foreign workers who intend to work in management, administration, manufacturing, technology or research and development of a foreign-invested company. A foreigner may reside in South Korea to the extent permitted under the relevant visa. A person who wishes to stay 91 or more days in South Korea must be registered as a foreigner, which requires submission of an application for registration together with other requisite documents to the head of the Immigration Office or a branch having jurisdiction over the foreigner's residence within 90 days from his or her entry into South Korea. Any change in the foreigner's registered information, visa status or period, workplace or residential location must also be reported under the Immigration Control Act.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

There is no special restriction related to the import of equipment.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

In the absence of extreme circumstances (eg, war), there is no law that provides for any forcible nationalisation or expropriation of business facilities.

If a concession agreement is terminated, the agreement may require the concessionaire to return its concession rights to the government.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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?

Interest on foreign investment in a local company is exempt from individual income tax and corporate income tax pursuant to the Special Tax Treatment Control Law (the STTCL), provided that the foreign investment is 'foreign currency denominated bonds issued outside of Korea' under the STTCL. If not exempt under the STTCL, the rate of individual income tax rate or the corporate tax rate applicable to interest is currently 15.4 per cent (South Korean won-denominated bond) or 22 per cent (loan), which is inclusive of local income tax. However, the withholding tax rate applicable to the interest (15.4 per cent or 22 per cent) may be reduced or exempted by an applicable tax treaty between South Korea and the country of residence of the beneficial owner of the interest. To obtain a reduced tax rate or a tax exemption under the applicable tax treaty, a beneficial owner of interest should submit an application for entitlement to a preferential tax rate or an application for exemption to the party liable for the withholding.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

In relation to project financing involving businesses relating to roads, bridges, tunnels, railways (including subways and light rails), harbours, airports, schools, boarding houses and sewage facilities, it is established practice to implement projects according to the Act on Public-Private Partnerships in Infrastructure (the PPP Act).

On the other hand, private capital raising for power plants (coal, liquified natural gas (LNG), combined heat and power, wind, solar, fuel cells, biomass, etc), oil terminals, LNG terminals and waste-treatment facilities is not, in practice, conducted in accordance with the PPP Act. Instead, legislation applicable to a particular sector of business (the Electric Power Source Development Promotion Act, the Integrated Energy Supply Act, the Act on the Promotion of the Development, Use and Diffusion of New and Renewable Energy, the Petroleum and Alternative Fuel Business Act, the Urban Gas Business Act, the Wastes Control Act, etc) is customarily observed for such businesses. In South Korea, businesses subject to the PPP Act, in practice, are called PPP businesses, infra-businesses or system and organisation controls businesses, and businesses subject to specific legislation are referred to by reference to the specific type of business, such as power business, energy business or waste treatment business. Effectively, however, such terminologies are not definite and can be used interchangeably. The Private Investment Policy Department of the Ministry of Economy and Finance is the competent authority for the PPP Act and its Enforcement Decree. The Public and Private Infrastructure Investment Management Center of the Korea Development Institute supports PPP businesses conducted by the government (the Ministry of Land, Infrastructure and Transport, the Ministry of Oceans and Fisheries, etc) and municipalities by conducting research and advising on their projects.

The Basic Plans and Detailed Methods are, from a legal perspective, an internal document of the relevant government agency. However, in practice, they carry similar weight to the law.

The Ministry of Trade, Industry and Energy is responsible for power and energy projects, whereas the Ministry of Environment is responsible for waste treatment projects.

However, the government is not involved in setting the terms and conditions of project financing deals, nor is there a requirement to report project financing deals to the government or obtain its consent or approval.

For PPP projects, the government can affect the terms of project financing through the concession agreement it enters into with a concessionaire.

As for power, energy or waste treatment projects, the terms and conditions of the relevant project financing would be affected by the relevant permits and licences, the priority of funding, the power price, REC terms, the level of monopoly over gas revenues, etc.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Under the Constitution and the Mining Industry Act, no individual may excavate and own any unexcavated minerals (including oil and natural gas) without first being granted a mining right from the government. As such, a private person or a corporation, regardless of nationality (including the rightful owner of the respective land where the minerals are located), is prohibited from excavating and owning the minerals in the absence of a mining right.

A foreigner may be issued with a mining right if any of the conditions below have been met under the Mining Industry Act:

- where the home jurisdiction of a foreigner allows the South Korean national to have the right to mine, under the same conditions as the national of the foreigner's home jurisdiction;
- where South Korea allows a foreigner to have the right to mine, and the home jurisdiction of the foreigner allows the South Korean national to have the right to mine under the same condition as the national of the foreigner's home jurisdiction; or
- where the right to mine is permitted by a treaty or its equivalent.

Under the Mining Industry Act, the government of South Korea has exclusive mining rights in relation to oil and natural gas and therefore no foreigner can be granted mining rights for oil and natural gas.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

There are no royalties or taxes imposed on the extraction of minerals or other natural resources under the Mining Industry Act.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

There are no restrictions, fees or taxes imposed on the export of minerals or natural resources.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

There is no requirement to report project financing deals to the government or to obtain its consent or approval, nor is there a requirement to pay certain fees to the government.

For public-private partnerships projects, changes in investment ratios frequently occur along with refinancing at the end of the construction phase and the start of the operation phase. It is common for the concessionaire's shareholders to change at this point. In such cases, the government, the concessionaire, investors and lenders must agree on the terms and conditions of the overall restructuring. It is mandatory that the concession agreement with the government be amended to reflect the changes in the investment ratios, and often the government is perceived to be in a superior position in negotiation, as such amendment is subject to the government's approval. This is why, in practice, the process of obtaining the government's consent is similar to receiving its approval or a permit.

Registration of financing

21 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 such requirement, as the government is merely a party to the concession agreement and is not directly involved with project or finance agreements (to avoid being directly liable for the relevant project).

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

In the event that an arbitral award is obtained from a foreign arbitral tribunal, it will be recognised by the South Korean courts and enforceable against the South Korean party in South Korean courts without re-examination of the merits, provided that the recognition and enforcement of the award may be refused by a South Korean court where:

- the award is governed by the New York Convention and does not satisfy the conditions for recognition and enforcement as set forth in article V; or
- the award is not governed by the New York Convention and does not satisfy the following conditions:
  - such award was finally and conclusively given by an arbitral tribunal having valid jurisdiction in accordance with South Korean laws or international treaties;
  - the party against whom such award was rendered was served with process (other than by publication or a similar method) in sufficient time to enable such party to prepare its defence, in conformity with the laws of the arbitral tribunal rendered the award or responded to the proceeding without being served with process;
  - recognition of such award is not contrary to the public policy of South Korea;
  - awards of the arbitral tribunal of South Korea are accorded reciprocal treatment under the laws of the arbitral tribunal that rendered such award; and
  - awards of the arbitral tribunal of South Korea in the country of the arbitral tribunal that rendered such award are not treated in a manner that is highly prejudicial to their recognition and their treatment is substantially the same as the treatment by the South Korean court of such award in material respect.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

For projects in South Korea, the governing law for project agreements and financing agreements is South Korean law. There are instances where there may be an offshore financing component. The governing law of offshore financing is usually English law.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Submission by the parties to the jurisdiction of the foreign court under a project contract or financing agreement is, as a matter of contract law, duly recognised and enforced by South Korean courts, provided that submission to the jurisdiction of the foreign court by the South Korean party is deemed to be valid and binding under the laws of the foreign jurisdiction.

Waiver of immunity is recognised and enforceable in South Korea. In other words, a claim for immunity from the court's jurisdiction cannot be made.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

South Korea has four major laws on the prevention of money laundering and terrorist financing:

- the Act on Reporting and Use of Certain Financial Transaction Information;
- the Special Act on Prevention of Illegal Transaction of Narcotics;
- the Act on Regulation of Punishment of Criminal Proceeds Concealment; and
- the Act on Prohibition Against the Financing of Terrorism and Proliferation of Weapons of Mass Destruction.

In accordance with the Financial Transaction Reports Act, the financial institutes must submit the Suspicious Transaction Reports to Korea

Financial Intelligence Unit on any transactions that are suspicious of money laundering or tax evasion in connection with specific crimes. To meet such requirements, financial institutes may ask investors for relevant documents or take specific measures insofar as the institutes are responsible for customer identification. In contrast to such applications to specific circumstances, the three other laws mentioned above have general application to all transactions.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 What environmental, social and governance (ESG) issues are relevant in typical project sectors? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations?

The latest ESG trends include:

- on 25 March 2022, the Framework Act on Carbon Neutrality and Green Growth to Cope with Climate Crisis entered into force. Under this Act, businesses that establish or implement business plans that are subject to the environmental impact assessments must conduct a climate change impact assessment for the business plans and development activities that emit large quantities of greenhouse gases; and
- the Environmental Technology and Environmental Industry Support Act was amended so that all companies listed on a South Korean exchange that has total assets of 2 trillion won or more at the end of a fiscal year must disclose the environmental impact of their business.

The Hydrogen Economy Promotion and Hydrogen Safety Management Act identifies the investment company under the Financial Investment Services Act and Capitals Markets Act (the Capitals Markets Act) as a 'hydrogen-specialised investment company' and imposes the duty to invest in hydrogen-specialised companies of at least 51/100.

The Capitals Markets Act requires that companies listed on a South Korean exchange with total assets of 2 trillion won or more must have gender diversity on their boards.

The Serious Accidents Punishment Act, which took effect on 27 January 2022, obligates business owners and executives to prevent harm or risks to the safety and health of their employees, customers and other individuals who visit their business sites. The business owners and executives that caused serious industrial or civil accidents that resulted in death may be imprisoned or fined. Business owners, corporations, or institutes are liable for indemnification if they caused serious accidents through intentional misconduct or gross negligence.

PROJECT COMPANIES

Principal business structures

27 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Concessionaires are joint-stock companies established under the Commercial Code. Under the Commercial Code, shareholders of joint-stock companies have limited liability, and laws on procedures regarding formation, operations, corporate governance, dissolution and liquidation, bankruptcy and rehabilitation, etc, are clearly established. There is sufficient accumulation of relevant precedents, which means that parties have the advantage of managing legal relationships among themselves.

In South Korea, unincorporated joint ventures are rarely used for project financing transactions.

Project financing vehicles (PFVs) – complete paper joint-stock companies that do not have employees or full-time directors and that receive tax benefits pursuant to the Corporate Tax Act – are frequently used for project financing in real estate development projects. However, these types of PFVs are not used in public-private partnerships projects or power, energy or waste treatment projects, as the concessionaires involved in these projects are required to have full-time directors and employees.

Construction investors and operations investors invest by acquiring common shares. Generally, financial investors provide capital through a combination of acquiring preferred shares and providing mezzanine loans. Banks, insurance companies and pension funds provide senior loans as senior lenders and sometimes simultaneously participate in mezzanine lending. Depending on the situation, these financial institutions indirectly invest in funds as beneficiaries, and these funds are also senior lenders, mezzanine lenders and preferred shareholders. At times, concessionaires issue public company bonds, but such issues are not frequent as concessionaires are typically new entities and do not have a sufficient credit rating to back up such bonds.

For large domestic projects, the Korea Development Bank often provides financing. However, the Korea Export-Import Bank and the Korea Trade Insurance Corporation do not provide financing for domestic projects. Foreign development banks, the export credit agencies and mandated lead arrangers rarely provide financing for domestic projects in South Korea.

There are cases in which lenders of the concessionaire use structured financing by securitising their loans.

public-private partnerships (PPP) financing is as described above. Private finance initiative financing is similar to build-transfer-lease (BTL) (mainly schools, school boarding houses, military residences, sewage facilities, etc) financing of PPP projects in South Korea, and is the same as the above.

For build-transfer-operate PPP projects, ownership of infrastructure reverts to the government once construction is complete. Afterwards, the government grants the concessionaire concession rights. However, for BTL financing, ownership of infrastructure reverts to the government once construction is complete. In both schemes, ownership is transferred to the government. The difference, however, is that the concessionaire is first granted the management and operation rights, and the concessionaire leases the relevant infrastructure to the government. After the government grants the concessionaire concession rights, the concessionaire leases the infrastructure to the government, which makes lease payments to the concessionaire. BTL financing is slightly different structurally in this regard.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The central PPP enabling legislation is as follows:

- the PPP Act;
- the Enforcement Decree on the Act on Public-Private Partnerships in Infrastructure;
- Basic Plans on Public-Private Partnerships; and
- Detailed Methods on Refinancing published by the Public Investment Management Centre of the Korea Development Institute.

Under the PPP Act, 'infrastructure' means fundamental facilities that serve as the foundation of production, increase the efficiency of such facilities, and accommodate the convenience of users and the lives of the public.

Such infrastructure is divided into three categories. One is not obligated to be subject to the PPP Act when conducting an infrastructure business. However, the established customary practice when private capital is to be raised for a project involving roads, bridges, tunnels, railways, harbours, airports, schools, boarding houses and sewage works is to do so in accordance with the provisions of the PPP Act.

There is no industry-specific legislation with respect to each type of PPP project.

PPP – LIMITATIONS

Legal limitations

29 What, if any, are the practical and legal limitations on PPP transactions?

There are no special limitations on the use of a PPP scheme by the government authority.

However, the PPP Act provides the eligible project types for a PPP project, and the selection of a project company shall be made by one of two procedures, depending on whether a government selects a PPP project or a private company proposes a project to the government. With respect to the former, the government makes a public announcement of a project plan and initiates a bidding process, receives and evaluates the project plan from the bidders, and selects a preferred bidder that is ultimately designated as a concessionaire by way of executing a concession agreement. However, when a private company proposes a draft project to the government and the government deems such a project appropriate, and, if the government does not select another bidder (after soliciting further bids), the private company may become a concessionaire.

PPP – TRANSACTIONS

Significant transactions

30 What have been the most significant PPP transactions completed to date in your jurisdiction?

Major PPP transactions that were launched in the past three years are as follows:

- the Hwaseong–Gwangju Expressway:
  - a total investment cost of approximately 1.4957 trillion won;
  - financing model: BTO;
  - construction period: 60 months; and
  - opening date: 21 March 2022;
- the Bongdam-Songsan Expressway:
  - total investment cost of approximately 1.3253 trillion won;
  - financing model: BTO;
  - construction commencement date: April 2017; and
  - opening date: April 2021; and
- the Seoul-Munsan Expressway:
  - total investment cost of approximately 2.119 trillion won;
  - financing model: BTO;
  - construction commencement date: 30 October 2015; and
  - opening date: 7 November 2020.

UPDATE AND TRENDS

Key developments of the past year

31 In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

As part of its renewable energy policy, the new government aims to provide stable production of clean energy (blue hydrogen, green hydrogen and other types of hydrogen that emit no or significantly less greenhouse gas in their production), and promote the hydrogen industry by expanding the supply base. Aligned with such aims, an amendment to Hydrogen Act has been passed (although the effective date is uncertain). The amendment primarily concerns matters related to the development, production, supply and promotion of clean hydrogen, and the certification of clean hydrogen by different classifications. On the other hand, the new government contemplates a reasonable adjustment of the energy mix given nuclear energy and renewable energy (eg, using nuclear power for hydrogen production). It is seeking to revise its Nationally Determined Contributions implementation plans in several key areas such as energy, industry and transportation. The project financing of clean hydrogen power generation will likely expand and that feasibility studies for such projects will be conducted more vigorously certification systems, development, production and other matters relating to clean hydrogen are determined and regulatory schemes for hydrogen are fully implemented.

SHIN&KIM

Michael Chang
mchang@shinkim.com

Sang-Hyun Lee
shlee@shinkim.com

Yong Hwan Jeong
yhjeong@shinkim.com

Se Ra Song
srsong@shinkim.com

23rd Floor, D-Tower (D2)
17 Jongno 3-gil, Jongno-gu
Seoul 03155
Korea
Tel: +82 2 316 4114
Fax: +82 2 756 6226
www.shinkim.com

Switzerland

Thiemo Sturny and Roger Ammann
Walder Wyss Ltd

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Under Swiss law, many types of collateral are available for securing claims (eg, from a loan). Often a combination of different types of collateral is used. Collateral may include real estate, ships and aircraft, inventory and movable property, after-acquired property, securities such as shares or promissory notes, but also bank accounts, receivables or intellectual property rights like patents, trademarks, designs and copyrights.

The main types of security interests under Swiss law consist of pledges, transfers of full legal title for security purposes, assignments for security purposes and mortgages over certain types of assets. Corporate guarantees are also often issued as collateral for financing transactions.

A pledge or mortgage constitutes a limited right in rem in favour of the pledgee. By contrast, the secured party acquires full legal title in the relevant asset in the case of a transfer of legal title for security purposes or an assignment for security purposes.

Pledges are considered to be accessory security interests with the consequence that, inter alia, the validity of the pledge depends on the continuing validity of the secured obligations and the creditor of the secured obligations must be identical to the holder of the security interests. By contrast, the transfer or assignment for security purposes is considered to be a non-accessory security interest, which means that the transfer or assignment is independent of the (continuing) validity of the secured obligations and the holder of the security interests does not necessarily have to be identical to the creditor of the secured obligation.

As a consequence, in the case of a plurality of secured parties, a security agent will act as a direct representative in the name and for the account of the secured parties in the case of accessory security interests governed by Swiss law and, in the case of non-accessory security interests governed by Swiss law, as a fiduciary in its own name but for the account of the secured parties.

Unlike in other jurisdictions, the floating charge is not a recognised concept under Swiss law. Further, trade secrets and know-how may not serve as collateral. Security may be granted by the debtor and also by a third party (eg, a parent company or group affiliate). Last, guarantees or sureties given by third parties may also serve as security. However, the provision of upstream or side-stream security, guarantees and other benefits may be limited by corporate benefit issues and corporate capital protection rules.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Generally, the security interest is created by way of a written security agreement between the parties that governs, in essence, the type of, and way of granting, the collateral, the deposition, representations and warranties as to existing liens, covenants, duties and obligations of the grantee, enforcement rights such as private sale or public auction, governing law and jurisdiction.

For some types of collateral, registration in public registers is available or even necessary. Most importantly, the registration of encumbrances over real estate, ships and aircraft is necessary for perfection. There are special registers for recording ownership of, and holders of encumbrances on, real estate, ships or aircraft. The registration is binding in rem against the counterparty and third parties. On the other hand, certain other types of collateral do not need to be registered for perfection among the parties. However, registration has certain benefits with respect to third parties. For example, the pledge of registered intellectual property rights, such as patents, trademarks and designs, may be registered in the relevant IP register with the consequence that the secured party is protected against a bona fide third party acquiring such IP rights. Further, there may be registration fees.

Real estate is normally encumbered by way of security transfer or pledge of mortgage notes or land charges. The mortgage note is a negotiable instrument and may be issued in paper form (as a bearer or registered mortgage note) or as a paperless mortgage note. In each case, the mortgage note may be pledged or full legal title may be transferred for security purposes. The mortgage note is created by way of a notarised deed and registration in the land register. Registration fees for notarisation vary between cantons but are often calculated on the amount secured. The security interest over that mortgage note is then created by way of a security transfer agreement or pledge agreement and transfer of legal title of the mortgage note (ie, in the case of paper mortgage notes, transfer of possession and endorsement for registered mortgage notes, and registration in the land register in the case of paperless mortgage notes). By contrast, a land charge is a mortgage that is registered in the land register, securing any kind of claim. Other than the mortgage note, the secured claim is not registered in the land register and no negotiable instrument is issued. The creation of a security interest in the form of a land charge requires the entering into of an agreement between the parties regarding the creation of the land charge (in the form of a notarised deed) and registration thereof in the land

register. In practice, the land charge is less common than the mortgage notes. Additional rules may apply in the context of cross-border transactions, whereby the parties may be advised to obtain clearance from the appropriate authorities with respect to Lex Koller, Swiss rural legislation and special source taxes that may apply on the cantonal and federal level on interest payments in connection with claims that are secured by real estate in Switzerland (subject to applicable double tax treaties).

Company shares are normally pledged. The pledge is created by way of pledge agreement and, if physical share certificates have been issued, perfected by way of transferring physical possession over these share certificates to the pledgee; if the shares had been issued in the form of registered shares, the share certificates will, in addition, need to be duly endorsed (typically an endorsement in blank is provided). Further, in the case of registered shares, the pledge is commonly registered in the company's share ledger.

Receivables are normally assigned (for security purposes) by way of global assignment, based on an agreement between the assignor and the assignee and perfected by way of assignment declaration in writing. The assignment is considered to be independent of, and non-accessory to, the secured obligation. During the term of the agreement, the assignor should be obliged to deliver, on a regular basis (eg, quarterly) and upon request of the assignee, to the assignee its lists of receivables showing the assigned receivables. Third-party debtors are often not notified of the assignment until the borrower's default. However, as long as third-party debtors are unaware of the assignment, they can validly fulfil their obligations by payment to the assignor. Further, the assignee should have the right to notify the third-party debtors at any time. Acknowledgements of debt representing the assigned claims need to be transferred to the assignee to perfect the security interests. Global assignments are very often used.

Security interest over bank accounts can generally be created in the form of a pledge by means of a written accounts pledge agreement or an assignment for security purposes by way of an assignment agreement and assignment declaration in writing, respectively. Cash deposits held in bank accounts are treated as claims of the account holder against the bank. Therefore, the creation of security over cash deposits is based on the principles outlined above with respect to receivables. A Swiss bank at which the bank accounts are held will typically have pre-existing rights of set-off and pledge or other preferential rights under its general terms and conditions. If an additional pledge is created over such a bank account, the account bank will need to be notified thereof to perfect a valid security interest. Further, the account banks are usually asked to waive their priority rights in favour of the secured parties.

Security interests over movable property can generally be created under Swiss law in the form of a pledge or a security transfer of full legal title. Switzerland adheres to the system of the possessory pledge, meaning that movable property needs to be transferred into the possession of the pledgee or a pledge holder who holds the possession for and on behalf of the pledgee. No pledge is perfected as long as the pledgor retains exclusive control over the movable asset. Owing to the pledge's possessory nature, particular thought must be given to structuring suitable security over inventory, (raw) materials in the manufacturing process or movables in transit. In certain cases, a seller will wish to retain full legal title until full payment is received from an acquirer. This can be achieved by a special retention of title provision in the sales agreement plus registration in a retention of title register. However, such registration is complicated and in practice hardly ever used and then only in a situation of potential financial distress.

Guarantees are also a common form of personal security under Swiss law. The guarantee according to article 111 of the Swiss Code of Obligations is a direct, independent and non-accessory payment obligation of the guarantor and, thus, provides better security than a surety, which is accessory to the secured debt obligation.

If book-entry securities serve as collateral, then the Book-Entry Securities Act (BESA) applies. Book-entry securities constitute fungible claims or membership rights against the issuer having all functional features of a security in paper form without, however, being a right in rem.

A security interest over book-entry securities can be created either by way of transfer or by way of a control agreement. Transfers of book-entry securities are effected based on a transfer order of the account holder to the depositary institution and a credit entry of the book-entry securities to the acquirer's securities account. The account holder may cancel his or her order until such point in time as agreed in his or her agreement with the depositary institution or, as the case may be, as stipulated in other regulations of a settlement and clearing system. The account holder's order becomes irrevocable in any case with the debit of his or her securities account. Orders given by the account holder pursuant to the BESA are unilateral declarations of the account holder towards his or her depositary institution. The credit entry in the acquirer's securities account is of constitutive effect for the transfer of book-entry securities.

In the case of a control agreement, the granting of security interests over book-entry securities is effected by an irrevocable written agreement between the account holder and the depositary institution. In such an agreement, the depositary institution agrees to execute orders received from the secured party without the cooperation of the security provider. In this case, the book-entry securities remain in the securities account of the security provider.

In a syndicated facility agreement or multiple lien financings, one creditor or a third party is typically appointed to act as security agent and to hold the security for and on behalf of the project lenders. In the case of non-accessory security (eg, assignment of receivables), the security agent usually acts as fiduciary in its own name but for the benefit of the secured parties. In the case of accessory security (eg, pledges), the security agent acts as direct representative in the name and on behalf of the secured parties (and for itself if it is also a secured party). Generally, there is no requirement for the security agent to hold a licence.

Whether the security assets are separable from the bankrupt estate in the event of a security agent's bankruptcy largely depends on the chosen security structure. The enforceability of the parallel debt concept is questionable and has not yet been tested in court.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

As to real estate, priority depends on the time of registration. The land register excerpt shows all pre-existing encumbrances with rank and amount (except for certain legal liens in favour of authorities for claims of outstanding taxes, in particular real estate capital gain taxes and transfer taxes, charges and other fees). The same applies to ships and aircraft. As to other movable property, it is more difficult to be assured of the absence of liens ranking senior to the creditor's lien. Here, legal due diligence with the pledgor is key, as well as obtaining a representation and warranty that the security is free of any lien. This is particularly true for the pledging of bank accounts as well as the global assignment of receivables.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

The foreclosure procedure for collateral under the Debt Enforcement and Bankruptcy Act (DEBA) is the public auction (in particular,

enforcement into real estate), subject to certain exemptions. The DEBA sets forth respective rules and procedures and requires the involvement of the debt enforcement office. However, under Swiss law, the parties of a security agreement on claims, movables and security papers (including mortgage notes) are free to a large extent (albeit not completely) to agree on other foreclosure mechanisms. Not permissible is an agreement by which the collateral shall per se and immediately fall into the property of the pledgee if the pledgee's claims are not satisfied. But the parties can agree, for example, on a public auction or public offering without regard to the procedures and formalities of the DEBA or on a private sale. A private sale clause should expressly mention the right of the secured party to purchase the collateral. The value of the collateral will be determined based on the market value (eg, stock exchange price) or by appraisal as per the date of the sale. If the value is higher than the secured amount, the surplus amount is to be paid out to the securing party. A private sale in foreign currency can be agreed. However, claims in foreign currency will be enforced in Switzerland only in Swiss francs. Further, the purchase of real estate by foreign nationals might be subject to approval by the appropriate authorities.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Swiss bankruptcy law provides for avoidance actions. With the exception of the customary occasional presents, all gifts and voluntary settlements that the debtor made during one year before the seizure of assets or the adjudication of bankruptcy are voidable. The following transactions are deemed equivalent to a gift:

- transactions in which the debtor accepted a consideration out of proportion to his or her own performance; and
- transactions through which the debtor obtained for him or herself or a third party a life annuity, an endowment, a usufruct or a right of habitation (article 286 of the DEBA).

Further, the following acts are voidable if the debtor carried them out within one year prior to seizure of assets or the adjudication of bankruptcy, provided that it was, at that time, already insolvent:

- the granting of collateral for existing obligations that the debtor was hitherto not bound to secure;
- the settlement of a debt of money by another manner than in cash or by other normal means of payment; or
- the payment of an unmatured debt.

However, the transaction is not voided if the recipient proves that he or she was unaware, and should not have been aware, of the debtor's insolvency (article 287 of the DEBA). Finally, all transactions are voidable that the debtor carried out within the five years prior to seizure of assets or the adjudication of bankruptcy with the intention, apparent to the other party, of disadvantaging his or her creditors or of favouring certain of his or her creditors to the disadvantage of others (article 288 of the DEBA).

In the case of bankruptcy, creditors whose claims are secured by collateral have preferential rights. All other claims are divided into three ranking classes. Employee and social security claims are preferred (article 219 of the DEBA).

As a rule, apart from bankruptcy proceedings, debt enforcement against communities, cantons, the Swiss Confederation or state-owned enterprises resulting in seizure and realisation of assets is permissible, but subject to certain restrictions.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

In Switzerland, there are no foreign exchange restrictions or meaningful fees, taxes or charges on currency exchange.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

In Switzerland, there are no remittance restrictions. However, Swiss withholding tax of 35 per cent may have to be deducted from dividend payments and interest payments on, among others, bonds and credit financings by a Swiss debtor if, in essence and among others, it borrows from more than 10 non-banks under one instrument or from more than 20 non-banks in general. Swiss withholding tax may be refundable based on a double taxation treaty. In a facility agreement with a Swiss debtor, a respective representation or covenant is typically included.

In December 2021, the Swiss parliament adopted an amendment to the Swiss Withholding Tax Act to abolish Swiss withholding tax on interest payments on, among others, bonds and credit financings. This amendment is set to come into force as of 1 January 2023, subject, however, to the people approving this bill in a referendum vote that is expected to take place in the third or fourth quarters of 2022.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no statutory repatriation or conversion requirements, but this might be requested by the creditors to increase control over the project company's income and cash flow.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes, project companies may establish and maintain foreign currency accounts in other jurisdictions and locally.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Based on the General Agreement on Tariffs and Trade and World Trade Organization treaties, bilateral treaties with the European Union and further Swiss legislation, foreign participants are no longer excluded from public projects, etc, and their tender offers must be considered in competition with those of Swiss companies. If real estate is subject to Swiss rural and land protection legislation, approval might be sought from the appropriate authorities for an investment by foreign nationals. There are few other restrictions as to foreign ownership, for example, on projects relating to the exploitation of oil. Further, Switzerland has entered into more than 120 bilateral investment treaties, providing for protection of foreign investments in Switzerland and often also dispute resolution mechanisms. In contrast to the wave of new or strengthened foreign investment control regulations enacted by a number of countries, Switzerland has not introduced any general foreign investment controls.

Another question, however, is whether private investment and ownership as such are permitted. This generally depends on whether a sector is subject to a state monopoly. Some sectors, such as telecommunications, aviation, transport or energy, have been privatised and liberalised. Private entities are generally free to engage in these areas, but they need a government concession and may be subject to state supervision. The state may also act as a competitor in certain markets (eg, in telecommunications through Swisscom).

Other sectors are not open to private entities. For example, the Federal Reserve System is handled exclusively by the Swiss National Bank (SNB), a stock corporation subject to special legislation. The New Rail Link through the Alps, one of the world's largest railway tunnel construction projects, was led by AlpTransit Gotthard, a private corporation subject to special legislation and wholly owned by Swiss Federal Railways (SBB), which itself is a private corporation subject to special legislation and wholly owned by the Swiss Confederation. Large companies that are private stock corporations subject to special legislation operate in other sectors as well, with the Swiss Confederation, the cantons or the communities holding, directly or indirectly, at least a controlling stake in these corporations. Here, private investors are excluded from equity investment, or permitted only to a certain extent; for example, AlpTransit Gotthard and the SBB are not open to private shareholders and the SNB has tight restrictions on private shareholders. Under the Federal Electricity Supply Act, Swissgrid, the owner and operator of the nationwide electricity transmission grid, is expressly excluded from stock exchange listing but, within limits, open for private shareholders. On the other hand, Swisscom is listed on the stock exchange, although controlled by the Swiss Confederation.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Based on the Swiss Insurance Supervisory Act, in principle, foreign insurers may only offer insurance relating to risks situated in Switzerland through a Swiss branch or subsidiary and need to obtain a licence for their activities from the Swiss Financial Market Supervisory Authority. Apart from this, there are no major restrictions on insurance policies over project assets.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Citizens from the European Free Trade Association (EFTA) member states and the EU countries are granted easy access to the Swiss labour market based on bilateral treaties. New rules on unemployment that limit the impact of foreign workers on the domestic job market have recently been implemented in Switzerland. These rules do not, however, limit EU and EFTA immigration in general. Foreign workers, other than nationals from EU and EFTA member states, need work and residence permits. The Swiss government has allocated quotas per nation. Workers are admitted if their skills are urgently required and they are well qualified. The employer must demonstrate that in spite of considerable efforts no suitable Swiss national or citizen from an EU or EFTA member state has been found to fill a particular vacancy. EU and EFTA nationals taking up a job in Switzerland for up to three months may stay in Switzerland even without a residence permit. They only have to register with the authorities.

Following Brexit, the Citizens' Rights Agreement between Switzerland and the United Kingdom provides for employees who had already been employed in the other country as of 31 December 2020 to be permitted to stay there. UK nationals coming to Switzerland to work from 1 January 2021 are, in principle, subject to the admission requirements in the Foreign Nationals and Integration Act. However, special rules may apply to cross-border service providers from the United Kingdom with a stay of up to 90 days per calendar year in Switzerland pursuant to a temporary Services Mobility Agreement between Switzerland and the United Kingdom, which came into force on 1 January 2021 and has been initially limited to two years. This duration may, however, be jointly extended by the United Kingdom and Switzerland.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

There are no major restrictions on the importation of project equipment. Value added tax and customs duties may apply.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Expropriation is permissible, but in each case subject to a statutory basis, sufficient public interest, appropriateness and compensation. The expropriation procedure is governed by the Federal Expropriation Act. Decisions by the administration on expropriation and compensation are subject to appeal to the Swiss Supreme Court.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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?

When security papers are involved, Swiss transfer tax may apply. Swiss withholding tax of 35 per cent may have to be deducted from dividend payments and interest payments on, among others, bonds and credit financings by a Swiss debtor if, in essence and among others, it borrows from more than 10 non-banks under one instrument or from more than 20 non-banks in general. Swiss withholding tax may be refundable based on a double taxation treaty. Special source taxes may apply at the cantonal and federal level on interest payments in connection with claims that are secured by real estate in Switzerland (subject to applicable double tax treaties). Further, by incorporating a Swiss stock company with capital of over 1 million Swiss francs a moderate stamp duty rate applies.

To economically develop specific areas in Switzerland, industrial companies and production-related service companies that create new jobs or realign existing jobs and that are located in such specific economic development areas in Switzerland may be eligible for tax holidays of up to 10 years (subject to claw-back provisions).

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Because of Switzerland's state organisation, federal as well as cantonal authorities can be relevant, depending on the matter involved. The relevant cantonal authorities deal with mineral extraction and other natural resources, including oil and gas, and both the Federal Department of the Environment, Transport, Energy and Communications (DETEC) and cantonal authorities are competent regarding water. Most importantly, the DETEC and its agencies deal with matters like transport, the railway system, aviation, energy, power generation, telecommunication, radio and television. In particular, as to telecommunications, the Federal Communications Commission, which is an independent commission deciding disputes over concessions and interconnections, etc, and the Federal Office of Communications, which is a DETEC agency acting as supervisory authority, are competent. Regarding energy, the Federal Electricity Commission acts as the regulator of the electricity market, supported by the Federal Office for Energy. The Federal Office of Civil Aviation is competent with regard to aviation and the Federal Office of Transport is competent with respect to the transport sector.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The ownership of real estate extends to the property's integral parts and natural products. Further, the ownership of the soil implies the ownership of all that is above and below the surface to such a height and depth as the owner may require. It extends, subject to certain restrictions, to all buildings on the ground as well as plants and springs in it. However, the right of mining and exploitation of natural resources such as minerals, oil and gas or natural waters can be regulated, restricted or prohibited by federal or cantonal legislation based on public interest, depending on the matter involved. In such an event, a concession for mining and exploitation is necessary. Foreign nationals may acquire such rights to a certain extent, subject to federal or cantonal rural and land protection legislation.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The granting of a concession is subject to payment of concession fees or royalties. Typically, the amount depends on the value of the concession. As a rule, domestic and foreign parties are treated equally.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

Most notably, export restrictions may extend to nuclear energy, water for energy production and goods that are useable for military purposes.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Depending on the sector, project financing transactions might be subject to government approvals. This may apply to investments in equity or debt, or to operating activities, etc. Approval authorities are generally the Federal Department of the Environment, Transport, Energy and Communications and its agencies or cantonal governments. As a rule, with regard to financing, a private entity, albeit state-controlled such as Swisscom, applies private law, and no government approvals are required.

Registration of financing

21 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?

The disposition, including encumbering, of real estate, requires a notarised deed and registration in the land register. If real estate is subject to Swiss rural and land protection legislation, approval may be sought from the appropriate authorities for an investment by foreign nationals. Further, depending on the project, party and question involved (eg, in relation to PPP), relevant financing and project documents may need to be submitted to competent authorities for information or approval. This can include, but is not limited to, planning, zoning, tax,

construction and environmental issues and concessions. Of course, if the public sector is party to an agreement, the execution, delivery and performance of respective agreements must be duly authorised by the competent authority. In addition, the Federal Public Procurement Act applies to public procurement projects of the Swiss Confederation and sets forth rules for participation, qualification and awarding. Awarding of projects is done by means of formal decrees, which are subject to appeal.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Switzerland is a very arbitration-friendly country and an important arbitration venue. Not only Swiss disputes, but also foreign disputes are regularly arbitrated in Switzerland. Switzerland is a signatory state to the International Centre for Settlement of Investment Disputes Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, therefore, foreign arbitration awards are recognised and enforceable in Switzerland.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Project or joint venture agreements are normally governed by Swiss law, in particular, when there is a Swiss project company. The law governing financing agreements may follow the country of the arranger, lead manager or original lender, in particular, in large internationally syndicated loans. Security agreements involving Swiss security interests or Swiss companies are regularly subject to Swiss law. Irrespective of the chosen law, Swiss tax rules may apply and must be dealt with appropriately.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

A Swiss company may subject itself to a foreign jurisdiction. Also, state-owned private enterprises are free to do so with respect to their private (as opposed to public) activities. Swiss courts would recognise a final and conclusive judgment of a foreign court, subject to Swiss conflict of law rules and international treaties such as the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Financial intermediaries (such as banks) in Switzerland with whom the funds provided by investors will be deposited or that help transferring such monies are subject to Swiss anti-money laundering regulations, including ongoing due diligence obligations (such as know-your-client duties). As a consequence, anti-money laundering compliance checks will regularly be performed on investors before funds can be transferred irrespective of the sector.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

Because Switzerland is organised as a federal state, federal as well as cantonal laws and authorities can be relevant, depending on the matter involved. For example, property rights with respect to land are mainly governed by federal law, whereas the exploration and extraction of non-mining raw materials are governed by cantonal laws. Moreover, the relevant cantonal authorities deal with mineral extraction and other natural resources including oil and gas, and both the Federal Department of the Environment, Transport, Energy and Communications (DETEC) and cantonal authorities are competent regarding water. Most importantly, the DETEC and its agencies deal with matters like transport, the railway system, aviation, energy, power generation, telecommunication, radio and television. As to telecommunications, in particular, the Federal Communications Commission, which is an independent commission deciding disputes over concessions and interconnections, etc, and the Federal Office of Communications, which is a DETEC agency acting as supervisory authority, are competent. Regarding energy, the Federal Electricity Commission acts as the regulator of the electricity market, supported by the Federal Office for Energy. The Federal Office of Civil Aviation is competent for aviation, and the Federal Office of Transport is competent for the transport sector.

On 1 January 2022, new non-financial reporting obligations came into force requiring certain large Swiss companies of public interest to annually prepare and publish a separate report on certain non-financial matters. However, for companies that are not in the scope of these new regulations (including typically project companies), no general ESG reporting requirements exist under Swiss law.

PROJECT COMPANIES

Principal business structures

27 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

In Switzerland, the preferred company form is the stock corporation. International holding structures are sometimes used. When setting up the financing structure, Swiss tax issues should be considered. The principal financing sources are national or international lending syndicates, capital markets and state subsidies.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

In Switzerland, there is no legislation that deals specifically with PPP projects in the narrow sense. However, under the present legislation on a federal and on a cantonal level PPP projects are permissible in principle. Depending on the sector involved (eg, infrastructure, construction, culture, education, healthcare, social infrastructure, defence, waste removal or development), multiple legal statutes and regulations on a federal and cantonal or even communal level may apply. Worthy of note, for example, is the Federal Public Procurement Act, which applies to public procurement projects of the Swiss Confederation. Public awareness and the desirability of PPP projects have very much increased over recent years. The current (political) discussion is more about stimulating, facilitating and furthering rather than about questions of permissibility. These discussions may lead to the enactment of new legislation or the amendment of existing sector legislation.

PPP - LIMITATIONS

Legal limitations

29 | What, if any, are the practical and legal limitations on PPP transactions?

In principle, the state is permitted to contract with private participants. To what extent, however, certain public functions can be divested to private participants depends on the topic involved and the respective sector legislation.

PPP - TRANSACTIONS

Significant transactions

30 | What have been the most significant PPP transactions completed to date in your jurisdiction?

One of the first PPP projects in the strict sense is the construction and operation of the culture and congress centre in Lucerne (KKL Luzern). Its multimillion Swiss franc realisation dates back to the mid-1990s. The KKL Luzern is a PPP by the City and Canton of Lucerne and private participants.

As to infrastructure, one example is the construction and operation of a local heating grid in the Geneva area (Chauffage à distance Onex), in operation since 2002.

The radiology project of the Cantonal Hospital Lucerne and the Swiss Paraplegic Centre is a pioneer PPP project in the Swiss healthcare system. Since April 2008, a magnetic resonance tomograph has been operated jointly.

Some important PPP activity has recently taken place in the sports sector: the 220 million Swiss franc completion of the stadium La Maladière in Neuchâtel, operational since 2007, is a PPP model case in this sector. Another sports-related PPP project is the Sportarena Luzern, which is a 300 million Swiss franc project and includes a football arena, other sports facilities and further buildings. The whole complex has been operational since mid-2011. In Burgdorf, a town near the capital Berne, a 150 million Swiss franc project includes business premises and facilities for the local administration (including a prison) and was opened in spring 2012. Another 200 million Swiss franc PPP sports project was the construction of the stadium in Bienne (Stades de Bienne) that became operational in July 2015.

walderwyss attorneys at law

Thiemo Sturny
thiemo.sturny@walderwyss.com

Roger Ammann
roger.ammann @walderwyss.com

Seefeldstrasse 123
8034 Zurich
Switzerland
Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
www.walderwyss.com

There are a number of PPP projects pending that cover other sectors, such as schooling, construction and nursing homes. In the canton of Jura, the first theatre has been built in the centre of its capital Delsberg using the PPP model, with construction finished by the end of 2021. The theatre is part of the 100 million Swiss franc real estate Le Ticle project, where a private operator is building a car park with 270 parking spaces, commercial space and 108 apartments in addition to the theatre and a shopping centre.

UPDATE & TRENDS

Key developments of the past year

31 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

No updates at this time.

Taiwan

James C C Huang and Maggie Huang

Lee and Li Attorneys at Law

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 What types of collateral and security interests are available?

Among other things, the following types of collateral and security interests are available and common in local banking practice:

- a mortgage over real property, such as land and buildings;
- a chattel mortgage over movable property, such as machinery and equipment;
- a pledge over movable property;
- a pledge over shares or other securities;
- account pledge;
- pledge of transferable rights, such as patents; and
- assignment of rights under a contract or accounts receivable.

Collateral perfecting

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

The requirements relating to the creation, registration, filing and perfection of each of the security are as follows:

- cash deposit: 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, the concept of a floating charge is not recognised under Taiwan law. To deal with this issue, the pledgor, in practice, will be required to periodically confirm with the account bank and the pledgee the amount of cash in the bank account to ensure that the pledge also covers the cash deposited after the creation of the pledge;
- shares: to create a pledge over shares in certificated forms, a written pledge agreement entered into by the pledgee and the pledgor is required. 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 shares in scripless forms which are transferred through the book-entry system of the Taiwan Depository & Clearing Corporation (TDCC), the pledgor and the pledgee must sign a form prescribed by the TDCC and have the pledge registered with the TDCC;
- movable property: as for movable property, the security to be created may be a pledge or a chattel mortgage. To create a pledge, the pledgee and the pledgor must enter into a written pledge agreement and the pledgor should deliver the possession of the movable property 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, chattel mortgage registration with the competent authority is necessary for the mortgagee to create a valid chattel mortgage against third parties;
- real estate: to create a valid mortgage over real estate, the mortgagee and the mortgagor should enter into a written mortgage agreement, and the mortgage must be registered with the competent land office; and
- accounts receivables: to create a pledge over accounts receivables, the pledgee and the pledgor must enter into a written pledge agreement. In addition, the accounts receivables must be identifiable according to the content of the pledge agreement. Further, the obligor of such accounts receivables should be notified of the creation of the pledge for the pledgee to claim the pledge against the obligor.

No notarisation or stamp duty is required for the creation of security over different types of assets mentioned above. However, the registration fees are required for the chattel mortgage and real estate mortgage. The registration fee for creating a chattel mortgage over a movable asset is NT$900 per application. The registration fee for creating a mortgage over real property is equivalent to 1/1,000 of the total amount secured by the mortgage.

According to the Civil Code, a mortgage or pledge would not be validly created in favour of the mortgagee or pledgee if the mortgagee or pledgee does not have an underlying claim against the debtor.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

- Cash deposit: a creditor can assure itself as to the absence of a pledge over cash deposit by confirming with the account bank;
- shares: a creditor can assure itself as to the absence of pledge over shares in certificated forms by confirming whether the certificates of the shares have been endorsed and delivered to other pledgees. As to shares in scripless forms, a creditor can assure itself as to the absence of a pledge by confirming the registration record kept by the TDCC;
- movable property: a creditor can assure itself as to the absence of a chattel mortgage over movable assets by confirming the registration record of the movable assets kept by the competent authority with priority to the creditor's chattel mortgage;

- real estate: a creditor can assure itself as to the absence of a mortgage over real estate by confirming the registration record of the real estate kept by the competent land office with priority to the creditor's mortgage; or
- accounts receivables: a creditor can assure itself as to the absence of pledge over account receivables by confirming with the obligor of such accounts receivables.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

The requirements relating to the enforcement of each of the security are as follows.

Cash deposit

The pledgee may request the account bank to deliver the pledged cash deposits to the pledgee directly without going through any court proceeding, provided that the cash deposits are due and payable. If the account bank refuses to deliver the cash deposits to the pledgee, the pledgee must obtain an execution title (such as a final court judgment) prior to taking a court enforcement action.

Shares

The pledgee may sell the pledged shares through a public auction without court involvement. The pledgee, if possible, shall give the pledgor a prior notice before the public auction and the public auction shall be attended by a notary public or commercial association. However, the pledgee and the pledgor may enter into an agreement for the pledgee to acquire the title to the securities or dispose of the securities other than by way of public auction; provided, however, that such title acquisition agreement should not be detrimental to other security interest holders, if any. If the enforcement action against the pledged shares is conducted through a court proceeding, the pledgee must obtain an execution title prior to taking a court enforcement action.

With respect to the foreclosure over listed shares that are traded and transferred through the TDCC's book-entry system, the pledgee may notify the TDCC of its exercise of the pledge over the pledged listed shares and sale of such shares, together with the standard TDCC applications executed by the pledgee and the sale mandate form executed by the pledgor.

Movable property

In the event of a default by the debtor, the mortgagee may immediately take possession of the mortgaged movable property in accordance with the Personal Property Secured Transaction Act. If the debtor or the mortgagor refuses to deliver the movable property to the mortgagee, the mortgagee may petition the court for provisional attachment of the mortgaged movable property. If a provision in the mortgage agreement expressly permits a court's compulsory execution by the mortgagee, the mortgagee may go through the court for a compulsory execution proceeding for the sale of the mortgaged movable property.

Real estate

The enforcement action against the mortgaged real estate is commonly conducted through court proceedings. The mortgagee must obtain an execution title issued by the court prior to the court enforcement action.

Apart from the above, the Civil Code permits the mortgagor and mortgagee to enter into an agreement that the ownership of mortgaged real estate shall be transferred to the mortgagee when the debtor defaults; provided, however, that such transfer agreement may not be claimed against a bona fide third party unless such transfer agreement has been registered.

Accounts receivables

The pledgee may request the obligor of the pledged receivables to pay the pledged receivables to the pledgee directly without going through any court proceeding if the receivables are due and payable. If the obligor of such pledged receivables refuses to pay the pledged receivables to the pledgee, the pledgee must obtain an execution title prior to taking a court enforcement action.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Upon the bankruptcy of the project company, a project lender as a secured creditor may enforce its rights over the collateral without going through a bankruptcy proceeding, and the claims of foreign creditors are treated the same as the claims of local creditors. If the sale price derived from the court auction is insufficient to repay the claims in full, the project lender as a secured creditor may still participate in the bankruptcy proceeding of the project company to seek possible repayment of the unpaid claims pari passu with the unsecured creditors.

There are no preference periods with respect to the collateral. The followings are some examples with respect to preferential creditors' rights:

- land value increment 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;
- the following labour claims will rank prior to unsecured creditors:
- labour wages due and payable by the employer but overdue for a period of fewer than six months;
- retirement payments payable by the employer pursuant to the Labour Standards Act but not yet paid; and
- severance payable by the employer pursuant to the Labour Standards Act or Labour Pension Act but not yet paid; and
- fees and debts incurred for the benefit of the bankruptcy estate, which will rank prior to unsecured creditors.

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:

- provision of security for outstanding debts within six months prior to the bankruptcy adjudication; and
- repayment of the debts not yet due.

In addition, the bankruptcy administrator shall, within two years after the declaration of the bankruptcy proceeding, file with the court to rescind the transaction that 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.

Unincorporated associations without a representative or administrator, banks and insurance companies are excluded from a bankruptcy proceeding. There is no special legislation applicable to unincorporated associations. On the other hand, banks and insurance companies will

be subject to the proceedings provided under the Banking Act, Deposit Insurance Act and Insurance Act.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

A Taiwan corporate entity has an annual foreign exchange quota of US$50 million (or its equivalent) (or such other amount as determined by the Central Bank of the Republic of China (Taiwan) (CBC) from time to time at its discretion in consideration of Taiwan's economic and financial conditions or the needs to maintain the order of foreign exchange market in Taiwan). No prior approval from the CBC is required if the Taiwan corporate entity converts New Taiwan dollars into foreign currency for remittance to foreigners and the conversion does not exceed the above quota or is related to cross-border trade of goods or services. The CBC has the sole discretion to grant or withhold its approval on a case-by-case basis if the foreign exchange quota of the Taiwan corporate entity is insufficient for such conversion. From our experience, in the event that a foreign creditor enforces its claims in Taiwan and would like to convert the enforcement proceeds into foreign currency, it should not be difficult to obtain the necessary CBC approval for such conversion.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Any remittance of investment returns to a party in another jurisdiction will be subject to foreign exchange control in Taiwan if it involves exchange settlements against New Taiwan dollars. However, investment returns would not be subject to foreign exchange restrictions if the relevant investment by a foreign investor has been approved by the Investment Commission of Taiwan.

As to tax treatment, the remittance of dividends to foreign shareholders is subject to withholding tax at 21 per cent 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 per cent withholding tax or a lower tax-treaty rate.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

It is not mandatorily required for project companies to repatriate foreign earnings.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies may establish and maintain foreign currency accounts locally and Taiwan law does not prohibit a Taiwan company from opening an offshore account in another jurisdiction.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Foreign investors who plan to make direct investments in a Taiwan private company, regardless of the industry, are required to obtain prior approval from the Investment Commission of the Ministry of Economic Affairs. In addition, Taiwan maintains a list of industries in which foreign investment is prohibited or restricted up to a 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 open for PRC investments. None of the bilateral or other international treaties signed by Taiwan may afford relief from such restrictions.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

No person is allowed to engage in the insurance business in Taiwan without obtaining a prior approval from the Taiwan Financial Supervisory Commission. Foreign insurance companies can reinsure local risk, but according to the Regulations Governing Insurance Enterprises Engaging in Operating Reinsurance and Other Risk Spreading Mechanisms, if the reinsurer does not meet certain requirements, the local insurer may have additional obligations for such reinsurance. In addition, cut-through clauses are effective in Taiwan.

A foreign company may be named as a payee or receive an insurance payment through a pledge of the insurance policy in Taiwan; therefore, insurance policies over project assets may be payable to foreign secured creditors.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Certain equipment, such as cranes, cables and wires, is 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 per cent sale tax; the importation of certain commodities such as tyres, vehicles, gasoline and machinery is subject to commodity tax. The Act for Promotion of Private Participation in Infrastructure Projects provides an import duty exemption for certain qualified equipment used by construction contractors; and a deferred (until one year after commercial operations) instalment payment of import duty on operating equipment to be used by a project company.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

Certain equipment, such as cranes, cables and wires, is 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 per cent sale tax; the importation of certain commodities such as tyres, vehicles, gasoline and machinery is subject to commodity tax. The Act for Promotion of Private Participation in Infrastructure Projects provides an import duty exemption for certain qualified equipment used by construction contractors; and a deferred (until one year after commercial operations) instalment payment of import duty on operating equipment to be used by a project company.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Generally speaking, the Taiwan 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 reasonable compensation, provided that the total foreign investment in such invested company is less than 45 per cent of the total capital amount of the invested company. If the total foreign investment in an invested company has accounted for no less than 45 per cent of its total capital amount, the invested company will be immune from expropriation for 20 years from its establishment.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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?

For a domestic non-bank lender who is a Taiwan resident or a profit-seeking enterprise with a fixed place of business in Taiwan, the withholding tax rate for interest is 10 per cent, but such withholding tax is applicable to corporate borrowers only. Individual borrowers are not required to withhold tax on interest.

For a foreign lender who is a non-Taiwan resident or a profit-seeking enterprise without a fixed place of business in Taiwan, the withholding tax rate for interest applicable to a corporate borrower is 20 per cent. However, an applicable tax treaty between Taiwan and a foreign country may reduce such withholding tax rate to 10 per cent.

Income tax on the following categories of income shall be exempted:

- interest derived from loans offered to the Taiwan government or legal entities within the territory of Taiwan by foreign governments or international financial institutions for economic development, and interest derived from the financing facilities offered to their branch offices and other financial institutions within the territory of Taiwan by foreign financial institutions;
- interest derived from loans extended to legal entities within the territory of Taiwan by foreign financial institutions for financing important economic construction projects under the approval of the Ministry of Finance; and
- interest derived from favourable-interest export loans offered to or guaranteed for the legal entities within the territory of Taiwan by foreign governmental institutions and foreign financial institutions that specialise in offering export loans or guarantees.

Moreover, some of the tax treaties provide an exemption from income tax withholding for interest payment. For example, the Netherlands-Taiwan Tax Treaty provides that the interest that is paid in respect of a bond, debenture or other similar obligations of a Taiwan public entity, or a subdivision or local authority of Taiwan, should be taxed only in the Netherlands.

A foreign lender (except for a foreign entity's Taiwan branch) will not be subject to Taiwan income taxes solely because of a loan to, or guarantee or grant of security from, a Taiwan company.

For the purposes of effectiveness or registration, there is no tax applicable to foreign investments, loans, mortgages or other security documents.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

In Taiwan, project finance is primarily applied to infrastructure projects developed by the private sector or through a public-private partnership (PPP). 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 2018. 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 and tourism facilities;
- power-supply facilities;
- sports facilities;
- industrial, commercial, technical and agricultural facilities; and
- government office buildings.

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.

The government has title to natural resources, including oil and gas, minerals, water, forest land, land with mineral deposits, water sources or other pieces of land with similar resources.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The government has title to natural resources, including oil and gas, minerals, water, forest land, land with mineral deposits, water sources or other pieces of land with similar resources.

Under the Statute for Investment by Foreign Nationals, foreign investors may be subject to prohibitions or restrictions on owning certain classes of Taiwan businesses. Pursuant to the Negative List for Investment by Overseas Chinese and Foreign Nationals promulgated by the Executive Yuan, last amended on 8 February 2018, industries in which foreign ownership may be prohibited or restricted include certain sectors in agriculture, husbandry, fishing, forestry, etc.

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 Taiwan 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 relevant laws and regulations governing such public utilities. A project company incorporated in Taiwan and awarded the concession right pursuant to the Act for Promotion of Private Participation in Infrastructure Projects should generally be eligible for such licence.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Under the Mining Act, only Taiwan 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 per cent to 50 per cent of the price for petroleum and natural gas, 2 per cent to 20 per cent for metallic minerals and 2 per cent to 10 per cent for other minerals, while the amount of mineral rights fees depends on the kind of minerals and the terms of the concession.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

Tariffs may be imposed on the export of natural gas, petroleum and other natural resources, but there is no tariff for exporting natural gas and petroleum to a World Trade Organization member or a country that has a free-trade agreement with Taiwan.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

In general, Taiwan 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.

However, 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. Generally speaking, a Taiwan 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 sole discretion to grant or withhold its approval on a case-by-case basis if the Taiwan 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. The approval process described above may be simplified if the relevant loans are granted by foreign financial institutions and have been registered with the CBC in advance.

Registration of financing

21 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, Taiwan 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.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

An international arbitration award would be recognised and held enforceable by the courts of Taiwan without reviewing the merits, provided that none of the following exists:

- where the recognition or enforcement of the arbitration award is contrary to the public order or good morals of Taiwan;
- where the dispute is not arbitrable under the laws of Taiwan; or
- there is no reciprocity in the recognition and enforcement of an arbitral award between Taiwan and the country in which the arbitral award is made or the country whose arbitration rules are applicable.

Taiwan is not a member of the ICSID Convention or New York Convention. However, the grounds for denial of recognition or enforcement prescribed under the Arbitration Act resemble article 5 of the New York Convention.

Under the Arbitration Act, disputes that can be resolved through arbitration are limited to 'those which may be settled in accordance with the law'. For example, a dispute regarding the validity of patents or trademarks can only be decided by the Intellectual Property Office or the Intellectual Property Court.

Some types of disputes are subject to mandatory arbitration under Taiwan law. For example, 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 and the contractor files for arbitration, the dispute must be resolved by domestic arbitration.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

In Taiwan, parties to a project agreement are generally free to choose the governing law of the contract. In practice, it is common for the parties to choose Taiwan law as the governing law for projects in Taiwan; in particular, the government counterpart to an investment agreement under the Act for Promotion of Private Participation in Infrastructure Projects is not likely to accept a foreign law as the governing law. However, as regards engineering, procurement and construction contracts involving international contractors, we have seen contracts governed by New York law or English law.

Most infrastructure projects in Taiwan are locally financed. Thus, Taiwan law typically governs financing agreements. However, in recent wind-farm project financing, we have seen facility agreements governed by New York law or English law.

Investment agreements, off-take agreements, financing agreements, project insurance policies, local security documents and land acquisition agreements are typically governed by domestic law.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Under Taiwan 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. Taiwan courts generally honour such an agreement on the basis of party autonomy in the absence of any of the following circumstances:

- it would be unfair for the subject matter to be adjudicated by the chosen jurisdiction;
- the consent of a party to submit to the chosen jurisdiction is obtained by fraud, duress or other unlawful means;
- the parties are not on an equal footing when they enter into the submission-to-jurisdiction agreement;
- it would be inappropriate or inconvenient for the chosen jurisdiction to adjudicate the subject matter; or
- the country of the chosen jurisdiction does not recognise and enforce judgments of the Taiwan courts on a reciprocal basis.

The principle of sovereign immunity generally does not apply to projects in Taiwan.

Taiwan courts shall recognise the enforcement of foreign court judgment without further review of the merits unless any of the following circumstances exist:

the foreign court has no jurisdiction over the subject matter according to Taiwan law;

if the foreign court judgment is rendered by default:

- the losing party was not duly served within a reasonable period of time in accordance with the foreign law, or
- process was not served on the losing party with judicial assistance of Taiwan;
- the foreign judgment or the court proceeding resulting in the foreign judgment is contrary to the public policy or good morals of Taiwan; or
- judgments of the courts of Taiwan are not recognised by the foreign court rendering the judgment on a reciprocal basis.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Generally speaking, investors in Taiwan are not subject to anti-money laundering compliance checks or other relevant regulations, unless being designated by competent authorities as the 'non-financial enterprises' under the Money Laundering Control Act.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

Taiwan has announced Green Finance Action Plan 2.0 in August 2020, which, among others, includes several measures with respect to the following ESG issues:

- encourage financial institutions to finance and invest in areas of sustainable development projects;
- require listed companies and financial institutions to disclose climate and ESG-related information on corporate social responsibility reports; and
- establish and strengthen integration platforms and databases for ESG information.

Project companies in Taiwan are not subject to any mandatory ESG reporting requirement or other relevant regulations.

PROJECT COMPANIES

Principal business structures

27 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies in Taiwan are normally incorporated as a company limited by shares under the Company Act. The principal sources of financing for local projects are syndication loans provided by local and foreign financial institutions.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The Act for Promotion of Private Participation in Infrastructure Projects is the main legislation applied to infrastructure projects developed by the private sector or through a public-private partnership. 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 and tourism facilities;
- power-supply facilities;
- sports facilities;
- industrial, commercial, technical and agricultural facilities; and
- government office buildings.

PPP - LIMITATIONS

Legal limitations

29 What, if any, are the practical and legal limitations on PPP transactions?

Generally speaking, the terms and conditions of a PPP transaction are tailor-made on a case-by-case basis. There is no limitation generally applicable to PPP transactions.

PPP - TRANSACTIONS

Significant transactions

30 What have been the most significant PPP transactions completed to date in your jurisdiction?

Taiwan High Speed Rail is the largest PPP transaction to date. It was successfully completed in 2007 with a total cost of approximately US$14.5 billion.

UPDATE & TRENDS

Key developments of the past year

31 In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

It is anticipated that many local wind-farm projects are to be launched in the next few years, which will require funding from project finance.

理律法律事務所
LEE AND LI
SINCE 1965 ATTORNEYS-AT-LAW

James C C Huang
jameshuang@leeandli.com

Maggie Huang
maggiehuang@leeandli.com

8th Floor, No. 555, Sec 4
Zhongxiao E Road
Taipei 11072
Taiwan
Tel: +886 2 2763 8000
Fax: +886 2 2766 5566
www.leeandli.com

Thailand

Jessada Sawatdipong, Sarunporn Chaianant and Suphachok Saengarun
Chandler MHM Limited

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

The major forms of security under Thai law are mortgage, pledge, security under the Secured Transactions Act BE 2558 (2015), assignment and guarantee. Thailand's Civil and Commercial Code BE 2468 (1925) (CCC) governs mortgage, pledge, assignment and guarantee, while the Secured Transactions Act governs security created pursuant thereto.

A mortgage is a non-possessory security whereby the mortgagor assigns a property to a mortgagee as security for the performance of an obligation, without delivering the property to the mortgagee. Mortgages can be established over immovable property or certain movable properties that may be registered under relevant laws (eg, machinery registered for ownership under the Machinery Registration Act). Common assets usually registered for mortgages are land, building and registered machinery. Whereas a mortgage is applicable to registered machinery only, both registered and non-registered machinery can be secured by way of security pursuant to the Secured Transactions Act.

A pledge is a possessory security whereby a pledgor delivers to the pledgee a pledged property as security for the performance of an obligation. In addition to typical movable property, certain assets representing value such as shares, bills of exchange, promissory notes and cheques can also be pledged by delivery of documents. In the context of project financing, the most common assets secured by way of pledge are shares of a borrower.

A security under the Secured Transactions Act is a non-possessory security whereby the security provider assigns certain types of assets to a security receiver for the performance of an obligation. Assets that can be registered as security are a business (property used by the security provider in its business operations and other rights related to its business operations), claims (excluding rights represented by instruments), movable property used by the security provider in business operations, for example, machinery, immovable property (if the security provider operates an immovable property business), intellectual property and any other assets as provided in the Ministerial Regulation issued under the Secured Transactions Act. A security receiver must be a 'financial institution', which encompasses:

- financial institutions pursuant to the Financial Institution Business Act (namely, commercial bank, finance company and credit foncier company);
- life insurance licensees pursuant to Thai law governing life insurance and non-life insurance licensee pursuant to Thai law governing non-life insurance; and
- commercial banks or financial institutions established pursuant to specific law and other persons as prescribed in the Ministerial Regulation.

Note that a sole foreign commercial bank is currently not eligible to be a security receiver. However, according to the Ministerial Regulation dated 30 November 2016 (as amended), a foreign commercial bank that provides credit facilities by syndication with the 'financial institution' can be a security receiver.

In the light of project financing, the assignment of the borrower's rights against its counterparties is commonly created over material project documents, which usually include an offtake agreement, supply agreement, engineering, procurement and construction contract, operations and maintenance contract, and land lease and land sub-lease agreements. Borrower's rights in relation to bank accounts, insurance and bonds (guarantees) given as security under material project documents are also assigned in common practice. Assignment of insurer's rights against reinsurers under reinsurances is also required by the lenders. Assignment can be absolute assignment or conditional assignment. While assignment is a mere contractual arrangement that does not cause a lender as assignee to be a secured creditor, a lender as security receiver pursuant to the Secured Transactions Act ranks in priority to an ordinary creditor in terms of repayment from a property given as security. As such, following an enforcement of the Secured Transactions Act, onshore lenders are inclined to secure such rights by way of security pursuant to the Secured Transactions Act with provisions on conditional assignment incorporated therein.

A guarantee is a contract whereby a guarantor binds itself to a creditor to satisfy an obligation in the event that the debtor (namely, the borrower) fails to perform it. Under the CCC, any agreement that binds a guarantor as a natural person to be liable like or as a joint debtor (namely, the primary debtor) is invalid. On the contrary, a guarantor as a juristic person may agree to bind themselves to be liable for an obligation like or as a joint debtor.

On 27 October 2019, the Rights over Leasehold Asset Act BE 2562 (2019) became effective. The intention of this Act is to create a new type of entitlement of land, buildings and land or condominiums that provides more economic utilisation than leases, and shares similar characteristics to a usufruct right. In addition to utilising, sub-leasing, and transferring the right over leasehold asset, the right holder can also mortgage or use that right over leasehold assets as business security.

Collateral perfecting

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Formalities

Security that requires registration

Mortgage agreements must be made in writing in Thai, containing the minimum required particulars, for example, the mortgage amount in baht. The mortgage agreement must be registered with the competent official:

- the local Land Office for a land and building mortgage;
- the Central Machinery Registration Office for a mortgage over registered machinery; and
- the Marine Department or relevant regional registry office for ships and barges mortgages.

A business security agreement must be prepared in writing and registered online with the Secured Transactions Registration Office. For the purpose of registration, certain particulars must be provided, for example, the names and addresses of the parties, the secured obligation, the details of the assets designated as security, the maximum secured amount and the grounds for security enforcement. In addition, it is necessary for the contracting parties to a business security agreement to appoint a security enforcer when granting security over a business.

Security that does not require registration

A pledge does not require registration with a governmental body. To perfect a pledge, the pledged property must be delivered by the pledgor to the pledgee. In the case of a pledge of shares represented by registered share certificate, a share certificate must be delivered to a pledgee to perfect a pledge. For a share pledge to be valid against a company and third party, a record of pledge along with a name and an address of a pledgee must be registered in a share register book of a company.

Assignment

An assignment agreement must be made in writing. To be valid against obligors (namely, counterparties) or third parties, a written notice of assignment must be given to the obligors that owe obligations or a written consent from the same must be obtained.

Guarantee

A guarantee requires written evidence signed by the guarantor to be admissible in court.

Fees and taxes

For land and building mortgages, an official registration fee of 1 per cent of the mortgage amount but not exceeding 200,000 baht and other nominal fees must be paid.

For machinery mortgages, an official registration fee of 1 baht per 1,000 baht of the mortgage amount but not exceeding 120,000 baht must be paid.

In respect of security pursuant to the Secured Transactions Act, an official registration fee of 0.1 per cent of the secured amount but not exceeding 1,000 baht must be paid, except for registration of security over land where the fee shall be equivalent to the land mortgage registration fee. A fee of 200 baht per copy must be paid for issuing an evidence of registration.

For a guarantee, stamp duties of 10 baht must be paid if the guaranteed amount exceeds 10,000 baht.

Power of attorney is subject to maximum stamp duties of 30 baht. Maximum stamp duties of 5 baht per copy must be paid for counterparts of subjected instruments.

Priority

Mortgagor and security receiver rank in priority to an ordinary creditor for a repayment out of secured property. The security interest (namely, mortgage and security under the Secured Transactions Act) that was registered first has priority over interests registered later. Properties subject to security under the Secured Transactions Act cannot subsequently be pledged, otherwise, the pledge will be invalid.

Security agent and licensing requirement

Thai law only recognises the common law concept of trust under the Trust for Capital Market Transaction Act BE 2550 (2007), which only allows a trustee to hold securities for investors for certain capital market transactions. As a result, a security trustee who holds a security on behalf of the project lenders is not recognised. Nevertheless, Thai law has a similar concept called the principal-agent relationship and permits finance parties to appoint a security agent to hold a security for and on behalf of secured parties. There is no specific licensing requirement for acting in a capacity as a security agent. The concept of a security agent is not permissible for a mortgage, and thus each of the lenders needs to enter into the mortgage agreement as mortgagees.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

With respect to mortgages registered with a government official, the registration record is open to the public for searches to find the existing registered security interest. Transactions processed through a government official (including mortgage) are also recorded on a certificate representing mortgaged property (if applicable), for example, a machinery registration certificate for registered machinery and land deeds for land.

For pledges to be perfected, pledged assets or documents such as the share certificate must be granted to a pledgee. In the case of a share pledge, the share register book of a company can be searched for any registered interest.

Information on business security registration is also available to the public through the Department of Business Development's website.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Enforcement of mortgage

Before enforcing a mortgage, a mortgagee shall notify a debtor in writing to perform its obligations within a reasonable time limit, which is no less than 60 days. If the debtor fails to perform its obligation within the time limit, the mortgagee may file a suit to a court to enforce the mortgage by ordering a seizure of mortgaged property and sale by public auction. The mortgage may be provided by a debtor who owes obligations or a third party. If the mortgagor is not a debtor, the written notice must be given to the mortgagor within 15 days from the date the mortgagee issues a written notice to the debtor. If a mortgagee fails to notify the mortgagor within such time limit, it will release the mortgagor from all liabilities of accumulated interest, compensation

and charges incurred after such time limit. Apart from public auction, a mortgagee may foreclose a mortgaged property only if:

- a debtor has failed to pay interest for five consecutive years;
- the value of the mortgaged property is lower than the outstanding debt; and
- there is no other mortgage or other preferential right registered over the mortgaged property.

A debtor as mortgagor is not liable for a shortfall even though sale proceeds are inadequate to pay the whole debt, although parties could agree otherwise. A third-party mortgagor is not liable for a shortfall, and any agreement that holds such mortgagor liable for a shortfall or liable as a guarantor, whether specified in a mortgage agreement or as a standalone agreement, is invalid. Such restriction is not applicable in a case where a debtor is a juristic person and its legitimate managing or controlling person mortgages his or her property to secure the obligations of such debtor and executes a separate guarantee.

Enforcement of pledge

Before enforcing a pledge, a written notice informing a debtor to perform obligations within a reasonable time must be served. If the debtor fails to perform its obligation after such reasonable time passed, a pledgee may sell the property by public auction, provided that it has notified the pledgor of the time and place of the auction. If it is not possible to serve a notice to a pledgor, a pledgee may sell property by public auction after one month from the date the obligation became due. Thai law prohibits parties from entering into an agreement saying that the pledgee shall become an owner of the pledged property by any way other than a public auction before the date obligation is due. If sale proceeds are inadequate, the debtor would still be liable for a shortfall. A pledge agreement cannot contain a provision that allows enforcement of the pledge by any other method in advance before the occurrence of a default.

Enforcement of guarantee

Before enforcing a guarantee, the creditor shall notify the guarantor within 60 days from the date of default. The creditor cannot require the guarantor to perform the obligation prior to receipt of such notice by the guarantor. If the creditor fails to notify the guarantor within such time limit, it will release the guarantor from all liabilities of accumulated interest, compensation and charges incurred after such time limit.

Enforcement of business security

The enforcement of business security does not require a claim to be filed in court. The enforcement procedures of business security depend on whether the security is created over the whole business or specific assets. With respect to a business security over a whole business, the Secured Transactions Act provides that if the security enforcer determines that an enforcement event has occurred, the security provider shall deliver the business as well as the related documents, rights and liability to the security enforcer within seven days. Subsequently, the security provider shall be responsible for managing the business until it disposes of the business and allocates the sale proceeds towards the repayment of the secured obligation in accordance with the Secured Transactions Act.

With respect to a business security over specific assets, enforcement can be by way of foreclosure or public auction.

Upon receipt of an enforcement event notice by the security provider, the security provider's right to dispose of the assets will cease and the security provider must deliver the assets to the secured creditor. For bank accounts, the security receiver may immediately exercise the right to set off upon the occurrence of an enforcement event. Upon such set-off, the security receiver must notify the security provider by written notice within seven days. If the security receiver is not the account bank, the security receiver may send a written notice to the financial institution acting as the account bank informing the occurrence of the enforcement event and requesting the account bank to deduct the deposit for payment of debt.

Enforcement by assignment

The creditor must deliver a notice stating its intent to enforce its right. If the assignee fails to perform the obligation within the specified period in the agreement or notice, the creditor must file a claim to the court.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

A project lender having rights over the security may enforce such security without any need to apply for repayment of debt under bankruptcy proceedings but a project lender must allow such security to be examined by the receiver. However, a project lender may apply for repayment of debt in the bankruptcy proceeding on the condition that it could claim the outstanding amount in excess of the price of the secured property (Thai mortgage laws prescribe that a debtor as mortgagor would not be liable in excess of the price of secured property unless the agreement between parties says otherwise) and:

- when it agrees to relinquish the property given as security for the benefit of all creditors, it may apply for repayment of debt in full;
- when enforcement has been made against the property given as security, it may apply for repayment of debt in respect of the outstanding amount;
- when a request has been made to the receiver for auction sale of the property given as security, it may apply for repayment of debt in respect of the outstanding amount; or
- when the valuation of the property given as security has been made, it may apply for repayment of debt in respect of the outstanding amount.

Any fraudulent act, gratuitous act or an act under which the debtor receives unreasonably small remuneration can be cancelled if such act arises during the period of one year before the bankruptcy petition or thereafter. If a debtor transfers any assets or does any act with an intention to treat any particular creditor preferentially within three months before the bankruptcy petition or thereafter, such act can be cancelled. If the creditor who has become advantaged is the debtor's insider, the period of one year before the bankruptcy petition or thereafter shall be applied.

In a bankruptcy proceeding, certain taxes and employees' claims must be satisfied before any repayment to creditors. The Bankruptcy Act does not apply to Thai state agencies.

A court order is always required for a seizure of the debtor's assets and enforcement of such assets.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer?

Under Thai exchange control law, foreign currencies are allowed to be transferred, brought into Thailand, sold, purchased or exchanged with a

juristic person established by a specific law and granted permission to undertake foreign means payment business.

Purchase and exchange of foreign currency from authorised persons and transfers of funds in foreign currency outside the jurisdiction to make payments for loans and interest are generally allowed, provided that documents evidencing the transaction are submitted and the procedures prescribed by the Exchange Control Officer are followed.

In general, if the foreign currency exchange is intended to be paid to offshore entities, the Thai Revenue Code provides that such payments are subject to income tax. The payer has the responsibility to withhold the tax at source. The withholding rates depend on the type of income. If payments are made to a country that has a double taxation agreement with Thailand, the rate of withholding tax may be reduced or waived.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Foreign exchange approvals can be granted by authorised agents for all bona fide transactions that do not fall within a short list of 'restricted purposes' or the negative list.

The payment of investment returns, interest, repayment of a loan (of which proceeds have been remitted into Thailand) and payments made under a guarantee are not included in the negative list. Therefore, the outward remittance of such payment can be approved by commercial banks (as Bank of Thailand's (BOT's) authorised agents), provided that the relevant supporting documents are submitted.

There is a withholding tax imposed on interest or premiums on loans or bonds. The tax rate may be decreased or waived if there is a double tax agreement between Thailand and such relevant countries.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Foreign currency of US$1 million or more must be repatriated to Thailand and sold or deposited with an authorised juristic person within 360 days of receipt. However, exporters who earn proceeds from the export of goods or other types of revenue in foreign currencies shall be entitled to use such revenue to offset foreign currency expenses without having to repatriate the funds, so long as the debts that are subject to the offset do not fall within the negative list as prescribed by BOT.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies are allowed to maintain foreign currency deposit (FCD) accounts in Thailand, subject to certain limitations and requirements. The amount of foreign currency that a depositor can deposit in an FCD account shall be up to US$15,000 per day or not more than the underlying obligation of such proceeds per the conditions as prescribed by the BOT.

There is no restriction under the Thai Foreign Exchange Control Act for project companies to maintain foreign currency accounts in other jurisdictions.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

The fundamental law governing foreign investment in or ownership of project companies is the Foreign Business Act BE 2542 (1999) (FBA). Under the FBA, foreign nationals, whether individuals or corporations, may not engage in restricted business activities listed thereunder unless a foreign business licence is obtained prior to the operation of the respective restricted business. A corporation is considered as foreign status under the FBA if at least one-half of its share capital is owned by a foreigner (either a foreign individual or foreign entity).

The restricted businesses pursuant to the FBA are divided into three categories as follows:

- businesses under List 1 are strictly prohibited to foreign nationals for special reasons, for instance, rice farming, forestry and land trading;
- businesses under List 2 related to national safety or security or having impacts on arts, culture, traditions, customs and folklore handicrafts or natural resources and the environment (eg, the production of firearms, ammunition, gun powder and explosives, the production of wood carvings and mining are prohibited from being carried out by foreign nationals unless permission is granted by the Ministry of Commerce);
- businesses under List 3 in respect of which Thai nationals are not ready to compete with foreign nationals (eg, service businesses, construction and advertising business are prohibited from being carried out by foreign nationals unless permission is granted by the Department of Business Development).

The provision of loans or guarantees may be considered a service business pursuant to List 3. Thus, a foreign entity that provides loans to other persons in Thailand or provides a guarantee in favour of a creditor in Thailand may be required to obtain the foreign business licence prior to the entry of the guarantee agreement. Foreign nationals may be exempted from the restriction imposed by the FBA, if such foreign nationals:

- operate allowed businesses under the protection of a treaty to which Thailand is a party, for instance, the Thailand–US Treaty of Amity and Economic Relations;
- engages in regulated businesses permitted by the Thai government for a specific duration; and
- engages in businesses permitted by the Board of Investment (BOI) and foreign business certificates have been obtained.

In addition to the FBA, foreign restrictions may be imposed by other specific legislation for specific business sectors. For example, the Land Code restricts foreign ownership of land unless stated otherwise in specific laws and regulations (for instance, after obtaining approval from the Board of Investment, Industrial Estate Authority of Thailand, etc).

If a foreign creditor wishes to enforce a security, owing to the limitations of foreign ownership in real property (mentioned earlier), it may not be able to foreclose or take ownership of the mortgaged property.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Insurance for projects in Thailand must be placed with Thai licensed insurers and may not be placed with foreign insurers. However, foreign insurers may write reinsurance for Thai licensed insurers.

A project company may assign its right to insurance proceeds from an insurer to the lenders or its agent, whether foreign or domestic.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

According to the Working of Alien Act BE 2551 (2018), to work on a project in Thailand, foreign workers are required to obtain necessary work permits from the Ministry of Labour. To be qualified for obtaining a work permit for a foreign worker, the project company shall have at least 2 million baht for each foreign worker the project company has hired; and a ratio of Thai workers to foreign workers shall be 4:1. BOI-promoted project companies may hire foreign experts exceeding the above limit if the BOI's committee considers it appropriate.

Workers from Cambodia, Laos, Myanmar and Vietnam may receive benefit from the memoranda of understanding entered into between Thailand and Cambodia, Laos, Myanmar and Vietnam. Those workers may be subject to less restrictive permit requirements for working in Thailand, in specific industries, including construction.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

The Export and Import Act BE 2522 (1979) is the main legislation that imposes restrictions on the importation of goods. Certain goods are prohibited from being imported into Thailand while other goods may require a licence or are subject to other control restrictions. In addition to the Export and Import Act, import restrictions may exist in specific legislation. For example, under the Armament, Ammunition, Explosives, Fireworks, and Imitation Firearms Act BE 2490 (1947), the importer of military hardware, ammunition or explosive devices requires an import licence from the Ministry of Defence.

The import of any goods shall pass the custom clearances and controls process where the duties and taxes may be imposed on the person who imports such goods pursuant to the Customs Act BE 2560 (2017). A BOI-promoted project company shall be entitled to the exemption or reduction of customs duty with respect to the importation of machinery.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The laws regarding the nationalisation or expropriation of project companies and their assets include the Thai Constitution BE 2560 (2017), the Expropriation and Acquisition of Immovable Property Act BE 2562 (2019) and the Administrative Procedure Act BE 2539. The expropriation of immovable property shall not be permitted except by virtue of law enacted for the purpose of public utilities, national defence or acquisition of national resources or for other public interests. Should there be any nationalisation or expropriation of the assets or projects, fair compensation of the investment shall be paid to the owner or the affected investors as well as to all persons having rights who suffer loss from such expropriation. Other than the domestic laws mentioned earlier, Thailand is also a party to a number of trade or investment agreements, such as the Thailand–Australia Free Trade Agreement, which has provisions with respect to nationalisation or expropriation of the investment made by an Australian national. In the event of nationalisation or expropriation, the criteria as stipulated in the trade investment agreement must be met (eg, to protect public interest purposes, to not be on a discriminatory basis, and to ensure fair compensation is provided).

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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?

Tax incentives are generally granted to foreign investors by the Board of Investment (BOI) for certain business activities and with additional privileges in some geographical areas. Available tax incentives are as follows:

- corporate income tax holidays of three to eight years (extendable to 13 years in total);
- exemption from duties on importation on items used for, machinery, R&D raw and necessary materials imported for manufacturing for export;
- exemption from corporate income tax (CIT) equivalent to or greater than the invested amount, with an exclusion of the cost of land and working capital, for a maximum of 15 years, depending on the promoted activity;
- reduction of 50 per cent in the CIT rate for five years from the date of the expiry tax holiday period; and
- exclusion of dividends received from promoted businesses from taxable income during the period of CIT exemption and within six months from the date on which any tax holidays expire.

In addition to the tax incentives under the aforementioned BOI privileges, investors may be eligible to obtain a subsidy from the Competitiveness Enhancement Fund established under the National Competitiveness Enhancement Act for Targeted Industries, BE 2560 (2017) (the Act). Subsidies will be granted to eligible investors in targeted industries as prescribed in the secondary law enacted under the Act, which must be industries new to Thailand or they must use new technology and leading specialist knowledge.

The Thai Revenue Code imposes a 15 per cent withholding tax on interest on both Thai and foreign loans. Nevertheless, Thailand is a party to a number of tax treaties in relation to the avoidance of double taxation with 61 countries. The withholding tax rates on interest on these treaties that are more favourable to the taxpayer shall prevail over the rate imposed under the Revenue Code.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Government agencies or departments with authority over typical project sectors are:

- the Energy Regulatory Commission for gas and power sectors;
- the Department of Mineral Fuels oversight of the upstream sector of the nation's oil and gas industry and administration of the Petroleum Act, BE 2514 (1971), as amended. Its primary objectives include promoting petroleum exploration and production, the enhancement of domestic petroleum supply, mineral fuels research and development and the acceleration of petroleum development on land subject to multiple claims;
- the Department of Alternative Energy Development and Efficiency regulates and supervises designated factories and buildings to ensure compliance with Thai energy law;
- the Department of Primary Industries and Mines, Ministry of Industry is responsible for granting permits and supervising the operations of the mining, mineral extraction and metal industry;
- the Department of Industrial Works, Ministry of Industry is responsible for granting the permit and supervising the chemical refining business;
- the Department of Land Transport is responsible for all land public transportation while the Marine Department is responsible for ports;
- the National Broadcasting and Telecommunications Commission is responsible for supervising telecommunications industries; and
- the Department of Industrial Works is responsible for granting a licence and supervising water treatment projects for factories releasing polluted water.

State-owned enterprises that relate to the abovementioned project sectors are:

- PTT Plc, a gas, oil and petrochemical enterprise;
- the Mass Communication Organisation of Thailand, which operates a television network;
- TOT Plc and CAT Incorporation Plc, which provide services relating to a telecommunications system;
- Airports of Thailand Plc, which owns all airports;
- the Electricity Generating Authority of Thailand, the Metropolitan Electricity Authority and the Provincial Electricity Authority, which together monopolise the distribution and sale of electricity for a whole country; and
- the Metropolitan Water Works Authority and Provincial Water Works Authority, which together operate the water supply.

REGULATION OF NATURAL RESOURCES

Titles

17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

There is no specific law that clearly stipulates the owner of all natural resources in Thailand. However, under the Thai constitution, the state has the authority to manage, use or arrange for usage and protect natural resources. Laws governing natural resources vary by sector. If a person wishes to acquire rights over a certain natural resource, such person has to comply with the particular law enacted for such resource. Indigenous persons do not hold any privilege in acquiring rights to natural resources. Every person is entitled to acquire rights to natural resources under the same conditions prescribed by law. For instance, oil and gas are protected and regulated under the Petroleum Act and a concession shall be acquired from the Ministry of Energy with a suggestion of the Petroleum Committee; mineral rights are regulated under the Mineral Act and a concession and a licence shall be granted by the Mineral Committee; and groundwater is regulated under the Groundwater Act and a licence is granted by the relevant local government authority. Concessionaires may gain benefits from such natural resource and have a right to prevent others from exploiting natural resource granted under the concession received. However, concession holders may have to perform obligations under the concession granted depending on the type of concession and conditions given by the relevant authority.

According to the Foreign Business Operation Act, foreign operators may be restricted to operate certain natural resource businesses, such as mining, which require an approval from the Ministry of Commerce. However, certain natural resource businesses are promoted by the Investment Promotion Act. If foreign operators obtain investment promotion under the Investment Promotion Act, such operators may procure a business operation certificate and shall be able to operate such promoted business.

Royalties and taxes

18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Concessions that are granted to the private sector for natural resource exploration and extraction are generally subject to special taxes and royalties. For example, under Thai petroleum law, concessionaires have to pay royalties based on revenue and the quantity of petroleum sold each month. In respect of income tax, concessionaires are exempted from an income tax under Thai general tax law; however, such concessionaires are subject to a special annual income tax calculated based on their net profit from petroleum business. Both local and foreign entities are subject to the same taxes and royalties' rules.

Export restrictions

19 | What restrictions, fees or taxes exist on the export of natural resources?

Under Thai law, the exportation of certain natural resources, such as gold and any radioactive mineral, is prohibited unless there is approval from the relevant competent authority. Thailand also complies with UN sanctions and restrictions on export.

In respect of tax implications, the export of natural resources may be subject to customs duty and value added tax under the Customs Act.

GENERAL LEGAL ISSUES

Government permission

20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

Project finance transactions involving foreign and local parties are permitted in Thailand. No project finance-specific governmental approval is required. Parties are required to comply with other general laws (eg, exchange control regulations).

In registering certain securities under Thai law with the relevant government body, registration fees would apply. A mortgage registration requires a fee of 1 baht for every 1 per cent of the mortgage amount but not exceeding 200,000 baht and other nominal transactional fees. Registration fees for business security registration vary depending on the type of security.

Registration of financing

21 | 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?

A loan agreement in an amount exceeding 2,000 baht must be evidenced in writing and signed by the borrower to be enforceable in Thai courts. A share pledge agreement is enforceable against the respective company

or any third party only if the creation of the pledge is reflected in the share register book of the respective company and the respective share certificate is in the possession of the pledgee or its agent. A mortgage agreement over immovable property or certain types of movable properties must be registered with the competent authority. A business security agreement must also be registered with the Department of Business Development.

An agreement made in a foreign language is required to be translated into Thai prior to going to the courts, except in the Intellectual Property and International Trade Court, which in its discretion may waive the requirement. In addition, as a condition of admissibility into evidence of agreements in court, the applicable stamp duty is required to be affixed on certain types of agreements (eg, loan agreement, guarantee agreement, hire of service agreement) within 30 days of bringing the document into Thailand (if it is signed abroad) or within 15 days if it is signed in Thailand.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The award rendered by the arbitral tribunal shall be recognised and enforced in a Thai court under the New York Convention for recognition and enforcement of the arbitral award and the Thai Arbitration Act BE 2545 (2002). Thailand is a member of the New York Convention. The arbitral award shall be enforced by a Thai court upon due application of a party seeking to enforce the award. Generally, the court will not review the merit of the dispute again since it has been considered and decided by the arbitration tribunal. However, a Thai court may refuse to recognise and enforce the arbitral award based on several grounds as prescribed in section 40 of the Thai Arbitration Act, for example, if the court sees that the arbitral award is against Thai laws, public order or is immoral.

Thailand is not a contracting state to the ICSID Convention. However, Arbitration and arbitral awards using ICSID and ICC arbitration process are enforceable in Thailand through the process in the Thai Arbitration Act.

Arbitrable disputes are limited to civil issues such as business and commercial disputes. Disputes arising out of administrative contracts, such as public-private partnership agreements, may also be arbitrable provided that a cabinet resolution approving the government agency's agreement on the arbitration is required.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

The parties may agree on the governing law provision in the project agreements and financing agreements. If the project agreement or financing agreement is governed by foreign law (the law other than Thai law), in the event that there is any proceeding taken in the courts of Thailand for the enforcement of the agreement, the choice of such foreign law agreed by the parties as the governing law will be recognised and applied, but only to the extent to which such law is proven to the satisfaction of the courts of Thailand (which satisfaction is within the discretion of the courts) and is not considered by the courts of Thailand to be contrary to the public order or good morals of the people of Thailand.

The general rule of severability may apply to the terms that are contrary to the public orders or immoral meaning that the ability to void or unenforceability of any provision may not affect the other remaining provision. Project agreements, for example, land lease agreements and domestic power purchase agreements, are typically governed by Thai law. Offshore supply agreements and onshore engineering, procurement and construction (EPC) agreements may be governed by foreign law depending on the agreement among the offshore supplier, onshore contractor and the owner. Finance documents of domestic projects that are domestically funded are generally governed by Thai law. However, certain types of security document, (eg, assignment of rights under the EPC contracts that are governed by foreign law, or guarantee agreement by a foreign parent company) may be governed by foreign law.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Any agreement providing the courts of a foreign jurisdiction to have exclusive jurisdiction to settle any dispute may not be enforceable in Thailand.

However, Thai law is silent on the effect of the irrevocable submission to the jurisdiction of a foreign court, of the appointment of agents for service of process for the purposes of proceedings before such court and the waiver to the objection of venue. We are not aware of any basis under Thai law to find such submission, appointment and waiver invalid.

A judgment of a foreign court will not be enforced by the Thai courts but may, at the sole discretion of the Thai courts, be admissible in evidence in an action in the Thai courts. They may re-try the entire case on its merits.

An express waiver of sovereign immunity made in writing may be effective. Nevertheless, the government agencies generally may be sued in the courts and may not raise a defence of sovereign immunity. In any case, Thai law expressly prohibits the seizure of state property.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

Anti-money laundering measures in Thailand are prescribed by the Anti-Money Laundering Act (1999). Certain professions have a duty to report to the Anti-Money Laundering Office any transaction conducted in cash with a value exceeding the amount prescribed in the secondary laws or is a suspicious transaction. The reporting entities are financial institutions, relevant land offices and other professions listed therein. Only sectors listed therein are subject to reporting requirements.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 What environmental, social and governance (ESG) issues are relevant in typical project sectors? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations?

The major environmental, health and safety laws and regulations and their regulatory bodies are as follows:

- the Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), with the Office of Natural Resources and Environmental Policy and Planning Environment as its regulatory body, and its subordinated regulations, imposes a requirement for certain types of projects to conduct an Environmental Impact Assessment or an Environmental Health Impact Assessment report;
- the Hazardous Substance Act BE 2535 (1992), with the Hazardous Substance Control Bureau, Department of Industrial Works

as its regulatory body, governs the management of hazardous substances; namely, oil, gas and fuel;
- the Fuel Oils Control Act, BE 2542 (1999), with the Department of Energy Business as its regulatory body, governs the operation and construction of huge oil storage facilities;
- the Petroleum Act, BE 2514 (1971), with the Department of Energy Business as its regulatory body, governs the operational environment, health and safety of petroleum concessionaires;
- the Factory Act BE 2535 (1992), with the Department of Industrial Works as its regulatory body and its subordinate regulations govern various environmental, health and safety issues such as electrical system safety, chemical and radioactive safety, workplace safety, fire hazard safety and general management for air and water pollution;
- the Building Control Act, BE 2522 (1979), with the Local Authorities as its regulatory body, governs the construction and public safety;
- the Public Health Act BE 2535 (1992), with the Department of Health as its regulatory body, governs general public sanitation; and
- the Labour Protection Act BE 2541 (1998) with the Labour Department as its regulatory body, the Workplace Health and Safety Act BE 2554 (2011) with the central government, the provincial government and the local government as its regulatory bodies, and their subordinate regulations govern various health and safety issues for employees such as chemical, heat, brightness, noise and radiation issues, general health checks for certain groups of workers, electrical systems and construction and machinery safety.

Depending on the size of each project as applicable, among others, oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport and ports projects are subject to an Environmental Impact Assessment (EIA) or an Environmental Health Impact Assessment (EHIA) report.

The Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992) also impose monitoring reporting requirements on projects that are subject to an EIA or HIA Report. Each project owner may have to submit a monitoring report once or twice a year (annually or bi-annually).

For good governance, at the current time, only listed companies are required by the Stock Exchange of Thailand to submit sustainability reports and make annual disclosures. Transactions between listed companies or their subsidiaries and the listed companies' connected persons and acquisition and disposition transactions are regulated. Depending on the size of such transactions, listed companies are required to report such transactions and (or) refer the matters for approval of the directors and (or) shareholders. The report may need to be accompanied by an opinion from financial advisors on the value of such transactions.

In addition, there have been efforts from various entities across a range of sectors such as the banking industry to implement ESG strategies. For example, the Bank of Thailand is encouraging financial institutions to integrate sustainability into their business and operating models.

PROJECT COMPANIES

Principal business structures

27 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Special purpose companies are generally established in the form of a private limited liability company for the sole purpose of undertaking specific projects that shield other assets of project sponsors in the event the project subsequently fails. However, the shareholding structures of the project companies are still subject to the restriction of the Foreign Business Act BE 2542 (1999).

Two main principal sources of financing available to project companies are equity finance (eg, capital contributions by the project sponsors or shareholders of the project companies) or public offerings through capital markets and debt finance (eg, corporate or shareholder loan or project finance loan from financial institutions).

For the project finance loan, lenders would grant term loan facilities to finance part of the project costs during the construction period and working capital facilities to finance the working capital requirement of the project during the operation period. In return, lenders will have control over key project decisions through restrictive covenants.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The Public-Private Partnership Act BE 2562 (2019) (PPP Act) came into force on 11 March 2019. This PPP Act replaces the Private Investments in State Undertaking Act BE 2556 (2013). Under the PPP Act, pure uses of state property are excluded. The PPP Act also streamlines the process of investment partnerships between the public sector and the private sector. The Public-Private Partnership Policy Committee is established to, including but not limited to, supervise the enactment of royal decrees or ministerial regulations, approve the plan for projects and approve the amendment to the public-private partnership agreement. The PPP Act governs various types of projects ranging from infrastructure transportation, public services, energy, telecommunication, hospitals, schools and exhibition centres.

In 2018, the Eastern Special Development Zone Act, BE 2561 (2018) was enacted. This Act creates an expedited process (PPP Eastern Europe Corridor (EEC) Track) for the approval of public-private partnership projects within the area of Chachoengsao, Chonburi and Rayong provinces. If the PPP projects fall under this Act and have complied with process and procedures on supervising and monitoring projects operation specifically prescribed by the EEC Committee, it shall be deemed that they are in compliance with the PPP Act.

PPP – LIMITATIONS

Legal limitations

29 What, if any, are the practical and legal limitations on PPP transactions?

A PPP project must only be initiated by a proposal from a government sector that is an owner of the project to the minister of the responsible ministry for consideration and approval. Private entities may, however, participate in the public hearing process.

Once the proposal has been approved, the matter is referred to the Private Investments in State Undertakings Policy Committee for further approval. After having been approved by the said Committee, the responsible ministry submits the matter to the cabinet for approval of the project and the relevant budgets.

After that, the project-owner agency will prepare an invitation to tender for a bidding process, initial draft private party selection documents and draft public-private partnership agreement and will propose them to the selection committee (case-by-case appointment) for approval. After approval, the project-owner agency will proceed with the selection of a private party.

After the process of the selection of a private party and negotiation of the draft PPP agreement with the selected private party, the draft PPP agreement would be submitted to the attorney-general for approval. The project-owner agency will then refer matters to the responsible ministry and further to the cabinet. If approved, the project-owner agency will sign the PPP agreement with the selected private party.

The private party may be selected not using the bidding process. The selection of a private party not using a bidding process must be in accordance with the notification regarding the criteria for the selection of a private party not using a bidding process. This notification requires that the selection of a private party not using a bidding process may proceed if:

- there is an urgent need for the private sector to invest in the project due to unexpected events not caused by the project owner agency and the selection by means of a bidding process may cause damage in any material respect to the public interest;
- private party selection by means of a bidding process will affect the success of the project or will result in other projects not being successful in accordance with the plan; and
- the project is under the strategic plan that requires investments from the private sector pursuant to government policies and the selection of private party by means of a bidding process may cause a delay that eventually will affect the objectives or the achievements of such policies.

PPP – TRANSACTIONS

Significant transactions

30 What have been the most significant PPP transactions completed to date in your jurisdiction?

There are PPP projects that have been approved to be processed under the EEC Track to allow the expedition of the overall approval process (eg, the consolidation of any unnecessary process and allow the procedures to occur in parallel), as well as to ensure transparency by the check and balance system and to exhibit strong commitment to better facilitate important investment. These include the following significant projects:

- U-Tapao Airport and Eastern Aviation City;
- High-Speed Railway Connection to Three Major Airports;
- Map Ta Phut Industrial Port Phase III;
- Laem Chabang Port Phase III;
- U-Tapao Maintenance, Repair and Overhaul Centre (MRO); and
- Digital Industry and Innovation Promotion Zone (Digital Park Thailand).

UPDATE AND TRENDS

Key developments of the past year

31 In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

Thai Overnight Repurchase Rate (THOR)

Thailand has adopted a synthetic interest rate called the Thai Baht Interest Rate Fixing (THBFIX), which is based on the US dollar–Thai baht foreign exchange swap. As the US dollar London interbank offered rate (LIBOR), which will cease to be published by June 2023, is a component of the THBFIX, the publication of the THBFIX by the Bank of Thailand (BOT) will also be impacted. Concerning this, BOT has been looking for a synthetic rate that is an alternative to the THBFIX. The Thai Overnight Repurchase Rate (THOR) representing the interbank overnight private repurchase rate (which is transaction-based) was developed as the new reference rate for the Thai financial market. Parties in Thailand have begun to utilise THOR as a new reference rate for project finance transactions. In addition, some existing THXFIX transactions have been amended to reflect THOR as a new reference rate to align with the cessation of LIBOR in June 2023.

Adoption of equator principles

The Siam Commercial Bank Public Company Limited (SCB), one of the largest banks in Thailand, has recently announced that it had become a signatory of the Equator Principles (EPs). The EPs are intended to provide a minimum standard of due diligence in supporting responsible decision-making when assessing risk. They are designed to be a financial institution's benchmark for determining, assessing and managing the environmental and social issues related to projects.

With the SCB becoming a signatory marks the first financial institution in Thailand to adopt EP, which is a significant step towards the adoption of the ESG strategies by Thailand's financial institutions.

CHANDLER MHM

Jessada Sawatdipong
jessada.s@mhm-global.com

Sarunporn Chaianant
sarunporn.c@mhm-global.com

Suphachok Saengarun
suphachok.s@mhm-global.com

17th and 36th Floors, Sathorn Square Office Tower
98 North Sathorn Road, Silom, Bangrak
Bangkok 10500
Thailand
Tel: +66 2009 5000
www.chandlermhm.com

United States

Brandon Tanguay*
Morgan, Lewis & Bockius LLP

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

In the United States, there are two primary categories of collateral: personal property and real property. Personal property is a broad category that includes consumer goods, equipment, goods, inventory, general intangibles, fixtures (to an extent), accounts, chattel paper, commercial tort claims, deposit accounts, documents, instruments, investment property, letter-of-credit rights, letters of credit, money and pre-extraction minerals. After-acquired property and proceeds from any of the above also tend to be part of collateral packages in the United States. Real property includes fee and leasehold interests, easement rights and fixtures (to an extent).

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

There is a multi-step process to perfecting collateral in the United States. With respect to personal property, the applicable uniform commercial code (UCC) (which is state-based) governs the rules for creation and perfection. The New York uniform commercial code can be found here. For real property collateral, the law of the local jurisdiction (usually state level) governs.

First, a security interest must be created. Typically, this is accomplished through a security agreement, where the debtor grants a security interest in the specific collateral. The description of the collateral in the granting section of the security agreement must be sufficiently precise.

Once the security interest 'attaches' (when it becomes enforceable against the applicable debtor), perfection is usually achieved through fling a UCC financing statement or by 'controlling' the collateral. Each state has approved their form of UCC financing statement (most states follow the same form and have the same requirements, but there are some differences among jurisdictions). The filing is a notice filing in a centralised location (usually the applicable secretary of state filing office). Section 9-310(a) of the Uniform Commercial Code (the UCC) specifies the types of collateral in which a security interest can be perfected via filing. UCC financing statements do not have to include as specific a collateral description as the underlying security agreement and are intended to put other parties on notice that a security interest has been granted in the collateral. Most UCC financing statements (other than transmitting utility filings) lapse after five years unless a continuation statement is filed in the six-month period prior to such lapse. Continuation statements can be filed in subsequent five-year periods. Most jurisdictions charge a nominal fee in connection with the filing of financing statements.

Certain types of collateral, including investment property, deposit accounts and letter-of-credit rights, can be perfected by 'control'. In a project financing, this is typically the primary method of perfecting collateral granted under a pledge of equity interests – where the secured party, usually through a collateral agent, takes physical custody of the debtor's certificate that documents the underlying project company's equity. This membership interest certificate is transferred to such agent along with a transfer power signed in blank, allowing the secured parties to step into the shoes of such equity holder without further action by the grantor or debtor.

For real property, a security interest in such collateral is typically granted via a mortgage or deed of trust (each state has their own requirements). The mortgage is then filed in the local jurisdiction where the real property is located, usually at the county level (but some states require filing at the town or city level), thus perfecting the security interest. The mortgage or deed of trust typically acts as a financing statement with respect to fixtures, but it is not uncommon for secured parties to also file a separate UCC 'fixture filing' at the county or town level, as a belt-and-braces approach.

For priority purposes, the first to file a financing statement has priority over such collateral. With respect to perfection by control, possession of physical collateral can only be maintained by one party at a time, so priority is clear. For other methods of perfection by control, such as with respect to deposit accounts, the security agreement (typically a depositary agreement or a deposit account control agreement), specifies that only the secured party will have 'control' over the applicable accounts in certain circumstances.

It is common for a collateral agent or trustee to hold collateral on behalf of the other secured parties. This agency relationship is usually documented in the underlying credit agreement or a separate collateral agency agreement. Lenders and secured parties can change from time to time, but so long as the collateral agent is unchanged, the security interest will be unaffected.

Assuring absence of liens

3 | How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

To determine that there are no prior liens filed with respect to specific collateral, a search of governmental records is typically ordered by the secured parties. There are private service companies that usually order these searches for the secured parties and they search UCC, tax, judgment and bankruptcy databases in the jurisdictions where the collateral is held (typically the jurisdiction of formation, the jurisdiction where the

principal place of business is located and the jurisdiction where the project is located). Often, these searches are conducted as close to the closing date as possible to ensure that the results are current; if closing is significantly delayed, these searches are often re-run or brought down prior to the rescheduled closing date.

For construction project financings, secured parties typically require lien waivers from the material contractors to the project, which waivers will reduce the risk of significant mechanics liens being filed against the project.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Outside of bankruptcy or state-law insolvency proceedings, a project lender may take enforcement actions permitted under the financing documents and (or) applicable law. Such remedies are usually available upon the occurrence of a default or event of default and may include judicial or non-judicial foreclosure on project assets or equity in addition to less drastic remedies to implement safeguards while negotiating a restructuring in the event lenders prefer not to take direct ownership of the project (eg, to avoid regulatory oversight, fiduciary duties, etc). Such lesser remedies often include, among others, the ability to prohibit dividends or other distributions to the project owners, requiring lender consent for distributions of any cash from the project's deposit accounts, or restricting the ability of project owners to take certain corporate actions. Most enforcement action requires notice by contract and (or) statute, and such notice may result in a bankruptcy filing. Given the expense and complications of bankruptcy, lenders often elect to engage in restructuring discussions with project borrowers before enforcing liens on collateral.

Contractual and extracontractual enforcement actions are primarily governed by applicable state law, including article 9 of the UCC with respect to most collateral other than real property. The UCC generally permits secured creditors, after providing due notice, to collect the proceeds of collateral, repossess collateral, dispose of collateral, or retain collateral in total or partial satisfaction of secured debt. State law governing the foreclosure of real estate varies by jurisdiction but generally permits judicial and (or) non-judicial foreclosure. Judicial foreclosure requires a secured creditor to seek a court order authorising the disposition of the real estate, usually by public auction. States that permit non-judicial foreclosure may permit a private sale pursuant to the terms of the financing documents. Certain jurisdictions provide a limited time post-foreclosure during which the borrower may redeem real property by paying the foreclosure price. A small minority of states permit strict foreclosure.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Upon the filing of a bankruptcy petition under chapter 11 (reorganisation) or chapter 7 (liquidation) of the US Bankruptcy Code, the automatic stay (statutory standstill) immediately prevents enforcement action without court authorisation, which is not readily obtained in most circumstances. Contrary to insolvency proceedings in many jurisdictions outside the United States, secured creditors are subject to the automatic stay. If the collateral is at risk during the bankruptcy proceedings, secured creditors may be entitled to adequate protection against the diminution in value of its collateral. Adequate protection may be granted to secured creditors in various forms, including periodic cash payments, super-priority claims, or a replacement lien on other property.

A creditors' lien or claim may be avoided (clawed back) in bankruptcy as a preferential or fraudulent transfer if it is found to harm other creditors. Security interests on pre-existing debt that are granted or perfected during the 90 days prior to bankruptcy may be avoided as preferential if the debtor was insolvent and the secured creditor would fare better in a hypothetical chapter 7 liquidation on account of the security interest. Granting of a lien or other transfer of a debtor's asset or interest may also be avoided as fraudulent transfer. Generally, a transfer may be avoided as actually fraudulent if it was intended to harm another creditor and constructively fraudulent if made during the two years prior to bankruptcy, the debtor was insolvent or rendered insolvent thereby, and the debtor did not receive reasonably equivalent value in return. For example, if a subsidiary of the borrower guarantees the project debt but receives no value in return and is rendered insolvent thereby, the guaranty obligation may be subject to avoidance.

Foreign and local creditors are treated equally under the US Bankruptcy Code, but certain claims receive preferential treatment. Post-petition debt may be granted priming liens and super-priority status, and certain administrative claims, while paid behind secured creditors in liquidation, are non-dischargeable and must be paid to confirm a chapter 11 plan of reorganisation. In bankruptcy, project assets may be sold free and clear of all liens and encumbrances, with liens attaching to the proceeds. Given this and other buyer protections, a project at auction in bankruptcy may realise a higher price than in foreclosure – but the administrative costs of bankruptcy could outweigh the benefit.

US bankruptcy jurisdiction is expansive; subject to certain exceptions, a project company organised anywhere in the world is eligible to be a debtor under chapter 11 if it has a domicile, place of business, or property in the United States. A secured creditor may seek the appointment of a receiver to preserve or liquidate collateral. However, receivership and other state law procedures are used less frequently, because they are subject to pre-emption by federal bankruptcy law.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

Generally, foreign investors are not restricted from remitting profits abroad, but such transfers and payments may be subject to restrictions imposed by the US Department of the Treasury due to sanctions against specific countries or individuals.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

Assuming a non-US investor is not engaged in a US trade or business, in which case other US federal income taxation rules may apply, certain categories of income, including dividends and certain interest, will generally be subject to withholding tax at a 30 per cent rate or such lower rate as may be specified by an applicable income tax treaty between the United States and the non-US investor's country of residence. In the case of payments of interest, non-US investors may also wish to consider whether the interest in question may qualify as 'portfolio interest', which is generally exempt from this withholding tax. To obtain a reduced rate of withholding under a treaty, a non-US investor generally will be required to provide the applicable withholding agent with a properly executed Internal Revenue Service (IRS) Form W-8BEN, IRS Form W-8BEN-E or other appropriate form, certifying the non-US investor's entitlement to benefits under that treaty. Returns of capital are generally not subject to US federal income taxation or withholding.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

US companies that have foreign subsidiaries are not required to repatriate foreign earnings. However, even if foreign earnings are not repatriated, they may be subject to taxation by the United States under rules that prevent deferral of US federal income tax.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

While project companies may establish and maintain foreign bank accounts, the project companies or their direct or indirect owners may be subject to certain tax reporting rules with respect to those accounts. Special tax rules apply to income attributable to fluctuations in the value of foreign currency.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Certain United States industries, such as transportation, telecommunication and energy, have special federal restrictions on the percentage of foreign ownership and control. Certain states have additional restrictions on the foreign ownership of certain land. Foreign investment in the United States in US technology, infrastructure and data businesses with 'critical technology', 'critical infrastructure' or 'sensitive personal data' may be subject to mandatory clearance requirements with the Committee on Foreign Investment in the United States (CFIUS). Additional rules apply to certain 'covered real estate' in close proximity to military installations and ports. Even if the mandatory clearance rules do not apply, many parties choose to make voluntary filings with CFIUS to clear transactions and CFIUS reserves the right to review and potentially block or mitigate non-cleared 'covered transactions' (which may include controlling and non-controlling investments) that present national security issues. Bilateral investment treaties do not exempt foreign investors from these requirements, although certain countries (currently, Australia, Canada, New Zealand and the United Kingdom) and their investors may benefit from an exception to the mandatory CFIUS filing requirements.

From a US federal income tax perspective, non-US investors may have an aversion to participating in tax transparent investment structures, which would cause them to be treated as engaged in a trade or business within the United States and create a US tax return filing nexus. Additionally, an investment in a project or related entity may give rise to Foreign Investment in Real Property Tax Act withholding and related tax return filings, which again, may give cause to certain non-US investors to be resistant to investing in such project unless additional structuring is done to mitigate such withholding and return filing.

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Generally, project assets may be insured by foreign insurance companies; however, a federal excise tax may be assessed in connection with the premium payments under such policies.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Foreign workers must be in the United States under one of several federal visas, which visa status must be verified by the worker's employer. Category eligibility is determined by the worker's experience and qualifications within certain fields and may be limited by quotas.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

Project equipment may be subject both to import duties and restrictions depending upon its origin. Project equipment produced in whole or in part from forced labour is prohibited by statute from importation into the United States. Project equipment may also be subject to trade remedies that may impose additional duties or quotas on importation. Project equipment that infringes intellectual property rights may be subject to in rem exclusion orders. Project equipment may not be procured from certain specially designated national or blocked persons or from countries subject to comprehensive economic sanctions.

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

Federal and state authorities have the sovereign power of eminent domain to take property for a legitimate public purpose with the payment of prompt, adequate and effective compensation protected by the US Constitution. There are no exemptions of a particular investment

from this authority and investment treaties only require national treatment but not exemptions. In addition, the federal government has the authority to nationalise private property or issue directed orders prioritising supply under the Defense Production Act to private businesses in times of national emergency.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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?

Generally, non-US investors do not rely on US tax incentives when considering a US investment in a project company. However, depending on how the investment is structured, non-US investors may be able to benefit from tax treaties to reduce withholding on interest and dividend payments. Non-US investors investing through US entities treated as corporations for US tax purposes may indirectly benefit from those incentives if the incentives reduce the US tax liability of those US entities. Additionally, non-US investors may be able to benefit from statutory exemptions from withholding, such as the portfolio interest exemption.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Depending on the location, industry and nature of the project, the governmental agencies involved vary tremendously. Typically, one can expect regulation by federal, state and local authorities. The primary federal authority for regulating the transmission and wholesale sale of electricity and natural gas in interstate commerce, as well as the transportation of oil by pipeline in interstate commerce, is the Federal Energy Regulatory Commission (FERC).

Given the breadth of regulation involved, we have included below a detailed discussion only with respect to power generation.

Federal

Energy regulation of power companies at the federal level is conducted through FERC, which sits within the Department of Energy. FERC has jurisdiction over electric transmission in interstate commerce, as well as wholesale power sales in interstate commerce (sales for resale).

A major area of FERC regulation for power development is the interconnection of new generation projects at the transmission level, which is generally 69 kilovolts or above. Under FERC's regulations for transmission owners, if a project seeks to interconnect either a new transmission facility or, far more commonly, a new generation facility, it must go through an extensive and relatively lengthy interconnection request and study process, all of which is FERC-regulated.

FERC does not, however, have authority over the siting of new power projects except in some limited cases for transmission facilities where siting is rejected by the applicable state authorities, and for hydroelectric facilities, which are exclusively FERC-regulated.

FERC also regulates public utility holding companies in the United States. Holding companies do not themselves engage in power operations, but instead are the entities that directly or indirectly own 10 per cent or more of the voting securities of public utilities in the United States.

States

At the state level, power projects are regulated by state utility commissions, which are often called state public service commissions. These state commissions typically focus on the regulation of distribution companies, including those that provide distribution service over electric distribution facilities as well as distribution power sales. State commissions are also typically the entities that authorise siting for new generation projects or new transmission projects. The specifics of these siting requirements differ greatly between the different states, typically dependent on the type of generation facility, the fuel source and the size of the individual units.

Texas Interconnection

The exception to the split between federal and state regulation is power industry regulation within the Texas Interconnection, which is a part of the state of Texas that is neither in the Eastern nor Western Interconnection in the United States. Regulation in this area is provided entirely within the state of Texas under Texas law and primarily by the Public Utility Commission of Texas.

Government ownership

State ownership of power facilities is not uncommon, particularly in the western United States. This includes large federal power marketing administrations (such as the Bonneville Power Administration), major hydroelectric facility owners, particularly the Bureau of Reclamation, state agencies and municipal utilities.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Title to natural resources can be held by US governmental entities (federal and state), private companies and individuals. Title and rights to natural resources are generally governed by state law (unless the relevant real estate parcel is located on federal land). Typically, separate fee-ownership interests are given with respect to real estate surface rights and the underlying mineral interests. Depending on the specific natural resource and its location, foreign ownership may be restricted.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The federal government imposes federal royalties on natural resources extracted from federal land. Additionally, there is a federal excise tax applicable to the production of coal. States may also impose severance taxes and royalties on the extraction of natural resources. US federal and state income taxes may also apply to income earned from natural resources.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

The United States does not tax exports. Certain exports of natural resources require the prior approval of certain federal regulatory agencies.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Most project financings require permits and approvals at the local, state and federal level. These approvals are with respect to the underlying project, not the actual financing thereof. At the local level, construction, zoning, use, operating and environmental permits are usually required. At the state level, environmental and energy regulatory approvals may be needed. The primary federal authority for power projects is the Federal Energy Regulatory Commission (FERC), which is responsible for regulating the transmission and wholesale sale of electricity and natural gas in interstate commerce, and also regulates the transportation of oil by pipeline in interstate commerce. In addition to certain FERC approvals, other permits may be needed from a host of governmental agencies, including:

- the Environmental Protection Agency;
- the Federal Aviation Administration;
- the Army Corps of Engineers; and
- the Department of the Interior.

Siting, location and the nature of the project will dictate what approvals are needed at the federal, state and local levels.

Registration of financing

21 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?

Uniform commercial code financing statements need to be filed in the applicable jurisdictional filing office (usually the secretary of state (or similar) office) or the county or local recording office. Mortgages, deeds of trusts, memoranda of a lease, landlord consents and (or) estoppels are typically also filed in the county or local recording office. Such real estate documents typically require notarisation (which is governed by state law) and also must include certain state-specific provisions. The balance of the financing documents, and most project documents, do not require filing with a governmental authority or legal formalities such as notarisation or apostillation (other than in Puerto Rico), but certain project documents such as leases, interconnection agreements, power purchase agreements and concession agreements may need to be filed with a governmental authority. When engaging in FERC-jurisdictional project financing transactions, none of the financing or project documents would need to be registered or filed with FERC unless a regulatory authorisation was needed. In those circumstances, the key documents would need to be submitted, although sensitive financial provisions can often be submitted confidentially.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The United States is a signatory to the ICSID Convention, the New York Convention and the Panama Convention. The New York and Panama Conventions are incorporated into United States law through the Federal Arbitration Act (FAA). These international provisions of the FAA apply to commercial transactions that involve international parties, apply to property or performance located abroad, or that have some other reasonable relationship with a foreign state.

Under the FAA, international arbitration agreements are enforceable. Courts may compel arbitration in accordance with the provisions of the parties' agreement. Once an award is made in an arbitration, within three years, any party to the arbitration may apply to a federal district court with jurisdiction for an order confirming the award, making it enforceable in the United States. A district court has jurisdiction if the controversy could have been brought in that venue absent the agreement to arbitrate or if the seat of the arbitration is located within that district. The court must confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified by the New York Convention. Grounds for refusal to confirm include invalid arbitration provisions, lack of notice of appointment of the arbitrator, and subject matter not capable of resolution by arbitration.

Arbitration agreements are not enforceable in sexual assault or harassment disputes, and certain matters involving family or public law, like criminal cases, cannot be arbitrated. There are no types of disputes subject to automatic domestic arbitration; arbitration is only required where parties agree to it.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Most financing agreements are governed by New York law. New York law provides a consistent, predictable and stable jurisdiction, with well-established court decisions. In some instances, we have seen financing agreements be governed by the laws of the state in which the project is located or where the lender is based.

Project contracts vary significantly with respect to governing law, with many being governed by the laws of the state where the project or real property is located, but also where a particular contractor is based. At other times, New York law is chosen.

Real estate-related documents, including mortgages, deeds of trust and land leases are governed by the laws of the state in which the project is located.

Organisational documents (such as limited liability company agreements and limited partnership agreements) are governed by the laws of the jurisdiction of formation, typically either Delaware or the state where the project is located.

Submission to foreign jurisdiction

24 | Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Submission to a foreign jurisdiction and waiver of immunity is generally effective and enforceable. Typically, a foreign judgment may be domesticated without re-examination of the merits if the judgment is final and enforceable where rendered, if the court issuing the judgment had jurisdiction, if the proceedings were impartial and the parties were afforded due process, and if the judgment does not violate basic notions of morality and justice.

Anti-money laundering rules

25 | Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

All US persons must ensure that they are not transacting business with specially designated nationals or other blocked persons or entities or persons formed or domiciled in countries or regions subject to comprehensive economic sanctions. Financial institutions have additional anti-money laundering screening requirements imposed by federal statute and regulations, including customer due diligence on beneficial ownership and suspicious activity reporting to the federal government. Under the newly adopted Corporate Transparency Act, newly formed US companies may have to disclose beneficial ownership to the federal government.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 | 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

In the United States, there are currently no federal ESG-specific reporting requirements or ESG-specific laws or regulations imposed on project companies. However, on 21 March 2022, the US Securities and Exchange Commission (SEC) proposed several climate-related disclosure rules that, if implemented, would impose mandatory climate-related reporting requirements on domestic and foreign registrants. As proposed, these requirements would include reporting on climate-related risks, greenhouse gas emissions, climate-related financial statement metrics, and any climate-related targets, goals or transition plans that the registrant may have. This reporting would be required as part of the registrant's registration statements and periodic reports. Although these requirements would be imposed only on registrants with the SEC, since these rules would set definitive standards, the requirements may spread to a variety of private entities and broad markets. In addition, some of the proposed rules, if unchanged, would impose a requirement that the registrant obtains information from upstream suppliers and downstream consumers, thereby imposing some level of measurement and reporting on counterparts to any of those contracted relationships. At this time, it is unclear what changes will be made to the proposals if they are implemented as rules in some form.

Voluntary ESG-related disclosures and standards are continuing to be more prevalent in US project sectors as such disclosures and standards become more prevalent globally. Project-related sectors, such as natural resources, energy and real estate, were already some of the most advanced for reporting on environmental issues and benchmarking indicators such as greenhouse gas emissions. As a result, these sectors were already adhering to a level of ESG-related disclosures and standards. Some of the more prevalent standards frameworks already broadly accepted, such as the Taskforce for Climate Related Financial Disclosures and the Greenhouse Gas Protocol, formed the basis for the SEC's proposals described above. The 'social' and 'governance' components of ESG largely remain absent from the project sectors except as related to long-standing regulations, such as sanctions programmes and regulations administered by the Office of Foreign Assets Control of the US Department of the Treasury.

In addition, projects are subject to regulation by state and local governments and agencies, particularly in the utilities, transmission and water project sectors. The disparate nature of regulation across the United States results in projects potentially being subject to differing reporting requirements and laws and regulations than similar projects located in another state or local jurisdiction, which may include ESG-related requirements.

PROJECT COMPANIES

Principal business structures

27 | What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Due to tax, bankruptcy and liability considerations, project companies in the United States are typically formed as limited liability companies or limited partnerships. Most project companies are special purpose vehicles that are formed solely to own and operate (and procure financing for) their respective project.

Financing can occur at the project company or asset level or can be incurred by an upstream owner of the project company, a financing type commonly referred to as 'holdco financing' 'mezzanine financing' or back-leveraged financing'. For large projects, we often see multiple levels of financing with respect to a single project, including project-level financing, mezzanine financing and equity financing. Financings can be with respect to a single project or asset or can be funded based on a portfolio of projects.

We see multiple sources of financing available in the project finance market, primarily through banks (in single or direct financings, and also part of club or syndicated loan facilities), institutional investors (often through private section 4(A)(2) note issuances or public rule 144A bond issuances) or other sources through equity investments.

Government funding may also be available to projects, such as via the Department of Energy's loan guarantee programme, various programmes that will be funded by the federal Infrastructure Investment and Jobs Act, or through state-sponsored programmes.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 | Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Until recently, PPP legislation was composed of a hodgepodge of state and local initiatives, together with a few federal agency-specific programmes. That all changed with the passage of the Infrastructure Investment and Jobs Act. The federal infrastructure act authorised the

allocation of US$1.2 trillion of government funds over a five-year period for infrastructure, with significant opportunities for public-private partnership. Infrastructure under this Act is broadly defined and includes transportation, energy, water, broadband and cybersecurity. It is still unclear as to how this funding will trickle through to state, local and other governmental levels, but the market is cautiously optimistic that significant opportunities for PPP project financings will be generated by this Act.

PPP - LIMITATIONS

Legal limitations

29 What, if any, are the practical and legal limitations on PPP transactions?

Practical and legal limitations on PPP transactions vary greatly by jurisdiction (with respect to jurisdictions that have enabled public-private partnerships). A major limitation to the project financing of a PPP project is the typical delay that must be built into the schedule due to having a governmental entity involved. In many instances, governmental authorities do not act with the urgency or speed of a private entity, thus the time from commencement to execution is typically much longer than for a standard project financing. Permitting delays, especially with respect to environmental permitting, are also a major limitation. Besides, being in the public eye (and potentially generating opposition), significant environmental diligence and process must be completed for a project. The Infrastructure and Jobs Act includes provisions that attempt to streamline environmental review and permitting, but that is not finalised as of now (and most likely would be subject to legal challenge).

PPP - TRANSACTIONS

Significant transactions

30 What have been the most significant PPP transactions completed to date in your jurisdiction?

Some of the significant PPP transactions completed or closed in the past year or so in the United States include the Washington DC Street Light Modernization Project, the Purple Line Project (urban transit) in Maryland, the Louisiana State University Central Utility Plant, the Tulane university Project RISE (energy production and efficiency) in Louisiana, the Fargo-Moorhead Area Diversion Project (flood control) in North Dakota and Minnesota and the East End Crossing Bridge refinancing in Indiana and Kentucky.

UPDATE & TRENDS

Key developments of the past year

31 In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

As was the case in the previous year, the covid-19 pandemic and associated supply chain issues and worker shortages plagued the project-finance market in the United States. Due to shipping delays, parts shortages and the lack of workers to build and service power facilities (and other infrastructure), projects were faced with construction delays and issues in meeting milestones under their project documents. In many cases, force majeure provisions were applicable, but that still did not help push projects forward (and rather provided an excuse under the applicable project documents for the delay). In some circumstances, force majeure provisions under the project documents (namely, the construction contracts and offtake contracts) did not line up, creating liquidated damages shortages and problems for developers, offtakers and lenders.

A second significant development this year has been with respect to anti-dumping tariffs with respect to solar panels. The Biden administration and the US Department of Commerce are investigating solar-cell parts from several Southeast Asian countries (namely, Cambodia, Malaysia, Thailand and Vietnam) to determine if the manufacturers are using parts made in China. If those countries are using solar parts made in China without significantly altering them, it may signify that those companies are circumventing antidumping (AD) and countervailing (CVD) tariffs. Given that a significant portion of solar products on order in the United States come from the target countries, solar developers are now facing challenges to find alternative sources of supply domestically or abroad. Many suppliers in the named countries have completely halted shipments to the United States unless the buyers will accept the market risk of increased AD or CVD duties, which means that current-year solar projects will likely face delays and potential cost increases in reaching operation. This has caused problems with the offtake contracts (requiring expensive amendments) and with respect to the financeability of many solar projects in the United States. Lengthy delays will have a detrimental effect on the US solar market for the short and medium term.

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Morgan Lewis

Brandon Tanguay
brandon.tanguay@morganlewis.com

One Federal St.
Boston, MA 02110-1726
United States
Tel: +1 617 341 7700
www.morganlewis.com

Vietnam

Jessada Sawatdipong, Dung Ha, Sarunporn Chaianant and Nirmalan Amirthanesan
Chandler MHM Limited

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Types of security available in Vietnam

The Civil Code 2015 sets out the types of security that may be created in Vietnam. Security may be created in the form of pledges, mortgages, security deposits, performance bonds, escrow deposits, title retention, guarantees, fidelity guarantees and property liens. Unlike in some other jurisdictions, assignments by way of security are not recognised under Vietnamese law as a security interest.

Mortgages, pledges, guarantees and security deposits in escrow accounts are the most common forms of security interests in Vietnam. In terms of the creation of security:

- security may be created over any property currently owned by the creator of the security, and also (unlike the case with legal mortgages in common law jurisdictions) that which will be owned in future, other than in the case of mortgages over land-use rights. While such property may be described generally in the security documentation, it must be identifiable;
- as in other jurisdictions, a mortgage does not require transfer of possession of the mortgaged property to the mortgagee;
- pledged property must be delivered to the pledgee to perfect a pledge; and
- the types of assets that may be deposited by way of security in an escrow account at a credit institution include sums of money, precious metals, gemstones and valuable papers deposited.

Onshore security packages for project financings in Vietnam typically include the creation of security over the assets of sponsors and project companies, briefly:

- a mortgage over the sponsors' equity interests in the project company. Transfer of equity interests of a sponsor can be subject to the first refusal right of other sponsors if the project company is established in the corporate form of a limited liability company. In that case, a written waiver of such rights of other sponsors is required;
- a mortgage over equipment and machinery of the project company;
- a mortgage over inventories;
- a mortgage over receivables and other claims under insurance policies and other contracts (enforcement of this mortgage will result in the transfer of ownership over the receivables or other claims to the mortgagee or other transferee. By law, a prior notice to the relevant counterparties (namely, payors or insurers) is required. In practice, lenders should require the project company to obtain a consent or acknowledgement from the relevant counterparties for the mortgage over the receivables and other claims);
- a mortgage over bank accounts and account balances standing to the credit of the bank account (both offshore and onshore bank accounts). Typically, in project financing, a project company will be required to open and maintain accounts with designated banks appointed by lenders. The lenders will typically have a contractual right to set off the credit balances in the project company's bank accounts against the company's debts. A mortgage is also created over such bank accounts to secure the priority of lenders against third parties;
- a mortgage over contractual rights is also common in Vietnam. However, contractual rights to be mortgaged must be rights measurable in money. Given that Vietnamese law has no concept of assignment by way of security, lenders should request the project company to obtain consents from counterparties to the underlying contracts on, among other things, step-in-rights enabling the lenders to replace the project company as a party to the relevant project agreements, or payments from the counterparties being made to the accounts designated by the lenders;
- a mortgage over land-use rights and other immovable assets. While security may be created over movable assets in favour of foreign lenders, the Land Law 2013 permits organisational owners to create mortgages over immovable property at credit institutions licensed to operate in Vietnam only. Accordingly, foreign lenders cannot take security over land use rights and assets attached to land under Vietnam law. While an onshore security agent would not be able to take security in circumstances where the foreign lender could not, such a structure may be used in practice to hold such security on behalf of a foreign lender in important public-private partnership power projects with special approvals and confirmative opinions from the Prime Minister and relevant state authorities.

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Perfection of security interests

The requirements and procedures for the perfection of security interests differ depending on the type of asset:

- immovable property: an agreement creating security over immovable property must be notarised by a notary office to be effective. In addition, security over immovable property (including over land-use rights, assets attached to the land that are recorded in the certificate of the rights to use the land and ownership of houses

and other property on the land) must be registered with the land registry of the Department of Natural Resources and Environment in the province where the land is located. A mortgage takes effect when the land registry records the registration of the mortgage in the registry book. Security over assets that will attach to the land in the future will typically also be registered with the land registry; however, such registration is not compulsory by law;

- ships and aircraft: pledges and mortgages may be created over aircraft and mortgages may be created over ships. Such security is required to be registered with the Civil Aviation Authority of Vietnam in the case of aircraft and the Vietnam Maritime Administration in the case of ships. There is no requirement to notarise security agreements over ships or aircraft; and
- movable assets other than ships and aircraft: there is no requirement to register security interests over movable assets generally to be effective. However, mortgages over such movable assets must be registered with the National Registration Agency for Secured Transactions (NRAST) to be effective against third parties. In the case of security created over the shares of public companies that are registered and deposited with the Vietnam Securities Depository and Clearing Corporation (VSDCC), the security should also be registered with the VSDCC. The VSDCC will block transactions involving the encumbered shares.

Priority

In general, the ranking of security is determined by the order in which it was registered, and in the case of competing unregistered security that has no effect against third parties, the order in which it was created. Registered mortgages over movable assets (although such mortgage is not required by law to be registered), have priority over the unregistered mortgage, even if created after the unregistered mortgage.

Fees and taxes

The fee for notarisation of agreements creating security over immovable assets will be determined based on the value of the assets or the value of the loan for which it is given, up to 70 million Vietnamese dong (approximately US$3,000).

The fees for registration of security over aircraft will be determined based on the value of the transaction and will range from 1.8 million Vietnamese dong to 18 million Vietnamese dong (approximately US$77.80 to US$778).

The fees for registration of security over movable assets other than aircraft (including ships) and immovable assets are nominal (namely, less than US$5).

Security agent

The concept of a security agent is not explicitly recognised or tested under Vietnamese law. The Civil Code 2015 generally recognises the concept of an authorised representative, and parties to a syndicated loan may appoint a security agent (eg, a local credit institution that is participating as a lender) to act as an authorised representative or agent on behalf of all of the lenders, including offshore lenders participating in syndicated financings, to take, manage and enforce the security for the syndicated loan.

Currently, there is no specific licensing requirement for security agents to hold or enforce security. However, a security agent must be a credit institution participating in the financing.

The secured assets would not become the assets of the security agent as long as no enforcement event against the borrower occurs. If a security agent as a credit institution becomes bankrupt, the security agent's role and participation in the syndicated loan can also be terminated when the secured obligations of the borrower to the security agent is fully repaid. Accordingly, the lenders can authorise another credit institution to act as a new security agent to take, manage and enforce the security.

Security agent arrangements in favour of offshore lenders are generally permitted, except for security over immovable property. However, such security agent arrangements can be used where a foreign bank branch or a local bank can take mortgages over immovable property in favour of offshore lenders with the special approval and confirmative opinions of the Prime Minister and relevant state authorities. This security agent arrangement is not available to all types of project financing. In practice, only some large-scale public-private partnership projects power projects can get the approvals and confirmative opinions to use an onshore security agent to take mortgages over immovable property in favour of offshore lenders.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

In addition, creditors can undertake searches of the applicable registries at which security is registrable to assure themselves of the absence of liens with priority to the creditor's lien as set out below:

- in the case of immovable property, creditors should request the security provider to submit a request to the land registry of the Department of Natural Resources and Environment in the province where the secured property is located for information regarding all securities created over such land and the assets attached to it;
- in the case of ships and aircraft, creditors should request the security provider to apply to the Vietnam Maritime Administration or Civil Aviation Authority of Vietnam (as applicable) for information regarding all securities created over such assets; and
- in the case of movable property other than ships and aircraft, creditors should undertake a search of the online database of the NRAST maintained by the Ministry of Justice. In addition, creditors may submit a request to NRAST for an official search result regarding registered mortgages of a security provider. However, there is no requirement to register security over movable assets generally (namely, other than ships and aircraft), and the search conducted at NRAST will not disclose prior unregistered security interests. Unregistered mortgages generally rank below registered mortgages.

Vietnamese law also recognises statutory liens, which are generally understood to have priority over registered forms of security, and as such, lenders should confirm the existence of any such liens.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

In general, the enforcement process shall be mainly as follows:

- enforcement notice: prior to enforcing security, a secured party (or its authorised representative such as a security enforcement agent) must provide such period of notice as agreed in the security agreement, or the absence of agreement, reasonable notice, to the security provider and any other secured parties. Under Decree 21/2021/ND-CP, reasonable notice of enforcement means not less than 10 days in the case of movable property and not less than 15 days in the case of immovable property. Such notice may also be given by registering the enforcement notice with the relevant registry at which the security is registered (eg, the NRAST in the case of movable property and the applicable land registry of the provincial Department of Natural Resources and Environment in

the case of immovable property) and that registry will notify other secured parties of the enforcement notice;
- handover of secured assets: the secured party may inspect the secured assets to prevent the disposal of the secured assets and seek its handover to enforce the security interest, or seek the assistance of the courts if the party in possession of the secured assets does not handover the secured assets to the secured party for enforcement; and
- enforcement methods: depending on the nature of the secured assets and the parties' agreement in the security agreement, the security may be enforced by private sale of the secured assets, auction of the secured assets, by the secured party acquiring the ownership of the secured assets to set off against the secured obligations, and other agreed measures for enforcing the security. Such sale may be effected by the secured party (and not by judicial sale) without any involvement (or powers of attorney) from the security provider.

The sale of secured assets in Vietnam is subject to foreign exchange control regulations that require payment to be denominated and paid in Vietnamese dong.

Enforcing collateral rights following bankruptcy

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

The Bankruptcy Law 2014 governs insolvencies in Vietnam. Under this law, a company, its shareholders, creditors and employees (or their union) may file a bankruptcy application. Bankruptcy proceedings apply to all types of enterprises established under the laws of Vietnam.

Vietnam does not have a concept of receiverships. However, as an alternative to petitioning the winding up of a company, a lender may sell secured assets to satisfy their debts under the Civil Code and in accordance with their security agreement.

Effect on enforcement

Within five working days from acceptance of a bankruptcy application by a court, rights to enforce security will be subject to a temporary suspension and during such period of suspension, enforcement of security is possible only with the permission of the court (where there is a risk of the secured assets being damaged or significantly devalued). After the judge decides to open the bankruptcy proceedings, the judge will consider and decide how the suspension of enforcement of security will be handled in accordance with the following cases:
- if the unsecured creditors of the company approve for the company to be rehabilitated under a procedure called the restoration procedure, and secured assets are agreed to be used for the restoration of the company by the relevant secured creditors, the enforcement of security will be enforced in accordance with the resolution of the creditors' conference (including the time period and plan for using such assets); and
- if there is no restoration procedure or the secured assets are not necessary for the rehabilitation of the company, the security can be enforced in accordance with the applicable security agreement. If the security agreement has not become enforceable, the court shall suspend the security agreement and may permit enforcement of the security before declaring the company's bankruptcy.

Adjustments of prior transactions

Under the Bankruptcy Law, the following transactions, among others, may be avoided if they occur within six months of the commencement of bankruptcy proceedings (or 18 months if they are with a related party of the bankrupt entity) by the order of the court:
- disposals of assets that are not at market price;
- set-off of debts that have not yet become due;
- grant of security in relation to existing unsecured debts; or
- transactions not for purposes of business activities of the company.

Priority of payments

Under the Bankruptcy Law, the proceeds from the liquidation of a company will be distributed first to meet the costs of the bankruptcy proceedings, second to pay unpaid wages, allowances, compulsory insurance and other entitlements of employees, next to pay debts incurred after the commencement of the bankruptcy proceedings for the purpose of rescuing the business, and last to pay any debts owed to the Vietnam government and other unsecured creditors (including secured creditors whose security did not meet the secured obligations). The residue will be distributed among the shareholders and other equity holders.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange and transfer (eg, are any licences or approvals required for transfer of foreign currency outside the jurisdiction)?

Vietnam strictly controls foreign exchange (FX) activities within its territory or in relation to the residents in Vietnam. Some FX restrictions include:
- all payments and transactions conducted in Vietnam must be denominated and paid in Vietnamese dong except for certain limited cases as provided in the FX regulations;
- remittances of foreign currency overseas (including for payment of the principal or interest on loans) are strictly regulated. The remitting bank will verify the documents submitted by its customer to ensure that the remittance is in accordance with the FX regulations and reflect the transactions entered into by the customer;
- Vietnamese dong can only be converted into foreign currency if the conversion is for a permitted transaction and there is a supporting document for such transaction. Even if conversion is permitted, the State Bank of Vietnam (SBV) strictly controls the exchange rate between the US dollar and Vietnamese dong; and
- Vietnamese law allows an enterprise established in Vietnam to maintain and open foreign-currency offshore accounts with offshore banks. An enterprise may open and use a foreign-currency offshore account to, among others, borrow foreign loans from foreign lenders. The SBV's permit is required for opening and using offshore accounts, and that permit will record the details of the account as well as the purpose, and the inflows and outflows from that account. In practice, it would be difficult to obtain this permit except for large-scale projects or overseas investments by Vietnamese entities.

Investment returns

7 What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions? Are any withholding taxes applicable to payments of interest or premiums on loans or bonds?

A foreign-invested project company must open a direct investment capital account (DICA) at a licensed bank in Vietnam. Under applicable FX regulations certain transactions must be effected through the DICA, including relevantly:

- remittance of dividends overseas to foreign investors;
- remittance of divestment amounts overseas to foreign investors; and
- disbursement and repayment of medium-term or long-term offshore loans (including international bonds issued in a foreign currency to offshore investors).

Interest or premiums on foreign loans or international bonds to corporate lenders or institutional bondholders is subject to a withholding tax of 5 per cent unless an applicable double taxation treaty with Vietnam provides otherwise.

Foreign earnings

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Vietnamese law does not require investors to convert foreign earnings into Vietnamese dong. However, project companies must repatriate their foreign earnings (through their offshore investment capital account opened in a licensed bank in Vietnam) within six months from the date on which there is a tax finalisation report or an equivalent document under the laws of the country where the offshore investment is conducted. This period can be extended by up to 12 months, subject to notifying the Ministry of Planning and Investment (MPI) and the State Bank of Vietnam (SBV) that the project company cannot meet the six-month deadline for the repatriation of such earnings as described above. If a project company wants to retain its foreign earnings to reinvest overseas, the project company must obtain amendments to the offshore investment registration certificate or new offshore investment registration certificate issued by the MPI.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

A project company can establish and maintain foreign currency accounts in other jurisdictions for its offshore investments subject to obtaining the permit of the SBV. The project company must obtain the SBV's permit for opening and use of the offshore account that will record the details of the account as well as the purpose, and the inflows and outflows of such offshore account.

A project company can establish and maintain foreign currency accounts in Vietnam, including DICA, if, for example, the project company is established with foreign shareholding. It may maintain payment accounts in foreign currencies for the purpose of making payments in foreign currencies in Vietnam or overseas in accordance with the FX regulations in Vietnam.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

A foreign investor must satisfy, among other conditions, the following conditions:

- the proposed investment project does not fall within the list of prohibited business lines (Prohibition List); and
- the foreign investor satisfies the market access conditions that are applicable if the investment falls within the list of business lines in relation to which foreign investors must satisfy market access conditions (FI Market Access List). The market access conditions will include, among other conditions, limitations on foreign ownership, investment form, the scope of investment activities and the capacity of investors.

Vietnam takes the negative list approach in which foreign investors are treated as domestic investors in terms of the market access conditions when investing in business lines that do not fall within the Prohibition List and the FI Market Access List.

Vietnam is a party to a number of bilateral and multilateral treaties that may provide preferential market access and investor protections to investors from treaty partners. Major treaties include:

- Vietnam's commitments to the World Trade Organisation (WTO), set out under WTO document number WT/ACC/VNM/48/Add;
- the Comprehensive and Progressive Agreement for Trans-Pacific Partnership;
- the ASEAN Framework Agreement on Services and ASEAN Comprehensive Investment Agreement; and
- the Japan–Vietnam Economic Partnership Agreement signed between Japan and Vietnam;

The restrictions on investment and conducting business in Vietnam are also applicable to foreign investors or creditors in event of the foreclosure on the project and related companies, or the enforcement of security (eg, enforcement of security over the shares in a project company that is undertaking a business for which foreign investors are permitted conditional market access only must be in accordance with the applicable restrictions on such investments).

Insurance restrictions

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

A foreign insurance company can provide insurance services (other than life insurance and health insurance) in Vietnam provided that:

- the foreign insurance company is headquartered in a country that is a party to an applicable international treaty in which Vietnam has made a commitment to permit the cross-border supply of insurance services; and
- only foreigners working in Vietnam and project companies with foreign ownership greater than 49 per cent of the charter capital may purchase an insurance policy from a foreign insurance company.

Insurance policies obtained from Vietnamese insurers may be reinsured under the Law on Insurance Business.

Worker restrictions

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Under Vietnamese laws, employers (including both project companies and contractors) are only permitted to recruit foreigners to work in positions such as managers, operators, experts and technicians, and only if Vietnamese workers are not yet able to satisfy the production and business requirements. Employers must report and explain their need to employ the foreign worker to the labour department of the People's Committee of the central province or city where the person will work and obtain written consent before recruiting the foreign worker.

Generally, foreign workers in Vietnam must obtain a work permit.

Equipment restrictions

13 What restrictions exist on the importation of project equipment?

In general, project equipment may be imported into Vietnam subject to payment of applicable import duties and the obtainment of import licences (if applicable).

Nationalisation laws

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The state recognises and protects the ownership of assets, investment capital and income and other lawful rights and interests of investors. The government may expropriate an asset due to national defence and security, where it is in the national interest, in emergency circumstances or to prevent or combat a natural disaster, subject to compensating the investor in accordance with the law.

Foreign investors from a country that is a party to an investment treaty with Vietnam may also be entitled to protections from expropriation under those treaties.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

15 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-invested companies and domestic companies are treated equally in terms of investment incentives, including tax incentives, reduction or exemption of land use fees or land rental and application of accelerated depreciation. Subject to satisfaction of conditions on the location, sector and size of the investment project with business lines that are entitled to investment incentives or project locations that fall into the areas with difficulties in socio-economic conditions, investment projects can be entitled to the following main investment incentives:

- exemption from corporate income tax (CIT) for up to four years, and a 50 per cent reduction in the CIT rate for a further four to nine years;
- reduced CIT rate of 10 per cent for the whole term of operation, or 10 per cent for the first 15 years, or 17 per cent for the first 10 years of the project (the normal CIT rate is 20 per cent or 22 per cent except for certain mining projects that are subject to a higher CIT rate of 32 to 50 per cent);
- exemption of import tax for the importation of equipment and machinery for the projects; and
- exemption of the land rental for the whole term of the land lease, or for the construction period of the investment project, or for some periods.

There is no stamp duty levied on foreign loans, mortgages, or other security documents. The payment of interests or premiums on foreign loans or international bonds paid to corporate lenders or institutional bondholders is subject to a withholding tax of 5 per cent on the interest or premiums unless an applicable double taxation treaty provides otherwise.

GOVERNMENT AUTHORITIES

Relevant authorities

16 16 What are the relevant government agencies or departments (central and regional) with authority over projects in the typical project sectors (please cover oil and gas, and minerals extraction; chemical refining; water treatment; power generation (including renewable power) and transmission; transportation; ports; telecommunications; or other typical project sectors)? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Key government agencies or departments include:

- the Ministry of Industry and Trade, which is responsible for power, oil and gas and mineral extraction and processing projects;
- the Ministry of Transportation, which is in charge of infrastructure projects; and
- the Ministry of Information and Communications, which is in charge of telecommunication projects.

Generally, these agencies will play three key roles:

- they are involved in the appraisal of projects;
- they are authorised to issue permits or licences required for projects; and
- they are authorised to sign project contracts with investors in public-private partnership projects.

In addition, the Prime Minister is in charge of approving the national industry master plans prepared by the competent authorities for each sector. The national industry master plan is used to appraise the conformity of proposed investment projects in the relevant sectors.

Vietnam has opened its markets to foreign investors and narrowed the state's monopoly in certain sectors. In the power sector, before 1 March 2022, the state held a monopoly over the power transmission network (besides the load dispatch of power systems and construction and operation of large-scale power plants), which were especially important to the economy and national defence and security of Vietnam. From 1 March 2022, private parties are entitled to invest in and construct transmission networks and operate the transmission networks they invest in and construct.

In the oil and gas sector, Vietnam Oil and Gas Group (PVN), a state-owned enterprise, is entitled to conduct oil and gas activities, including searching, exploring, developing a mine and exploiting oil and gas, and activities directly serving these oil and gas activities. PVN is entitled to sign oil and gas contracts with contractors. Foreign parties may sign oil and gas contracts with PVN to conduct oil and gas activities in Vietnam.

REGULATION OF NATURAL RESOURCES

Titles

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Land, water, minerals, oil and gas and other natural resources belong to all Vietnamese people and the state manages such resources on behalf of the Vietnamese people. Private parties are granted rights to explore, exploit and use such natural resources and other rights under Vietnamese law.

In general, land may be owned through allocation or lease of land from the state or transfer or sublease of such rights from a private landholder (such as an industrial zone developer or other private parties. Private land users own land-use rights, which are recognised as property rights. Foreign entities (other than those with diplomatic functions) cannot directly own land-use rights. However, foreign-invested companies can use land for permitted purposes and own the land use rights.

Investors may obtain an exploration licence and an exploitation licence to prospect for and exploit mineral deposits. A foreign branch or representative office in Vietnam may qualify for an exploration licence, however, foreign investors must establish a company in Vietnam to obtain an exploitation licence.

The state-owned enterprise, Vietnam Oil and Gas Group (PVN) is entitled to conduct oil and gas activities, including searching, exploring and developing mines and exploiting oil and gas, and activities directly serving these oil and gas activities. PVN is entitled to sign oil and gas contracts with contractors, including foreign parties.

Royalties and taxes

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

There is no distinction between the natural resource taxes payable by domestic companies and foreign-invested companies (or foreign parties, where permissible). The natural resource taxes are levied on projects for the exploitation of Vietnam's natural resources including minerals, crude oil, natural gas, coal gas, natural forest products (other than animals), natural aquatic products (including marine animals and plants), water (including surface water and groundwater), swallow's nests, and other resources, as regulated by the Standing Committee of National Assembly. The natural resource taxes are determined based on the natural resource output, specified taxable price and tax rates.

The tax rates vary depending on the group and type of natural resources, ranging from 1 to 40 per cent. Crude oil, natural gas and cold gas are taxed at progressive rates on the daily average exploitation output.

Export restrictions

19 What restrictions, fees or taxes exist on the export of natural resources?

Regulations on the export of natural resources vary depending on the type of natural resources. The natural resources to be exported must have legitimate origins and fall within the list of natural resources with specific quality standards issued by the Ministry of Industry and Trade. Export of some minerals or in particular cases is subject to an export licence or special approval issued by the competent authority, such as the Ministry of Science and Technology or the Prime Minister. Regarding oil and gas, other than the mandatory amount required to be sold domestically by the government of Vietnam, in certain limited cases provided for in the Law on Oil and Gas, private contractors are entitled to export oil and gas in accordance with the oil and gas contracts signed with PVN.

The export rates levied on natural resources vary depending on the type of natural resources and timing of export, ranging from 1 to 30 per cent.

GENERAL LEGAL ISSUES

Government permission

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Investment

Infrastructure projects such as power, transportation or telecommunication sector projects must be included in the relevant industrial master plan prepared by the competent authority for each sector.

For certain projects, an investment in-principle approval issued by the National Assembly, the Prime Minister or the provincial-level People's Committee will be required, depending on the type and size of the project.

To establish a project company to implement an investment project in Vietnam, an investment registration certificate (IRC) recording the information of the investment project issued by the provincial Department of Planning and Investment (DPI), management board of an industrial zone, processing zone, high-tech or economic zone and an enterprise registration certificate (ERC) recording the information of the project company issued by the provincial DPI must also be obtained.

To make a capital contribution or acquire shares in a project company, foreign investors must obtain the approval (mergers and acquisitions approval) of the provincial DPI.

The fee for issuance of the ERC is nominal (being 50,000 Vietnamese dong, or approximately US$ 2.20).

Loans

Foreign medium and long-term loans must be registered with the State Bank of Vietnam (SBV). Confirmation of foreign loan registration issued by the SBV is required before the borrower can make any drawdown or repayment of the loan.

A licence issued by the SBV is also required for a project company to open and maintain an offshore foreign currency account.

In general, the total outstanding amount of all medium and long-term loans of a borrower must not exceed the difference between the total investment capital and the amount of capital contribution recorded in the project's IRC, or if no IRC has been issued, the demand for borrowing approved in the business plan or investment plan.

Land

A project company must obtain a land-use right certificate issued by the provincial People's Committee for the project land and construction works built on the land, and pay the applicable rent.

Environment

Depending on the scale, capacity and nature of the business activities, an environmental impact assessment report (EIAR) may need to be submitted to the Ministry of Natural Resources and Environment or the provincial People's Committee for approval. An environmental licence is also required for projects discharging waste into the environment, managing waste or importing scrap from overseas as raw material for production. The fee ranges from 6 Vietnamese dong to 96 million Vietnamese dong (approximately US$259 to US$4,142) for the assessment and approval of an EIAR, and ranges from 45 million Vietnamese dong (approximately US$1,941) for the assessment and issuance of the environmental licence.

Construction

Depending on the type and scale of the project, authorisations must be obtained for construction works such as approvals of feasibility study reports and construction design, and a construction permit. In addition, there are several authorisations related to fire fighting and extinguishment such as a certificate of appraisal of design for fire-fighting and extinguishment, acceptance of fire prevention and extinguishment and approval of fire extinguishment plan, which must be obtained.

Registration of financing

21 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?

Security agreement over land-use rights and assets attached to lands must be notarised by a notary office to be effective.

Security interests created over certain types of assets (namely, land-use rights, assets attached to land recorded in a certificate of rights to use land, ownership of house and property on land, ships and aircraft) are also subject to registration. Although not strictly required under Vietnamese law, security created over movable assets should also be registered to be enforceable against third parties and to establish priority over unregistered security interests.

Loan agreements with foreign lenders must be registered with the SBV if:

- it is a medium- and long-term loan with a loan term above 12 months;
- it is a short-term loan but its term has been extended so that the total term is above 12 months; or
- it is a short-term loan that has not been extended, but the borrower has not completed the repayment of the loan within 10 days after the first anniversary of the initial capital drawdown.

Security agreements are not required to be submitted to the SBV, but the security interests created for an offshore loan need to be listed in the application to the SBV to register the offshore loan, and will be set out in the SBV's confirmation of registration of the offshore loan. In practice, the SBV may ask for security agreements to be submitted to it.

Arbitration awards

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Vietnam is a party to the New York Convention. It has made three declarations to the Convention, being that the Convention would:

- apply only to awards made in the territory of another contracting state to the Convention;
- apply only to differences arising out of legal relationships that are considered as commercial under the laws of Vietnam; and
- the interpretation of the Convention would be in accordance with the Constitution and laws of Vietnam.

Foreign arbitral awards will only be enforced in Vietnam if they are recognised and held enforceable by a competent Vietnamese court. A party seeking to enforce a foreign arbitral award in Vietnam must file an application with a competent Vietnamese court within three years from the effective date of the award (this time period may be extended where there are applicable force majeure events or other exceptional circumstances).

Vietnamese courts will generally recognise and enforce foreign arbitral awards made in a country that is a party to an international treaty (such as the New York Convention) on recognition and enforcement of arbitral awards to which Vietnam is also a party, or if a treaty does not apply, on the basis of the reciprocity principle.

A foreign arbitral award may be set aside if, among others:

- the dispute could not be resolved by arbitration proceedings in accordance with Vietnamese law; and
- the case where the recognition and permission for enforcement of the award of foreign arbitrators in Vietnam is contrary to fundamental principles of Vietnamese law.

It is not yet established what the fundamental principles of Vietnamese law are, as this concept is not clearly defined in Vietnamese law (although there is a limited set of fundamental principles in the Civil Code 2015, the Commercial Law 2005 and the Law on Commercial Arbitration 2010).

Vietnam is not a party to the ICSID Convention.

Except for disputes where Vietnamese courts have exclusive jurisdiction such as disputes over immovable property situated in Vietnam, commercial disputes may be subject to arbitration, including:

- disputes arising from commercial activities;
- disputes in which at least one party is engaged in commercial activities; and
- other disputes that are stipulated as arbitrable under the law.

Disputes between foreign investors and a state authority relating to investment activities within the territory of Vietnam will be subject to domestic courts or domestic arbitration unless otherwise agreed in a contract or prescribed under a treaty to which Vietnam is a party.

Vietnamese law has no regulation on automatic domestic arbitration. Settlement of a dispute through arbitration must be based on a valid arbitration agreement of the parties. Absent such arbitration agreement, Vietnamese courts will have jurisdiction to hear the case.

Law governing agreements

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Generally, in international project financing, offshore lenders prefer to select a foreign law such as English law to govern financing agreements and certain project agreements. The Civil Code 2015 generally allows the parties to select a foreign law to govern a contract if there is a foreign element such as the participation of a foreign entity in the contract, provided that the consequence of the application of the foreign law is not contrary to the fundamental principles of Vietnamese law.

Notwithstanding a contrary choice of law, the law where the immovable property is located (namely, Vietnamese law in the case of property in Vietnam) will govern the transfer of ownership rights and other rights in relation to the immovable property, the lease of and the security created over immovable property. In addition, any minimum guaranteed rights of employees or consumers under Vietnamese law will be mandatorily preferred. Project contracts of public-private partnership projects entered into between the Vietnamese state authorities and the sponsors and project company must also be governed by Vietnamese law.

Submission to foreign jurisdiction

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable? Do local courts enforce judgments of foreign courts without re-examination of the merits of the case?

Except for certain cases being subject to the exclusive jurisdiction of Vietnamese courts such as disputes over immovable property situated in Vietnam, submission to a foreign jurisdiction will be effective. Judgments of foreign courts will only be enforced in Vietnam if the foreign courts' judgments are recognised and held enforceable in Vietnam. Similar to foreign arbitral awards, foreign judgments will be enforced by Vietnamese courts if made by the courts of a country with which Vietnam has agreed a treaty to recognise judgments, or on a reciprocal basis. In practice, Vietnam has entered into very few such treaties, however, there are several precedents of foreign courts' judgments being recognised and enforced in Vietnam, which are generally considered to be based on the reciprocity principle.

In general, the merits of a foreign judgment will not be re-examined by Vietnamese courts for the purpose of recognition and enforcement. However, Vietnamese courts may refuse to recognise and enforce foreign judgments if certain applicable grounds in the Civil Proceeding Code 2015 are met, including where the foreign judgment violates the fundamental principles of Vietnamese law. It is not yet established what the fundamental principles of Vietnamese law are, as this concept is not clearly defined in Vietnamese law.

The Civil Code 2015 suggests that a waiver of immunity could be effective and enforceable. It provides that the state of Vietnam, central and provincial state authorities will be liable for their civil obligations to foreign legal entities and foreign individuals in the following cases:

- an international treaty to which Vietnam is a signatory provides for a waiver of immunity;
- the parties are in a civil relationship and agree to waive immunity; or
- the state of Vietnam, central or local state authorities waive immunity.

Anti-money laundering rules

25 Are investors in your jurisdiction subject to any anti-money laundering compliance checks or other rules? Are these required by all sectors or only certain regulated sectors?

The Law on Prevention and Anti-money Laundering imposes obligations on licensed financial institutions and entities operating in certain sectors such as real estate businesses regarding money laundering, such as an obligation to conduct know-your-client procedures and report suspicious transactions. It would be advisable for investors to undertake an anti-money laundering compliance check as part of their due diligence prior to undertaking a transaction in Vietnam.

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

Relevant ESG issues

26 2526 What environmental, social and governance (ESG) issues are relevant in typical project sectors (oil and gas and minerals extraction, refining, water, power generation (including renewable power) and transmission, transport, ports, telecommunications, or other sectors)? Are project companies in your jurisdiction subject to any ESG reporting requirements or other ESG laws or regulations? (If not mandatory, are any voluntary ESG disclosures and standards relevant?)

The Law on Environment Protection 2020 classifies investment projects into four groups based on, among other factors:

- size, capacity and type of production;
- business and service;
- area of land;
- land with the water surface and sea used;
- the scale of extraction of natural resources; and
- sensitive environmental factors.

Large-scale projects in the first group and some types of projects in the second group must undertake an Environment Impact Assessment Report (EIAR).

In addition to an EIAR, a project company must obtain an environmental licence if the project is in any of the first three groups and will generate wastewater, dust and emissions into the environment that must be treated or generate hazardous waste that must be managed in accordance with regulations on waste management before officially being put into operation.

PROJECT COMPANIES

Principal business structures

27 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Typically, a special purpose company will be established to implement a project, to segregate it from an investor's other businesses and invite participation from other investors. The principal sources of financing include equity capital of investors, shareholder loans, bank loans and through the issuance of debt securities in Vietnam or offshore.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

28 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The Law on Investment in Form of Public-Private Partnership (the PPP Law) was adopted by the National Assembly in 2020 and took effect on 1 January 2021. The government of Vietnam also issued Decree No. 35/2021/ND-CP providing detailed guidance on the PPP Law and Decree No. 28/2021/ND-CP providing guidance on the financial control mechanisms of PPP projects. Previously, PPP projects were governed by Decrees of the government and did not have an overarching legislative framework. The PPP Law is the first law in Vietnam on PPP projects and represents a significant change in Vietnam's approach to PPP projects.

The PPP Law covers PPP projects in the following six sectors with a prescribed minimum investment (except for PPP projects in the form

of operation and maintenance PPP projects to be implemented in areas with difficult socio-economic conditions):

- transportation, including projects in road, railway, inland waterways, maritime and air transport with a total minimum investment of 1,500 billion Vietnamese dong (approximately US$65 million);
- power grid and power plant projects with a total minimum investment for renewable energy projects of 500 billion Vietnamese dong (approximately US$21.65 million) and a total minimum investment for non-renewable energy projects (such as coal or gas or liquid natural gas-fired power projects) of 1,500 billion Vietnamese dong (approximately US$65 million);
- irrigation, clean water supply, water drainage and wastewater and waste treatment with a total minimum investment of 200 billion Vietnamese dong (approximately US$8.7 million);
- healthcare, including medical examination and treatment facilities, preventive healthcare and testing, with a total minimum investment of 100 billion Vietnamese dong (approximately US$4.3 million);
- education and training, including educational infrastructure, facilities and equipment, with a total minimum investment of 100 billion Vietnamese dong (approximately US$4.3 million); and
- information technology (IT) infrastructure including projects in, among others, digital information and economic infrastructure, application and development of IT and databases, shared national platforms, applications and services, network security and information and communication technology infrastructure for smart cities, with a total minimum investment of 200 billion Vietnamese dong (approximately US$8.7 million).

Types of PPP structures recognised under the PPP Law include:

- build-operate-transfer;
- build-transfer-operate;
- build-own-operate;
- operate-manage;
- build-transfer-lease;
- build-lease-transfer; and
- combinations of these.

Build-transfer (BT) is no longer considered a form of PPP under the PPP Law. BT projects where the in-principle investment approvals had not been obtained by 15 August 2020 will be terminated under the PPP Law.

PPP - LIMITATIONS

Legal limitations

29 | What, if any, are the practical and legal limitations on PPP transactions?

A PPP project can be initiated by either a competent state authority or a private investor. However, the selection of PPP investors must be conducted by an open bidding process for all PPP projects including those proposed by private investors, except for certain limited cases where competitive negotiation or direct appointment is available. In practice, it could take several years to initiate and select investors for a PPP project.

The PPP Law provides certain limitations that would affect the bankability of PPP projects. Notably:

- foreign currency convertibility: in Vietnam, foreign exchange activities are strictly regulated. Foreign currency availability and convertibility are material risks to international investors and lenders. Previously, by law, there were no caps on the government's guarantee on foreign currency convertibility. In practice, in some large-scale build-operate-transfer (BOT) power projects financed by international lenders, the government guaranteed to deliver sufficient US dollars for the BOT company to convert all of its Vietnamese dong revenue (excluding local expenses) to fulfil its payment obligations to offshore lenders and sponsors. However, under the PPP Law, the government's guarantee on foreign currency convertibility is capped at 30 per cent of the project revenue minus the expenditures in Vietnamese dong. Moreover, a government guarantee on foreign currency convertibility is only available to important and large-scale projects that are subject to the authority of the National Assembly or the Prime Minister to decide investment policies;
- the time limit for financial close: under the PPP Law, financial close is required to be achieved within 12 months after the signing of the project contract, or 18 months in the case of projects subject to approval by the National Assembly or the Prime Minister. Given the recent PPP practice in Vietnam, this time limitation is a significant constraint, especially for projects with international project financing;
- government guarantee: the government previously provided guarantees to secure the performance and payment obligations of Vietnamese counterparties in several PPP power projects. The PPP Law and the Law on Investment 2020 no longer contemplate the provision of such guarantees. However, the Law on Investment Law 2020 and Decree No. 31 guiding the implementation of the Law on Investment 2020 still allow the Prime Minister to decide other forms of guarantee for important projects that are subject to the authority of the National Assembly or the Prime Minister; and
- governing law for project contracts: the Civil Code 2015 allows the parties to choose a foreign governing law if there are foreign elements such as the participation of foreign parties. In the past, contracting parties in PPP projects could select a foreign law to govern project contracts and other contracts in accordance with the Civil Code. However, the PPP Law requires contracts and other relevant documents entered into between Vietnamese state authorities with sponsors and project companies to be governed by Vietnamese law. International lenders typically require project documents to be governed by a foreign law (typically, English law). This requirement for a choice of Vietnamese governing law may affect the bankability of PPP projects.

PPP - TRANSACTIONS

Significant transactions

30 | What have been the most significant PPP transactions completed to date in your jurisdiction?

No PPP project has achieved financial close since 1 January 2021, the date the PPP Law entered into force. A number of PPP projects that were initiated prior to this time have also not achieved financial close yet. Most significant PPP projects have been carried out in the thermal power sector in the form of BOTs. These projects have successfully obtained international project financing. Some high-profile examples include:

Coal-fired power plants with total investment capital per project ranging from US$2.2 billion to US$2.8 billion that achieved financial close from 2011 to 2021:

- Vung Ang 2 coal-fired BOT power project with a capacity of 1,200 megawatt (MW);
- Van Phong 1 coal-fired BOT power project with a capacity of 1,320MW;
- Nghi Son 2 coal-fired BOT power project with a capacity of 1,200MW;
- Duyen Hai 2 coal-fired BOT power project with a capacity of 1,200MW;
- Hai Duong coal-fired BOT power project with a capacity of 1,200MW;

- Vinh Tan 1 coal-fired BOT power project with a capacity of 1,200MW; and
- Mong Duong 2 coal-fired BOT power project with a capacity of 1,200MW.

Gas-fired power plants:

- Phu My 2.2 gas-fired BOT power project with total investment capital of US$480 million and a capacity of 715MW, which achieved financial close in 2002; and
- Phu My 3 gas-fired BOT power projects with total investment capital of US$450 million and a capacity of 716.8MW, which achieved financial close in 2003.

UPDATE & TRENDS

Key developments of the past year

31 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

The focus on the power industry in Vietnam has recently shifted from coal-fired thermal power plant projects to liquid natural gas (LNG)-to-power and renewable energy projects. A pilot programme on the direct power purchase agreement is currently being considered, as an initial step to the implementation of a competitive electricity retail market. The programme was proposed to cover grid-connected wind and solar power projects, with a combined total capacity below 1,000 megawatts. The contractual structure for the sale and purchase of power by a consumer from a power generator was expected to be through three contractual arrangements:

- the sale by the power generator of electricity to the state-owned Vietnam Electricity (EVN) or the power corporations affiliated with EVN at the spot price;
- the purchase by customers of electricity from EVN at the spot price (plus applicable fees); and
- a contract between the power generator and consumer providing for the consumer to pay the power generator an amount equal to the difference between the agreed price agreed between them for the supply of power and the spot price.

The finalisation of this pilot programme remains pending.

A number of large-scale LNG-to-power projects have been registered recently. However, no foreign-invested LNG-to-power projects have publicly announced financial close to date. The bankability of these projects is unclear and investors remain in discussion with the MOIT, EVN and other authorities to improve the bankability of these projects. It is expected that these negotiations will take further time and potentially require a reconsideration of current policy settings.

The State Bank of Vietnam is also currently drafting new guidance on offshore loans that is expected to introduce a number of new requirements such as a cap on borrowing expenses and mandatory use of derivatives to hedge foreign exchange risks. If these new requirements are adopted, they may significantly affect offshore financing arrangements.

CHANDLER MHM

Jessada Sawatdipong
jessada.s@mhm-global.com

Dung Ha
dung.ha@mhm-global.com

Sarunporn Chaianant
sarunporn.c@chandlermhm.com

Nirmalan Amirthanesan
nirmalan.amirthanesan@mhm-global.com

17th Floor, Sathorn Square Office Tower
98 North Sathorn Road, Silom, Bangrak
Bangkok 10500
Thailand
Tel: +66 2009 5000
www.chandlermhm.com

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