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PREFACE

La meilleure façon d’être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.

Michel Villey, Critique de la pensée juridique modern (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association’s Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from new jurisdictions in this edition: Ghana and the Philippines. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors, and their law firms who graciously agreed to participate.

Finally, I dedicate this ninth edition of The Projects and Construction Review to a dear friend, the late John (Jack) Bernard Tieder, Jr, who died on 3 December 2017. Jack was the founding partner of Watt, Tieder, Hoffar & Fitzgerald LLP and the Global Construction and Infrastructure Law Alliance. He is much missed and I am most grateful for his friendship, and all his support and guidance during my path as a construction lawyer. He leaves behind a large extended family and many close friends and esteemed associates around the world.

Júlio César Bueno
Pinheiro Neto Advogados, São Paulo
June 2019
Preface

A dedication to Jack Tieder (1946-2017)
by Professor Doug Jones AO

Jack Tieder was one of the doyens of the International Construction Bar.
Graduating from John Hopkins University and Syracuse and American University
School of Law in 1971, he commenced practice as lawyer with the firm of Lewis Mitchell &
Moore where he progressed to the ranks of partnership. In 1978 he was a founding partner of
the firm then called Watt Tieder Killian & Hoffar and was the senior partner of the firm now
known as Watt Tieder Hoffar & Fitzgerald from March 1978 until his passing.

Over the course of his career he contributed to international construction projects
practice through the establishment of project delivery and financing structures that ensured
success for many major projects around the world. As counsel in court and arbitration he
was formidable.

Jack though was more than an attorney. He was a contributor to legal education around
the world and to the development of collegiate practice of construction law in the United
States and elsewhere in the world. An example only was his foundation fellowship of the
American College of Construction Lawyers.

I knew Jack for many years and his commitment in a variety of ways outside the law
to the assistance of young people wanting to make their way in the law and to education of
lawyers in parts of the world outside his home country was quite extraordinary. For many
years he coached teams at the Willem C Vis Moot and regularly lectured in eastern Europe
and Russia to local practitioners to bring to them an international perspective of the practice
to which they aspired.

Jack was a runner of some note, who during his life maintained a fitness regime that
was the envy of his friends. His expertise in, and love of, beer was legendary.

In recent times, Jack undertook a significant amount of work as an arbitrator and
it has been my privilege to sit with him in that role. His experience of practice around
the world equipped him well to decide disputes in the international construction context
and his capacity for incisively cutting to the chase on the key issues in complex cases was
awe-inspiring.

In a case recently concluded I worked with Jack in hearings during the period in which
he was undergoing some quite significant medical procedures. His cheerful acceptance
of what for many would be regarded as seriously debilitating effects of surgery and other
treatment was inspiring to those of us who were working with him. His mind remained sharp
until the end and in very recent times his dedication to the conclusion of issues in the case
was remarkable, his work insightful and his judgement impeccable. Upon recent news of the
return of his illness, he faced the position with courage and amazing good humour.

We have lost a giant of the construction law industry, who will remain a legend to all
who knew him.

It has been our privilege to have Jack as a Fellow and mine to have him as a colleague
and a friend.

He will be missed by all of us, but not nearly as much as by Rufus and the family. At
this time all our thoughts and prayers are with Rufus and the children and grandchildren
with whom doubtless the memories of Jack’s personality and contribution to their lives will
remain strong forever.
The ever-increasing global consumer demand fuelled by population growth and economic wealth places corresponding pressure on producers, providers and suppliers of core products and services in the oil and gas, natural resources, petrochemicals, telecommunications, transport and power sectors. Oil and commodity price volatility, coupled with extraordinary expansion in oil and gas production as a result of fracking and shale technology, within the context of slowdowns in economic growth in certain jurisdictions and political uncertainty and instability in other regions, may give investors and developers cause for reflection, at least in the short term, but large-scale investment remains, and will continue to be, very much a necessity across a broad spectrum of industries. Neither governments nor private sources on their own can meet that need in full. To be successful, investment projects have to amass funding and other commitments from a combination of public and private sector participants, and involve increasingly sophisticated financing arrangements.

As the speed of development has accelerated, the scale of individual projects has had to keep pace. At the same time, uncertainty of supply has driven exploration for resources to more remote locations, often requiring innovative technology, and the cost of extracting and processing resources has therefore risen. The development of ‘megaprojects’ has exacerbated the competition for funding. The result? Ever larger financings occurring at a time when traditional commercial bank sources continue to face market and regulatory constraints. As any successful sponsor must call on a widening variety of finance sources, there is a continuing need for lawyers who are capable of structuring the most innovative and complex transactions.

Before examining the role of project finance (and project finance lawyers) in this context, it is useful to consider the more basic question of what we actually mean by the term ‘project finance’.

I WHAT IS PROJECT FINANCE?

In essence, project finance is simply a form of secured lending involving intricate (but balanced) risk-allocation arrangements, and much of the legal expertise is drawn from the discipline of banking. Transactions are characterised by lenders extending credit – often, very large amounts – to newly formed, thinly capitalised companies whose principal assets at the time of closing consist of little more than collections of contracts, licences and ambitious plans (hence the focus on prudent legal analysis).

However, to reduce the discipline to its constituent parts is to miss the magic – or alchemy if you prefer – of project finance: the conversion of an assortment of paper assets into

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1 Aled Davies is a partner and Andrew Pendleton is a senior associate at Milbank LLP.
a viable economic undertaking. The process is akin to creating an economic ‘ecosystem’ in which inputs are sourced and processed and outputs are sold and consumed, with the resultant revenues allocated carefully to predetermined uses, all pursuant to contracts generally entered into before the project has even been constructed.

Project financing has evolved significantly since it emerged in its modern incarnation in the 1980s. Then, it was a tool used principally by commercial banks to finance the construction of natural gas extraction projects and power plants, largely in North America and Europe. Even when projects were financed in the southern hemisphere, lenders and sponsors were generally based in (or near) London, New York or Tokyo. In recent years, this concentration has been diluted, with the increased pressure on traditional sources of credit (which is likely to be amplified by the application of the ever more stringent Basel standards) providing an opportunity, and a need, for commercial lenders across Asia, the Middle East and Latin America, with export credit agencies, multilateral development organisations and (for stronger projects) the capital markets, to plug the resultant gap. Similarly, more geographically diverse sponsors are now driving the development of projects, in some cases to provide their home markets with access to natural resources and, in others, because they are often able to supply equipment and skilled labour at competitive prices.

In virtually all regions of the world, concerns about climate change are leading to investment both in low carbon power and in energy efficiency. This is a significant movement against coal-fired power plants, with many banks and power developers withdrawing from the sector. In recent years, economic growth has been particularly rapid in Brazil, India and China, leading to demand for a broad range of commodities, goods and services. Significant investment has also been seen in recent years in Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa, and other emerging economies. As has been the case throughout history, emerging markets will frequently face cyclical variances in growth and shorter-term, event-driven volatility. Government policies advocating renewable power generation have led to the development of significant solar, wind and, more recently, offshore wind facilities; innovations being pursued also include battery power storage facilities and new sources such as tidal power. Further, increased gas production in the United States, in particular, is providing a basis for new, clean, gas-fired plants and the increase in global production of liquefied national gas (LNG) has resulted in a search for new markets for LNG (to replace the more saturated traditional markets of west Europe, Japan and Korea) with ambitious LNG regasification and power generation projects resulting.

II THE ROLE OF A PROJECT FINANCE LAWYER

Since the nature of project financing is document-intensive, project finance lawyers have a key role in managing the process of closing deals. This entails the identification of key risks, securing consensus among the interested parties on how they are best mitigated and then properly reflecting what has been agreed in the underlying documentation.

With the expansion of project finance into new industries and regions, the attendant legal issues have become increasingly complex and the prediction of potential difficulties correspondingly more challenging. Ever-shifting market standards, coupled with the absence of standard form documentation for projects, contribute variety. The result of this is a need for project finance lawyers with a real understanding of the borrower’s business (including its susceptibility to a range of external risks — be they political, geological, economic,
meteorological or anything else) and the practical detail of all aspects of the underlying project, from the security of feedstock and fuel supply to the liquidity and volatility of offtake markets to the ecological and social impact of the project on the environment in which it operates.

Even after the relevant financing and project documentation has been executed, the parties must sustain relationships and address problems through economic, political and legal change. No matter how extensive or well-drafted the legal documentation, virtually every project encounters technical or commercial problems during its life, and the solutions must fit within the agreed legal framework. Two parties can have a legitimate disagreement about the meaning or effect of a few of the words contained within a mountain of documents governing their relationships (whether simply because they have different perspectives and interests or because they have different recollections of why things were phrased as they were). Moreover, issues not contemplated at the time of signing (and not addressed in the documentation) can and do arise, often necessitating creative solutions to balance conflicting interests. The underlying economics of a project may also change when, for example, market volatility proves more extreme than originally anticipated. The secret to minimising the frequency with which any project encounters problems is a careful initial assessment of the most salient risks and a sensible approach to mitigating them.

III  RISK ASSESSMENT AND ALLOCATION

Thoughtful lawyers will consider the technical, political and legal risks of an individual project before they negotiate how contentious issues should be treated. This requires degrees of familiarity with a number of different disciplines, including civil procedure, contract, property, trust, tort, equity and conflicts of laws, and with a range of financial instruments, from commercial bank loans and conventional capital markets instruments, through domestic government-funded loans and export credit and multilateral agency loans and guarantees, to a host of shariah-compliant financing structures. Using this expertise, a project finance lawyer can help the parties structure their project and its financing (and negotiate the implementing contractual documentation) in a way that is likely to be sufficiently robust to withstand long-term volatility.

Although many risks can be structured, contracted or insured away, projects, as with other commercial endeavours, are exposed to many events and circumstances that may adversely affect their economic performance, stability and even viability. In considering these matters, the lawyer will need to liaise with myriad specialist advisers, take guidance from the lenders (and sometimes the project’s sponsors) and work closely with local lawyers in relevant jurisdictions – efforts that will usually culminate in the production of a comprehensive due diligence report that pulls together the key risk assessments, often presenting them with an accompanying commentary that includes ideas (drawn from past experience) for possible solutions to any problems identified.

At the inception of a project, there will, inevitably, be differing views on both the likelihood of future adverse events and their potential impact. An essential element of the lawyer’s role in helping the parties to assess a project involves an analysis of the potential risks associated with the project, the way in which those risks have been allocated among the parties and the extent to which that allocation is appropriate in the circumstances (having regard to, but without slavishly following, precedents set in comparable circumstances). This assessment may depend on whether the most material risks have been allocated sensibly to parties able to bear them under contracts that will withstand legal challenge. For example,
construction risk is often allocated to engineering and equipment manufacturing firms under market-tested contractual forms featuring detailed testing and liquidated damages regimes; supply and offtake risk is generally managed through a range of firm capacity contracts, ‘take or pay’-style commitments or mere supply or purchase undertakings with limited quantity or price commitments. Which of these many options makes sense in any particular context is often the key to determining the ‘bankability’ of a particular project.

The risk profile of a project will itself have a number of consequences in relation to the structuring of the project company’s overall debt and equity arrangements. For example, power-generation projects are often awarded to sponsors by utilities or governments (who generally lower the generator’s risk profile by guaranteeing to purchase both the project’s power capacity and actual generation) through a competitive tendering process and are structured to ensure the lowest electricity tariffs possible. This is achieved because the lower-risk profile allows lenders to accept a higher leverage ratio and relatively low debt service coverage ratios, and agree to both longer maturities and lower margins. These features serve to offset the effects of the lower tariff and so preserve healthy equity returns for the sponsors. At the same time, however, low debt service coverage ratios and higher gearing mean that the ability of these projects to absorb the risk of increased costs or reduced revenues is limited, with the result that the parties will focus more attention on the risk allocation effected through the project contracts.

Many other projects are designed to produce products or commodities, such as oil, gas and other minerals, sold on global markets where, for well-positioned companies that are able to access global markets, profit levels may be significant. The sponsors may then be prepared to fund the project with a greater proportion of equity in exchange for increased contractual flexibility in the management of the business. As a result, the approach to risk adopted in various project contracts is often less comprehensive than in other projects, the consequence of this being that the lenders to such projects are likely to require more robust overall project economics in mitigation.

IV ENVIRONMENTAL AND SOCIAL ISSUES

The construction and operation of a project will have an environmental and social impact on the project’s locale. Lenders will generally require, at a minimum, that the project company undertakes to comply with all applicable domestic environmental and social laws and regulations. Credit institutions financing a project may also require compliance with World Bank or similar standards, including the voluntary set of guidelines known as the Equator Principles, not only to insulate the project from the risk of penalties and other sanctions, but also to preserve the lenders’ reputations. Among other things, those standards require the development of, and compliance with, an agreed environmental and social management plan. The principal areas of focus include labour and working conditions, pollution prevention and abatement, community health, safety and security, biodiversity conservation, sustainable natural resource management, and protection of indigenous peoples and cultural heritage. Virtually every large-scale project seeking access to the financial markets will therefore need to evidence a high level of environmental and social compliance.
THE CONCERNS OF SECURED CREDITORS

The willingness of a lender to extend credit to a project is likely to depend on the degree of comfort it takes from the viability of the underlying security 'package'. Lenders focus particular attention on whether local law recognises the rights of secured creditors and whether their claims will be dealt with equitably when a project company becomes insolvent.

Not all countries have express insolvency regimes and those that do often have very different approaches when it comes to balancing the interests of debtors and creditors (and, in particular, secured lenders).

One of the principal reasons for a lender taking security over a borrower's asset is to ensure that, if its loan is not repaid when due, it will be entitled to require the sale of the underlying asset and the application of the resulting proceeds in repayment of the loan (to the exclusion of the borrower's unsecured creditors). It is likely, however, that the process of enforcing security will be expensive, disruptive to the operation of the project, time-consuming and uncertain in outcome. In practice, therefore, enforcement of security is something of a last resort. In the context of project finance, it is probably correct to say that the more practical reason for a lender taking security is to maximise the strength of its bargaining position as against other interested parties (notably the project’s trade creditors, the host government and the project company's shareholders). The fact that the lender is entitled to enforce its security (with limited obligations to share the benefits of the enforcement with others) ultimately means that holding security puts it in the best possible position from which to negotiate suitable restructuring arrangements for the project.

Whether a security interest has been validly created and whether it has priority over competing interests are questions that are, in most instances, governed by the law in which the charged assets are located. While the bulk of a project company’s assets, for these purposes, will be located in the jurisdiction of the project, its bank accounts and receivables may well be located elsewhere, as may its shares (or the shares of its holding company).

There are often problems with taking security in jurisdictions where there are no clear procedures for the creation and perfection of security (such as registration or filing) or where the enforceability of ‘step-in’ rights granted to the lenders is uncertain. The location and nature of the asset may also be such that the efficacy of the security is uncertain – orbiting satellites and undersea pipelines being particular cases in point. Uncertainty may also arise if the law of the jurisdiction in which the asset is located lacks uniformity. When the cost of filing or registering security is significant, sponsors may regard the creation of security (particularly in jurisdictions with little experience of complex financings) as unduly burdensome and argue that the practical value of the security does not warrant the related expense. Although in some cases it may be possible to negotiate exemptions from the rules giving rise to these costs in the underlying concession agreement or enabling legislation, the extent of the security granted will be a matter for negotiation between the lenders and the sponsors.

The efficacy and enforceability of security interests are also likely to be affected by the relevant insolvency regime. Whether the court, trustee in bankruptcy or administrator (or equivalent officer) is bound by a grant of security (or is able to prevent or delay its enforcement) must be assessed in light of the applicable insolvency law (or, if the charged assets are located in a number of jurisdictions, the insolvency laws of all those jurisdictions). Insolvency laws vary significantly, from those that readily recognise the rights of secured parties to take possession or force a sale of charged assets, to those that permit debtors to
retain possession of assets pending a court-approved plan of reorganisation, to those that provide very little guidance as to how the courts would treat the rights of a creditor relative to an insolvent debtor.

VI  HOST COUNTRY RISK FACTORS

i  Location

The one feature of a project that no amount of structuring can avoid is its location. The political, judicial, economic and social stability of the country in which a project is situated will generally be of some concern to both investors and lenders. At the extreme, structuring a deal in an active conflict zone is likely to be challenging (at best). However, there is much that can be done to mitigate the levels of political risk encountered in most countries, and in a case where a project’s lenders and investors have particular concerns about the stability of the host state, they may be able to address their concerns through political risk insurance and credit support.

When a project is located in an impoverished or developing country, the lenders and investors to the project will often seek to mitigate the resulting risks through the involvement of multilateral and other public sector lending institutions, whose participation may act as a deterrent to adverse interference by the host government for fear of cutting off access to international credit sources. If this is the case, these institutions will seek to confirm that the project satisfies their specific development and other policy mandates. For example, they may need to determine that the project benefits the local population and not just a limited number of well-positioned investors and government officials. To accomplish this, they may require that diligence be undertaken to confirm the absence of inappropriate payments relating to the award of the project’s licences and concessions. They may also seek clarity on how the host government will invest the tax and other revenues derived from the project.

ii  Corporate governance

Because host governments often require that project companies be established under local law, investors will wish to pay particular attention to how that law affects the governance of the project company. Crucially for investors, the project company’s ability to distribute the project’s surplus funds to its shareholders must not be unduly constrained by corporate law and local accounting practices. Foreign investors who participate in the equity alongside local investors will wish to be certain that their rights in relation to the control of the project company will be respected. Lenders will also need to assess the degree of flexibility that local law allows in such matters, not least because, in the worst-case scenario, they may need to replace the original investors in the project.

iii  Regulation and authorisations

The construction and operation of a project generally requires the project company to obtain a broad range of permits and consents in relation to matters ranging from environmental and social impact to land use, health and safety, and industrial regulation. The analysis of the risks arising from the need for permits turns, in the first instance, on the identification of the consents that will be required and ensuring that they have been issued (or will be issued in the ordinary course without undue expense, delay or conditionality) and that any permit conditions can be complied with. Also important in this context are the related questions of
whether an enforcement by a secured lender of its security interests in relation to the project will (or could) trigger a revocation of a permit and whether a person to whom the lender sells the project on an enforcement of its security would be entitled to the benefit of the permits.

Many projects operate in regulated industries that require ongoing compliance with detailed laws and regulations. The vast majority of countries, whatever their level of economic and political development, impose regulatory oversight on, at least, their public utilities (power, water and telecommunications) and infrastructure sectors, and may also extend regulatory oversight to their natural resource sectors. Regulation can encompass a licensing regime, under which permission to operate is granted to specified companies or classes of companies. It may (and often does) extend further to dictate the manner in which a project company is to operate and, in many cases, the prices that company may charge for its services or output.

The manner in which regulation is imposed can vary significantly. For most projects, the analysis of the regulatory environment involves two basic areas of investigation: to determine the rights that are granted to, and the obligations that are imposed on, the project company; and to assess the risks associated with the introduction (during the life of the project) of changes to the regulatory regime that could operate to the detriment of the project company, its investors or its lenders.

iv  Taxation

All projects are subject to some form of taxation, and the tax regime will generally have a significant effect on the project’s economics. The project company is likely to be subject to corporate taxes, often calculated on the basis of the profits that it generates. It may also be required to account for value added or sales taxes. In some cases, it may be obliged to pay royalties to the host government, calculated on the gross value of its sales or of raw materials that it uses in its production processes. Stamp taxes, registration taxes and notarial fees may also be payable. The laws of the host state may also require the project company to make withholdings on account of tax on interest and dividend payments it makes to overseas lenders and shareholders. If interest payments made by a project company to its lenders attract withholding tax, the project company will usually be required to gross up the payments to the lenders so that they receive the amount of interest they would have received in the absence of the withholding tax. In such cases, it is likely that some degree of relief from the effects of the withholding requirement will be available under an applicable double taxation treaty or the domestic tax laws of the country in which the investors or lenders are situated, with the result that the financing documentation will be structured to minimise the impact of the withholdings regime.

v  Duties and trade restrictions

Whenever goods or individuals cross a border, they will be subject to the laws of both the country they are leaving and the country they are entering. Key concerns include the project company’s ability to import into the host state key goods, equipment and raw materials and to employ expatriate managers, engineers and labour. Although customs restrictions are often limited to the imposition of simple import duties, in some cases they extend to an absolute prohibition on imports. Likewise, immigration laws usually permit the employment of qualified expatriates to a limited extent, but they are likely to prohibit the employment of expatriates without particular skills or qualifications and to require the training and employment of local
nationals. In some cases, the project company may find that restrictions apply on the export of its output, either generally or to specific destinations. However, the project company may be able to negotiate exceptions to import, immigration and export restrictions.

vi Legal certainty and change in law

Countries with well-developed laws and an established and independent judiciary are often more attractive jurisdictions for investment than countries with little clarity as to their laws or certainty as to their application. Concerns about legal and regulatory certainty are perhaps more acute in relation to projects operating in regulated industries or those that have significant social or environmental impact, but the concern is common to all projects, wherever located. Newly independent countries, in particular, may seek to address this through regional harmonisation of disparate legal systems on the basis that so doing provides a means to attract foreign direct investment, eliminate barriers to cross-border trade and provide a platform that improves their chances of competing more effectively on the world stage. Although jurisdictions with more developed legal regimes and stable judiciaries may afford investors with a somewhat higher degree of legal certainty, investors in any jurisdiction have to acknowledge that it may not always be possible to predict how specific problems or conflicts will be resolved in practice.

Project finance loans are generally repaid over an extended period of time (as long as 20 or more years in some cases). Notwithstanding whether initial certainty may be achieved as a result of the assessment of the host country’s laws, these laws are likely to change during the life of the project; it is an accepted prerogative of sovereign states to change their domestic laws on a largely unfettered basis. For example, public policy may evolve as governments change; if regime change is frequent and policy objectives vary widely, public policy will itself be volatile. Governments may also impose increased environmental compliance requirements on companies that operate within their borders to comply with new treaties and similar obligations (or even simply to improve their reputation). As their economies develop, host governments may be able to extract more favourable terms from new investors, and they may find it tempting to seek to renegotiate agreements reached earlier.

In circumstances where there is significant uncertainty as to the stability of the legal or regulatory regime, specific commitments from host governments may be enshrined in national law through some form of enabling legislation, thereby allowing greater certainty that the relevant commitments will have precedence over competing and often inconsistent laws and regulations. In other cases, it may be appropriate for the host state to enter into direct contractual undertakings with the project company (and, in some cases, its principal investors, including its lenders) for the purpose of providing appropriate investor protections.

Government commitments vary from legally binding undertakings, the breach of which will entitle the project company (or its investors) to damages or other specifically agreed levels of compensation, to ‘comfort letters’ that afford little, if any, certainty of remedy. A host government might also seek reciprocal undertakings from the project company, including commitments to (1) provide adequate service during the term of the agreement, (2) observe relevant safety and environmental standards, (3) sell its output at reasonable prices and (4) particularly when the project company is under an obligation to transfer its assets to the host state at the end of the concession period, carry out prudent maintenance and repairs so that, at the end of the concession period, the state (or the applicable state-owned entity) will acquire a fully operational project. Breach by the project company of such reciprocal undertakings will invariably give rise to specific penalties, including those
involving forfeiture of its concession rights or termination of supply and offtake contracts with relevant government bodies. Ideally, these agreements should include provisions that recognise the role of lenders (including an entitlement to receive express notice of defaults on the part of the project company, and cure and ‘step-in’ rights), but in cases where it is not possible to ensure the inclusion of such provisions, it is important that the agreements do not contain terms (such as prohibitions on assignments by way of security and change of control termination rights that could be triggered by an enforcement of security) that are likely to operate to the detriment of the lenders.

VII GOVERNING LAW ISSUES

Although most contracts describe the terms of a transaction reasonably clearly, the manner in which contracts will be interpreted or enforced is likely to differ (sometimes significantly) from one jurisdiction to another. The project finance lawyer’s analysis in this context will involve an examination of (1) the effectiveness of the choice of the law of a particular jurisdiction to govern the various project agreements, (2) the extent to which contracts governed by the law so chosen are legal, valid, binding and enforceable, and (3) the choice of the forum for the determination of disputes arising from the transaction (including the extent to which judgments or arbitral awards that emanate from that forum will be enforced in other relevant jurisdictions).

The knowledge that the transaction is governed by the law of a familiar jurisdiction can be a source of significant comfort to investors and lenders. In the case of finance documents, this most frequently entails an election between English law and New York law. A preference of one over the other is not as substantive as it might appear. Each has well-developed case law providing clarity in relation to the way in which the law is likely to be applied in any given circumstance, and the material elements of each that are relevant to the enforceability of customary finance documents are broadly similar. However, lenders may have strong views in this area, particularly based on familiarity with customary forms and terminology.

In contrast, the choice of law can have particular significance in relation to a range of commercial contracts. For instance, parties may find it attractive that Article 2 of the Uniform Commercial Code, as in effect in the state of New York, allows key price terms in contracts for the sale of goods and certain commodities to be left open for resolution by future agreement among the parties (in the absence of which through resolution by a court). In contrast (subject to various exceptions), English law may find that such a contract fails for uncertainty.

In some circumstances, there is no real choice of law. Conflict of law principles, such as the doctrine of lex situs (i.e., the rule that the law applicable to proprietary aspects of an asset – whether tangible or intangible – is the law of the jurisdiction where the asset is situated), will very often dictate which law is to be applied for specific purposes (notably the transfer of title to, and the creation of security interests in, the assets). Although there may be no particular legal theory that stipulates that project contracts giving rise to personal claims (rather than proprietary interests) should be governed by the law of the jurisdiction in which the project is located, it is often a requirement of the host government that its own domestic law be specified as the governing law of such contracts (and in particular those with national agencies).

Not all contracts are enforceable in accordance with their terms in all respects. There will often be mandatory provisions of law that override the terms of the contract. Many
countries have civil or similar codes whose provisions will apply to a contract notwithstanding its express terms. Public policy considerations in a particular jurisdiction may also invalidate a provision in a contract that would be fully effective under the law of another jurisdiction. Legal uncertainty is likely to be more pronounced when the country in which the project is located has no tradition of reported case law (making it more difficult to establish how the rules are applied by the domestic courts in practice) or no system of judicial precedent, or where domestic law prohibits fundamental aspects of the transaction (a notable instance of this being obligations to pay interest being rendered unenforceable in some jurisdictions by virtue of general principles of shariah law).

VIII CHOICE OF FORUM ISSUES

The selection of a forum for the hearing of disputes in connection with a project may also have important implications. Pertinent questions in this context include the following:

a. Will the forum be neutral in its decision-making?

b. Will the chosen forum apply the law specified by the parties in the contract?

c. Will the outcome differ if it does not?

d. What evidential or procedural rules apply in the forum if the contract is silent in relation to such matters?

e. Does the position change if the contract stipulates that hearings should be conducted on the basis of particular evidential or procedural rules?

f. Will judgments or arbitral awards be enforced in the home jurisdictions of the parties to the dispute?

When considering the choice of forum, another important question is whether the dispute should be the subject of judicial or arbitration proceedings. There are obvious advantages to using the courts of a country with a long history of case law and a binding (and comprehensible) precedent system; established procedural laws and unbiased judicial oversight are things that provide comfort to sponsors and lenders alike. In many jurisdictions, the courts can compel parties to disclose facts or documents and may be able to order interim relief, such as injunctions that prevent a party from moving assets out of the jurisdiction. Further, because arbitration is a product of contract, only parties that have specifically consented to the arbitration of a dispute can be compelled to proceed in that forum.

On the other hand, the speed and privacy of an arbitral process can be a significant benefit to all or some of the parties, and a specially designated arbitrator may well be better equipped to address complex technical issues than a judge with more general skills. Moreover, an arbitral award will, in some instances, be more likely than a judgment to be recognised and enforced in the home jurisdiction of the party against whom it is made without there being a review on the merits of the dispute. International treaty arrangements, such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), call for Member States to give effect to arbitral awards made in other Member States. However, there are often sufficient exceptions to even treaty-based rules that mean that awards can be reopened when they are being enforced.

Government entities may also be immune from proceedings before the courts of the host state or of other states (or both). Their assets may also be immune from the normal processes that apply in relation to the enforcement of judgments and arbitral awards, with the result that a successful judicial or arbitration proceeding can prove to be a distinctly
hollow victory. This immunity is widely acknowledged as a matter of international law, but there may be exceptions to its application. For example, a state entity acting in a commercial capacity may not benefit from immunity from suit, or even enforcement, against assets used in a commercial capacity, and, under the law of many countries, it is possible for a state entity to waive its rights to immunity.

IX CLOSING THE DEAL

The principal role of project finance lawyers, once they have identified and analysed the various risks applicable to the project, is to mitigate those risks as far as is practical by documentation in the context of the negotiating leverage of the parties. This requires a combination of skills: the ability to negotiate artfully and effectively, and the ability to draft sensitively (among other things, being able to retain a view of the bigger picture when crafting the detail and understanding which points really matter).

Project finance lenders will expect to manage the risks they face through the credit documentation. There is no doubt that project finance loan agreements are characterised by a wider range of conditions precedent, representations, undertakings and events of default than other extensions of credit. Although lenders will be persuaded that these help to minimise risk, sponsors may consider them to be unwarranted intrusions on their management capabilities and discretion. Finding a way to balance these competing perspectives is perhaps an additional aspect of the alchemy of project finance.

Project finance lawyers must also organise the documentation process and ensure that each of the parties understands sufficiently the issues in question. Closing a project finance transaction is often as much about process management as legal analysis and drafting. With assets, sponsors, lenders and their respective advisers based in a broad range of countries and time zones, organisational challenges can be significant. Managing the logistics of complex negotiations across the globe requires a mastery of communications technology. Although English is the dominant language of project finance, it can also be a significant hindrance to the closing of a deal if the lawyers responsible for orchestrating the closing are not conversant in at least some of the native languages of the key project participants.

The ability of international counsel to communicate with local counsel in a broad range of jurisdictions is absolutely crucial to an international transaction. Local lawyers who have trained at international firms will often be adept at conveying legal issues in terms that are readily understood by their international counterparts. However, guidance from books such as this is of particular value in ensuring that all the lawyers on all sides of the transaction have a common view regarding the key legal issues that must be considered by the parties.
Disputes are as integral to the construction process as the preparation of plans and the placement of concrete. However, most industry participants yearn for the reduction — if not the elimination — of project disputes. They correctly argue that disputes disrupt and often irrevocably poison the good working relationships between project participants that are essential to project success. While this is a noble goal, it is unlikely to be achieved any time soon. Hence, it is important on any project, especially an international project, to have the appropriate dispute resolution mechanisms in place for the inevitable confrontation.

Anyone participating in the construction industry knows that disputes take on lives of their own and usually result in further exacerbation of the project’s underlying problems, themselves causing delays and costs. Certainly, the dispute resolution processes involve expenditure and diversion of valuable company resources — attention and time as well as cost — but we must never forget that construction companies are in the business of building, not litigating. Disputes are part and parcel of many major international projects and, as a result, on some of these projects the parties actually include allocations in their budget for this eventuality.

With more and more construction taking place in Asia, for example in core parts of China’s Belt and Road Initiative and in developing countries in general, the task then becomes not only about preparing for the eventual dispute but also, more importantly, being in a position to appropriately control the resolution of the disputes and protect the best interests of the project.

I CONSTRUCTION DISPUTES IN DOMESTIC AND INTERNATIONAL PROJECTS

Complications are a normal, everyday component of the construction process; indeed, it is the constant challenge of diverse problems on construction projects that makes the process as exciting as it is. The people who lead projects, on all sides of the agreement, tend to be smart, tough, demanding and self-confident — and having such strong personalities, more often than not, significantly complicates any possibility of reaching an amicable resolution in the first instance.

Resolving disputes at the project level typically prevents negative impacts on both schedule and budget. When disagreements escalate from ‘problem’ to ‘claim’ and then to ‘dispute’ status, those potentially valuable project-level benefits are lost to processes that have little to do with the construction process and tend to take on a life of their own.

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On an international project, in which the strong players who represent their companies come from different cultures, speak different languages and consider contractual issues against the backdrop of different legal systems, the challenge to work through problems to a solution at the project or even at the executive level is challenging, but critically important. Moreover, fully understanding the dispute resolution mechanisms, and where enforcement or a challenge to an award may need to be pursued, is an absolute necessity and must be addressed with an increased level of diligence, even before a contract is executed.

II  SOLVING PROBLEMS AT THE PROJECT LEVEL
The best place and time to resolve claims, or even potential claims, is at the project level. On projects in which the parties fail to engage regularly in constructive and pragmatic discussions and thereby resolve issues at the field level whenever they arise, unsolved problems tend to accumulate quickly in substantial numbers as claims beget more claims. The larger the number and value of unresolved problems, the greater the amount of money in dispute and the more difficult it becomes for the parties to resolve matters amicably without a formal dispute resolution process. Therefore, it is extremely important to construct a well-thought-out dispute resolution mechanism that will, if necessary, effectively, quickly and economically resolve disputes while giving the parties an opportunity to cool down and reassess situations. In recent years, the trend of including mandatory cool-down periods in contract documents, both bespoke and form, before a commercial dispute can commence has only accelerated.

III  THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN EARLY PROBLEM-SOLVING AND DISPUTE AVOIDANCE
Fortunately, the participants in international construction projects are typically sophisticated and not afraid to use the various dispute resolution techniques that have proved to be effective in achieving an early solution to problems – processes that are timely, cost-effective and provide added value. These processes fall within the moniker of ADR (alternative dispute resolution). The ‘alternative’ in ADR refers to alternatives to arbitration and litigation. These processes may occur as early as during pre-construction, and may occur as late as the eleventh hour before formal hearings are held in arbitration or court. To address concerns of cost and efficiency, most of the national and international arbitral bodies have adopted expedited resolution processes for both small and large projects. The key is to understand the many available options and properly match them to the specifics of a particular project.

IV  THE GROWTH OF ADR
It is true of many industries, but especially of construction, that anyone legitimately involved in major domestic and international projects has, at least once, participated in an extensive and costly dispute resolution process. This is especially so in the international arena. The mandatory resolution of disputes in the employers’ national courts, or in arbitration administered by local arbitration providers of the employers, is often not the preferred venue for resolving the open issues. In some jurisdictions, proceedings in the local courts can be biased, very costly and may take on a life of their own. In fact, arbitration, which is generally
billed as being a faster and cheaper alternative to litigation, has proven to be anything but. Hence, the rise in the use of ADR processes around the world and the criticality of fully understanding and properly structuring the ADR mechanisms.

V ADR MECHANISMS

i Partnering

Despite its name, ‘partnering’ does not create an economic or legal partnership between the project participants. Rather, it is a process led by a trained neutral facilitator in which the representatives of project participants (e.g., employer, main contractor, professional design team) gather together for a day, or perhaps more, with their counterparts to create personal relationships and understandings that should result in collegiality and dispute avoidance, notwithstanding the different responsibilities and risks that each has in the project. Although partnering was created in the United States by the Corps of Engineers to address the adversarial nature of normal construction project interactions, it has enormous potential for international projects in which culture, language, personal history, business conduct and other essential differences can lead to disharmony. As can be seen below, the structure of a partnering agreement, by its open and collaborative nature, can overcome most differences by encouraging open discourse and cooperation.

The parties will typically adopt a project ‘treaty’ or ‘credo’ in which they express their dedication to the goals they have set to work together in the best interests of the project and to avoid disputes. That document is signed by each of the participants and posted in their project and regular offices. There have even been instances of a partnering logo being adopted. From a practical perspective, the best value and results are achieved when participants meet regularly to review past and current project issues. These meetings, if properly guided, will result in increased collaborative effort and camaraderie among the participants. Ultimately, success is measured by issues resolved or discussed and prepared for future resolution. An added value of partnering is the end-of-project review and lessons-learned evaluation to improve future processes.

The process of partnering should result in fewer disputes when properly carried out with a trained, or at least experienced, professional facilitator. For the international project, the potential value of partnering is clear.

ii The decision-tree analysis

Whether the result of partnering or otherwise, each project should benefit from the establishment of a decision tree, in which the key project participants set out the names of their decision makers at project level, project executive level, company executive level and then the chief executive officer (CEO) of the company, on the understanding that resolution of problems should be made at the lowest possible level. In the absence of a resolution within a stated time, however, the problem-solving responsibility shifts upwards to the next level for a stated time until it reaches the level of the company CEO. This process has enjoyed success for a number of reasons:

a decision makers at each level are identified at the beginning of the project;

b decision makers at each level tend to get to know each other before they are confronted with a problem to solve;

c decision makers at each level are reluctant to see problems go to a higher level as many such situations could reflect poorly on their performance;
the mere imposition of time limits at each level assures focused prompt attention rather than deferral to a later time (which often leads to no resolution at all); the successful resolution of problems becomes part of each participant’s responsibility, rather than the creation of claims as a measure of success; and the successful resolution builds upon itself and creates an atmosphere of success that benefits the project.

iii Alliancing

Alliancing is the delivery method pursuant to which the diverse key parties to a project create a project team from their people with the most relevant and substantial experience, and challenge that team to operate with the singular purpose of on-time, on-budget completion of a high-quality project. While project participants can readily see advantages to participating in an alliance, it requires a major leap of faith on the part of the employer as the traditional separation of responsibilities with their attendant contractual protections must yield to the more collaborative model in which greater trust must be placed in the alliance team to achieve high-quality performance at the best cost based upon the best interests of the project. While there is likely to be a project budget that may not be exceeded, the team members are not limited to fixed-price contracts for their work and the project budget will be used by the team members as they decide collaboratively. Thus, the selection of the alliance team members is perhaps the most important decision that the employer can make as they must not only bring leading technical expertise to the table, but they must be capable of working effectively in this collaborative team arrangement, placing the interests of the team and the project ahead of what would normally be their own interests.

Because of the nature of the contract between the project employer and the alliance team, and because of the collaborative relationships that must be formed by the team members to work together to achieve the project goals, this model encourages the resolution of any and all disputes among the project participants in a prompt and business-like fashion, rather than through the customary dispute avoidance and dispute resolution techniques relied upon by parties in traditional contractual relationships. This result is enhanced by the presence of an alliance leadership team, with each participant represented by a senior colleague and the inclusion of the employer’s senior representative. Trust, relationships and personnel commitment to the successful outcome of the project are irreplaceable elements of any alliancing arrangement.

In June 2018, the NEC, as part of its fourth suite of contracts, released the NEC4 Alliance Contract, formalising the alliance model in a suite of documents. This new document codifies traditional principles of collaboration and sharing of risk and award as well as providing a structure and definition to the major players (i.e., client, alliance board, alliance manager, among others).

iv Dispute review boards

The use of dispute review boards (DRBs) has become more prevalent. Indeed, in some more complex projects where there are multiple layers of significant legal exposure, more than one DRB may be in place, dealing with specific contractual relationships.
The DRB model can be whatever the parties want it to be. However, a typical model would look something like the following:

\( a \) Prior to project commencement, two parties each select a member of the DRB who may be independent and neutral (independence and neutrality are preferred, even for the party-appointed members).

\( b \) Those two appointed parties select a third who must be independent and neutral.

\( c \) The DRB will meet either at the call of either party or periodically to hear and resolve disputes between the parties that the parties have not resolved themselves. For best results, it is preferable to keep the DRB members apprised of project developments through regular, planned updates and, if possible, site visits.

\( d \) The DRB hearing is usually informal and may or may not include attorneys; the purpose of the hearing is for the DRB panel to understand the dispute sufficiently to render a decision.

\( e \) The DRB will promptly render a decision. Normally, the finality of the DRB’s decision will depend on its authority under the parties’ contract. Typically, the DRB’s decision will be binding on the conduct of the parties while the project is under construction but not binding upon their legal rights. In other words, if the DRB directs the employer to pay the contractor additional compensation for claimed extra work, the employer must do so. However, after the project, the employer may assert that it had no legal obligation to make that payment and seek reimbursement from the contractor. Experience indicates that few project participants challenge DRB decisions at the end of the project simply because there have been no unresolved disputes, and the incentive to go to arbitration or litigation, with all the accompanying disruption and expense, is far less attractive under those circumstances. Additionally, if the DRB functions as it should, its decision is likely to be respected by the parties.

\( f \) The parties can also ask the DRB to issue advisory opinions to engender project-level negotiation and resolution. In fact, by fostering communications during the project, a well-informed DRB may prevent a formal DRB hearing or determination, or a subsequent litigation or arbitration.

The use of DRBs has become so prevalent that the Dispute Review Board Foundation – an organisation to promote the use of DRBs and advance the technique and quality of DRBs – was formed. It has published a practices and procedures manual, and holds conferences and seminars, maintains a database of members who offer their services for DRBs, and offers counsel to those employers who might consider this dispute avoidance technique.

\( v \) Planned early negotiation

Typically, litigators prefer a later resolution, believing that their clients’ best interests are served by first beating up the adversary a bit. However, most clients typically prefer the security of an earlier resolution – again, construction companies are in the business of building, not litigating. Planned early negotiation (PEN) is unique in that the parties agree to negotiate at the outset instead of focusing on contentious resolution. This approach is atypical because offering to negotiate at an early state of a dispute is traditionally considered a sign of weakness. Parties committed to PEN agree to forgo the typical posturing and instead agree to focus on early case assessment, business concerns, costs and time, and ways to resolve disputes (i.e., mediation, a neutral or a conciliator). To avoid derailing the process, the parties are best served by entering into an agreement that should set forth the parties'
desire to negotiate and the steps and mechanisms the parties will use to achieve that goal. It is important that the parties understand each other’s risks and commercial considerations during their discussions – and these factors should drive a positive business outcome. Key to a successful PEN process is the parties’ understanding of their respective positions, and a joint effort to identify potential third-party claims and similar other obstacles to a negotiated resolution.

vi Mediation

Mediation is an extremely valuable process, which, while not adjudicative, is basically an enhanced negotiation aided by a neutral facilitator, known as a mediator, who assists the parties in their negotiation and helps them achieve resolution and closure. The key advantage of mediation is that the process focuses on finding a practical resolution of a dispute as opposed to adjudicating the parties’ contentions and rights.

Unless agreed otherwise by the parties, a mediator makes no rulings and has no power to command that the parties act in a particular way. The process is voluntary and, when properly established, is completely confidential so that what is said by the parties during the process is not allowed to be repeated in arbitration or litigation. Often mediation is designated as a prerequisite to arbitration to provide a non-contentious resolution mechanism before the parties harden their positions. With the soaring costs of litigation, even in arbitral forums, mediation is becoming more important as parties seek to avoid contentious dispute resolution when possible.

For its part, the ICC renamed its Amicable Dispute Resolution Rules as Mediation Rules and issued Mediation Guidance Notes, which, as the name suggests, ‘provide guidance on issues that deserve attention when choosing and organising mediations’.

The new mediation rules complement the 2012 revision to the ICC’s arbitration rules that encourage arbitrators to help parties always consider different settlement scenarios. The Mediation Guidance Notes continue this trend and encourage arbitrators to actively guide the parties towards a non-contentious resolution of disputes.

In the international construction world, the fact that parties speak different languages and have differing cultural attitudes and prejudices (particularly as regards the obvious need for a commitment to compromise) adds to that scepticism as one or more parties refuse to believe that a mediator who is not from their country and culture can lead them fairly through a negotiation process; many reject mediation because they refuse to accept that what they tell the mediator in confidence will remain in confidence. Another factor to consider when agreeing to mediation is the good faith of the parties participating in the process. Because of mediation’s non-binding nature, there is no pressure on the parties to be fully prepared, as in arbitration or DRB proceedings. Hence, it is especially important that parties mediate, and prepare for mediation, in good faith to avoid a situation in which one of the participants chooses to treat mediation as a mere formality and not as an opportunity to resolve the dispute.

vii Ad hoc ADR

An ad hoc arbitration is a creation of the participating parties. It can be modelled on and follow the rules and procedures of a particular ADR organisation, such as the ICC, but without that body’s actual administration and oversight – alternatively, the participants may choose their own script. For example, the parties may determine the number of arbitrators and the process for appointing the arbitrators, as well as the conduct and procedure of the
arbitration, by referring to a particular organisation’s rules and procedures. The immediate and most obvious benefit of the ad hoc process is the lack of a – generally substantial – filing fee and the subsequent maintenance fees. Naturally, this process places a heavy burden on the project participants to adequately describe the ADR mechanism in such a way that the locale, composition or identity of the tribunal, the applicable law and procedures, and the method for negotiation of arbitration fees, are adequately encapsulated in the underlying contract documents. The ad hoc approach places a significant burden on the arbitrator, and to some extent the parties, to make sure that the proceeding is timely and adequately and thoroughly administered – functions usually handled by an ADR organisation’s professional staff. To that end, in February 2017, the Chartered Institute of Arbitrators (London) issued recommended ad hoc arbitrator guidelines to address the drafting of an ad hoc agreement itself, as well as other considerations such as costs, confidentiality and bias.

VI CONCILIATION
Conciliation is an ADR mechanism whereby the parties retain the services of a conciliator. The conciliator, unlike a mediator, will typically work with parties individually to frame relevant issues and come up with a list of ranked, desired outcomes to be reconciled in a negotiated settlement agreement. Typically, the parties never meet face to face, which can be helpful in an industry such as international construction, which is dominated by strong personalities.

VII NEUTRAL EVALUATION
As the name suggests, the parties can retain the services of a neutral evaluator, either independently or through one of the several international ADR organisations, to evaluate their dispute. Typically, this permits the parties to quickly exchange their claims and backup materials without fully committing to a contentious proceeding. Normally, the neutral will evaluate the parties’ positions and issue either a binding decision with an explanation or a non-binding report that can serve as a framework for a negotiated settlement. Alternatively, a neutral could also be tasked with evaluating the parties’ position before providing a recommended course of action that is the least disruptive to the project and the parties’ relationship. Using a neutral is especially beneficial on construction projects in which long-term cooperation between participants is especially important. As with any ADR method, it is important to make sure that the proceeding and any generated report are kept in confidence.

VIII ARBITRATION
The preceding sections have addressed methods designed to avoid the necessity of submitting a mature dispute to a finder of fact, be that an arbitrator or a judge. All the foregoing methods have in common the ability of the project participants to control the resolution of problems without yielding that control and authority to the ultimate adjudication of a binding award or judicial edict. However, there are some circumstances for which, for a vast variety of reasons, the intervention of an arbitrator or judge will be needed to achieve resolution. There is little point in discussing litigation in the international construction context here as treatises have been written about litigation in each jurisdiction. However, there are some observations that can usefully be made about international arbitration of construction disputes.
The complexities of international arbitration continue to expand as contracting practices change. In this ever-developing global world of construction, many international arbitration proceedings are faced with challenges that in some respects can make the process more complicated, time-consuming and expensive than was the case in past decades. There are many reasons for this, which include the following:

a Many project teams now comprise parties from around the globe, not just regional participants. It would not be unusual for engineering and design to be performed by a team of, say, US, French or British designers with designers from the country in which the project is located, while construction is led by a consortium of Spanish, French, Brazilian, Italian, Chinese, Korean, Japanese, US or other lead contractors with subcontractors also coming from diverse countries.

b Because of the variety of languages and experience brought by companies from around the globe, it is not unusual for contracts to be some form of the International Federation of Consulting Engineers contract (known as FIDIC) but modified by local practice and local legal perspectives. Contractual choice-of-law clauses may designate a jurisdiction that may have as one of its prime virtues the fact that it is not the law of any of the participating parties. For example, it is not unusual to have ‘New York’ as the choice of law when none of the project participants is from the United States, or even the state of New York. It is also not unusual for project participants to have little more than a very generic understanding of what New York law, or the law of any other designated jurisdiction, really provides for in the context of disputes that may arise until they are actually facing arbitration. The designation of locales for hearings that are not home to any of the project participants or the law of arbitration may not have been considered by the parties when the designation was made. However, the parties must have a very clear understanding of the law where the project is located and how that jurisdiction treats foreign forum selection and choice-of-law clauses. In 2018, in the context of bilateral investment treaties, the Court of Justice of the European Union refused to enforce an arbitration clause because it had, in the Court’s opinion, an adverse effect on EU law and was therefore incompatible with the European law. The matter to watch is whether this type of rationale will extend to purely commercial transactions, such as construction contracts, and the ADR provisions contained therein. The worst possible outcome is conducting an arbitration, only to learn that the award is invalid or unenforceable.

c Many arbitration clauses are customised by the parties and may include party-appointed arbitrators with no reference to their independence or neutrality, schedules for the hearing process that bear no resemblance to reality, and references to standard arbitration rules (such as those of the ICC, International Centre for Dispute Resolution (ICDR), London Court of International Arbitration, China International Economic and Trade Arbitration Commission and the many other providers of arbitration throughout the world) but with customised clauses inconsistent with those rules, which create ambiguity or confusion as to how the process will work.

d The variety of nationalities participating in the project team among whom the disputes arise is accompanied by very different perspectives on the arbitration process and the role of lawyers in that process can result in the creation of complex procedural and substantive issues that interfere with the efficiency of the arbitration process.
The arbitrators who have been selected may know nothing of the law of the choice-of-law jurisdiction and may not speak the language (both the idiom and the culture) of the other arbitrators, never mind the participants.

Although it could be argued that the development of document management through electronic databases, and software that can sort and facilitate analysis of documents and other electronic communications, aids the fair resolution of project disputes, it can also be convincingly argued that this development has added to the complexity of arbitration as some parties seek to engage in large-scale document and communication discovery within the arbitration process, and other parties passionately resist such discovery. This type of confrontation is understandable in the international context, particularly as practitioners from common law countries tend to be far more accepting of discovery in arbitration, while those from civil law countries consider broad discovery invasive and unacceptable in arbitration. When emails are included in the scope of what one party seeks to obtain from the other, the volume and associated costs of the electronic data that could be exchanged and then analysed can result in very substantial expense and the consumption of many months of discovery, all of which is part of the debate on this issue. It tends to be one of the challenging complexities facing project arbitration.

In November 2016, the ICC released its expedited procedure rules. These rules automatically apply to any dispute valued at less than US$2 million and, claimant beware, most expedited disputes will be resolved by a single arbitrator, even if the underlying arbitration agreement requires otherwise. Moreover, in line with the ICC’s January 2016 efficiency amendments, expedited arbitrations will have to be completed in six months. While the pertinent language advises that the court ‘may’ appoint a single arbitrator, this provision has proven somewhat controversial because it potentially takes away the parties’ right to the bargained-for three-member panel. Another factor to consider is that not every US$2 million arbitration is ‘simple’ when compared to matters of a larger scale. It is possible that complex issues may require more time than is allowed by the expedited rules and certainly would benefit from a three-member panel.

However, the trend for using quicker and more streamlined arbitration processes is not subsiding. In May 2018, following the ICC, the Chartered Institute of Arbitrators (CIArb) unveiled its own version of the expedited rules – Cost-Controlled Expedited Arbitration Rules – with the stated purpose of controlling costs. Like the ICC, the magic threshold is £2 million (note, pounds sterling) and the rules call for adjudication before a single arbitrator. Some interesting provisions of the CIArb rules include (1) capping arbitrator costs at 5 per cent of the amount in dispute, (2) recoverable legal costs capped at 15 per cent of the total amount in dispute and (3) the ability to require two or more witnesses or experts to be questioned together.

When it comes to international construction, few projects compare to China’s Belt and Road Initiative, which will establish new land and sea corridors between China, its neighbours and beyond to western Europe. Disputes will undoubtedly arise from a project of this magnitude, but it remains to be seen how and where these disputes will be adjudicated. The ICC, for one, through its Belt and Road Commission, has been very much up front about its expertise and its ability to help resolve the arriving and coming claims.

After initial concerns about the impact of Brexit, it appears that London will remain a preferred venue for international arbitrations. In general, Brexit has highlighted the advantages
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and security provided by the 1958 Convention on the Recognition and Enforcement of Arbitral Awards against the uncertainty of how court judgments will be enforced in the post-Brexit world.

Clearly, the nature of international construction arbitration has not in itself become a more complex process, but rather it reflects the increased complexity of global construction projects and the differences brought to the table by parties from different nationalities and different legal systems. Thus, the need for the parties and their legal counsel to reflect on the challenges specified above – as well as others that may be more specific to the particular project and its participants – is key to creating an arbitration process that can be efficient, effective and responsive, and one that will credibly resolve their disputes.

Furthermore, perhaps the time has come for greater standardisation of international construction dispute arbitration, with a single arbitration provider taking the lead in developing well thought-out rules, procedures and administration that will respond to the new model of the truly international project.

IX COSTS AND CONFIDENTIALITY

There are several considerations that must be carefully thought out before using mediation and arbitration to resolve project disputes. An agreement to arbitrate is, by its very nature, a contract; this means that the parties can agree and define the terms of the arbitration or mediation proceeding beforehand.

To conduct mediation or use DRBs, the parties must retain – and pay – a neutral or several neutrals, depending on the contract agreement and the size of the dispute, and retain lawyers and experts in most cases. While that cost can be significant, it is generally lower than the costs associated with formal legal processes before the courts. More important, however, is the value added by those processes when they successfully resolve disputes in a timely manner that benefits the project and helps avoid the true costs of formal dispute resolution in the courts, which go beyond fees, and may include an adversarial relationship between the parties as the project progresses, which in turn may lead to yet more disputes.

Arbitration, while known as an ADR process, is a substitute for litigation with many benefits. Cost savings may or may not be among them, however, depending upon the manner in which the arbitration is administered by the sponsoring organisation (e.g., the ICC or the ICDR), or by the conduct of the parties and their lawyers. Notwithstanding that fact, the parties do have the advantage of being able to control these costs through their contracts. The parties can agree to limit the number of hearings, witnesses and neutrals, and – especially – the extent of discovery. Similarly, a contractual provision can be negotiated to determine, based on the size of the dispute, how the aforementioned factors will be addressed.

Another issue to consider when engaging in ADR is confidentiality. While in many jurisdictions the record of court proceedings may be obtained by a third party, because of the contractual nature of ADR, the parties can provide that the proceeding will be confidential. The extent of confidentiality could range from an agreement that the proceeding will not be recorded in any way to destruction of exhibits and documents exchanged after conclusion of the hearings, or a full-blown confidentiality agreement binding all parties, including any neutrals. Depending on the nature of the dispute, the potential benefits of true confidentiality are numerous, especially where trade secrets, pricing information and other proprietary data are involved. Most of the amendments considered by established arbitral seats, as well as new and amended state legislation, place particular emphasis on confidentiality.
X INTEGRATED PROJECT DELIVERY SYSTEMS AND BUILDING INFORMATION MODELLING

The use of integrated project delivery systems, in which project designs, data and other information previously segregated among the various project team members in a manner consistent with their contractual responsibilities and rights are now shared through a secure website, is considered by many to be a revolution in the industry likely to reduce disputes simply because of increased communication and collaboration among those team members. Similarly, the use of building information modelling, whereby team members collaborate by inputting designs and information traditionally communicated through shop drawings into a common database resulting in three-dimensional renditions and analyses of those locations where elements conflict with each other, is starting to reduce disputes. With significant advances in pure 3-D modelling and the introduction of artificial intelligence, it is likely that clashes or inconsistencies in coordination may soon become a thing of the past. Notwithstanding the virtues attributed to these developments, the legal landscape in terms of contractual and other legal responsibilities among the project participants when there is a disagreement is largely untested in the courts and arbitration. When an employer elects to pay for the use of such systems, with the goal of increasing collaboration and reducing or eliminating disputes, the benefits of using an ADR process when problems and disagreements are encountered seem all but self-evident.

XI THE ROLE OF CONSTRUCTION LAWYERS

When it is clear to a project team member that arbitration or litigation must be commenced, there is no doubt in that party’s mind of the need to retain and be represented by legal counsel. However, the timing hardly presents that party with the best value that can be achieved with legal counsel: that best value occurs when legal counsel is part of the team from the very beginning of the project, as a guide through the various options and processes set out in this chapter, while also guiding the client with regard to the appropriate protections provided by contractual and legal rights, so that the client is in a position to obtain the relief to which it is entitled. Much is said and written about the unhappiness of the construction industry with the costs associated with legal processes and thus with their lawyers; however, the simple reality is that sound legal advice from qualified construction lawyers who are familiar with all these processes, and who share with their clients a passion for successful construction projects, is the least expensive and best use of construction lawyers.

XII CONCLUSION

As stated early on in this chapter, problems during construction projects should not automatically develop into claims and disputes. Methods are available to help the project team avoid solvable problems becoming formal dispute resolution processes. These methods allow the participants, indeed with the aid of their attorneys, to maximise the opportunities to solve problems efficiently from the first days of the project, to build on those solutions to establish problem-solving as the norm for the project, and to focus more of their efforts on the achievement of a successful project rather than successful arbitration or litigation.
The construction industry has long suffered from poor productivity growth and high levels of disputation. The causes of poor productivity growth are many, and include extensive regulation, site-specific complexities, fluctuating demand for construction services, inexperienced buyers, the fragmented nature of the industry and underinvestment in technology. But perhaps the most significant cause of inefficiency and the high levels of disputation in the construction industry is the misalignment of interests between project owners and other project participants caused by traditional contracting methods.

Traditional contracting methods typically involve the non-owner participants tendering a lump sum price or rates based on the owner’s proposed allocation of responsibilities and risks. Each non-owner participant has strong incentives to perform well the responsibilities allocated to it, but is far less invested in how other participants perform their responsibilities. The project becomes a collection of sub-projects, with each non-owner participant rewarded by reference to the timely completion, within budget, of its sub-project, rather than the performance of the entire project.

Indeed, late or poor performance by one participant will often excuse other participants from the need to strictly fulfil their obligations, or entitle them to claim additional money from the owner. Accordingly, when things go wrong, the participant’s financial interests are often served by blaming others and defending contractual positions, rather than working collaboratively to overcome the problem.

Further, when a non-owner participant is paid via a lump sum price or rates, it is financially motivated to minimise the cost of performing the agreed scope or activity to maximise its profit. This is so even if doing more would reduce the owner’s total costs or otherwise result in better outcomes for the owner. If the owner wants a participant to do more than the bare minimum required, to overcome a problem or achieve a better outcome, the owner will typically have to compensate the other participant for its additional costs, to restore its profit margin. There is little in a traditional construction contract to incentivise outstanding performance in areas that deliver value to the project owner. Traditional contractual incentives, such as liquidated damages and performance security, provide only negative incentives to ensure compliance with minimum requirements.

Finally, traditional procurement prefers a sequential approach to project scoping, design and construction. The scoping and design of conventionally procured projects is generally completed, or well progressed, before the owner calls for tenders from constructors. Engaging a constructor to provide input during the scoping and design process, to try to make the project easier and less costly to build, or to fast-track the project by overlapping the

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Collaborative Contracting

scoping, design and construction phases, can result in that constructor being seen to have ‘the inside running’ for subsequent tenders of the construction work. This can adversely affect the owner’s ability to run a highly competitive tender process for the construction work, and result in the owner paying a higher construction price.

It was out of these commercial realities that the concept of collaborative contracting (also referred to as relationship contracting) was born. The concept embraces a wide and flexible range of approaches to overcome the misalignment of interests associated with traditional contracting, including the following:

a contractual commitments to cooperate and act in good faith;
b early warning mechanisms, designed to alert other participants to emerging issues, so that solutions can be developed and agreed before the issue worsens;
c early involvement of the main contractor and key specialist subcontractors in the scoping and design process;
d governance arrangements that facilitate collective problem-solving and decision-making;
e payment arrangements that financially motivate each participant to act in a manner that is best for the project, rather than best for the participant; and
f each participant waiving its right to sue other participants for mistakes, breach or negligence (other than wilful default).

Collaborative contracts take many forms. For example, some try to facilitate greater collaboration by merely incorporating obligations to cooperate and early warning mechanisms within a traditional contracting framework. Others recognise the obstacles to greater collaboration that are inherent in the traditional contracting framework and incorporate more radical approaches.

This chapter focuses on three contemporary approaches: alliancing, managing contractor and the delivery partner model.

I ALLIANCING

Alliancing (sometimes referred to as integrated project delivery) represents the high-water mark of collaborative contracting in respect of the design and construction of new infrastructure. An alliance is a collaborative structure in which the parties share risks (rather than allocate them) and work together to deliver agreed project outcomes.

Alliance contracts, in their purest form, depart from traditional contracting strategies in five fundamental respects.

i Risk and remuneration regime

First, alliance contracts fundamentally alter the remuneration arrangements and risk allocation found in traditional contracts by replacing the lump-sum price with a performance-based remuneration regime that seeks to closely align the commercial interests of the parties, by embracing a ‘we all win or we all lose’ mentality. The remuneration of each non-owner participant (NOP) essentially comprises three limbs:

a limb 1 – reimbursement of the NOP’s direct costs on an open-book basis;
b limb 2 – a fee to cover the profit and contribution to corporate overheads they would expect to receive for business-as-usual outcomes; and
The gainshare or painshare regime is built around the project outcomes that will deliver value to the owner. Typically these will include a target out-turn cost (TOC), a target completion date and quality measures. Other key performance indicators (KPIs), such as environmental or safety outcomes and satisfaction of community expectations, may also be included, depending on what creates value for the owner.

If the project achieves a better than business-as-usual outcome against a KPI, this will result in a gainshare payment by the owner to the NOPs. Conversely, if the outcome against a KPI is worse than business-as-usual, it will result in a painshare payment by the NOPs to the owner. A share of any cost under-runs is usually added to the maximum potential gainshare payment. The maximum potential painshare payment of each NOP is usually capped at an amount equal to its limb 2 fee.

At first sight, the requirement for the owner to pay all the costs incurred by the NOPs—regardless of whether the project comes in over or under the TOC—might seem to suggest the owner solely bears the risk of increased or unforeseen costs. However, the risk is in fact shared as any cost over-runs will cause the actual out-turn cost to exceed the TOC, thereby reducing the gainshare payment or increasing the painshare liability, and hence reducing the profit derived by the NOPs.

The absence of a guaranteed maximum price or cap on the reimbursement of direct costs (limb 1) is also fundamental to avoiding a claims mindset. As soon as a guaranteed maximum price is introduced, the NOPs will want to be able to make claims in respect of events beyond their control that increase their costs. Dealing with such claims diverts the attention of the parties from solving problems and achieving outstanding performance against the KPIs.

**ii Virtual organisation**

Second, an alliance contract requires the creation of a virtual organisation known as the integrated project team, comprising the individual team members provided by the project owner and each non-owner participant, rather than separate owner and contractor teams. The UK Institution of Civil Engineers refers to this virtual organisation as an enterprise.

**iii Early and continuous involvement**

Third, an alliance requires the continuous involvement of all non-owner participants (including designers, contractors and key suppliers) from the moment the contractual relationship is formed, usually very early in the project scoping and design process, until project completion.

**iv No blame**

The fourth key feature is the no-blame regime. Each party agrees that it will have no right to bring any legal claims against any of the other participants, except in the very limited circumstance of a wilful default. By preventing the participants from recovering loss through making claims against one another, the commercial interests of each participant are best served by assisting one another to solve the problem in the way that will maximise the
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performance of the project against the agreed KPIs, regardless of who is at fault. This principle also encourages the NOPs to take sensible risks in the pursuit of outstanding performance, without fear of being sued if they get it wrong.

v  Unanimous decision-making
The fifth key feature is the requirement for most, if not all, decisions regarding a project to be made by way of unanimous agreement between the owner and all other participants. The requirement of unanimity fosters a culture of compromise throughout the project and a creative and collaborative search for solutions, as stalemates that result in inaction will adversely affect the gainshare entitlements and painshare liabilities of the NOPs.

Hybrids and long-term alliances
As with any contractual model, there are always variations. For example, there are alliance contracts that do not fully embrace the no-blame concept, or that allow decisions to be made other than by way of unanimous agreement. These ‘impure’ alliances have come to be referred to as hybrid alliances. It is important to recognise, however, that these hybrids are no less valid than a pure alliance model. They simply reflect the fact that there is no one-size-fits-all option when it comes to contracting strategies. What is important is that the parties understand the nature and the limitations of the particular contracting model that they are adopting.

Alliance principles can be applied to a single project or longer-term programmes covering a series of projects. The principles can also be applied to longer-term arrangements for the operation, or the through-life support, of an owner’s infrastructure investments.

II  THE MANAGING CONTRACTOR

The managing contractor is an innovative structure that shares some of its characteristics with design and construct (D&C) contracts and others with the agency relationships and project management roles seen in the construction management models.

The model originated in Australia and has been used extensively by the Australian Department of Defence and a variety of private sector owners. The managing contractor is responsible for the design and construction of the project from feasibility right through to the commissioning stage. The arrangement usually involves the owner entering into one contract with the managing contractor, which then subcontracts all its design and construction obligations.

This differs from the construction manager model in which the owner contracts with a manager to provide project management services only, and then contracts directly with each of the other project participants. Under the managing contractor model, the managing contractor is legally accountable to the owner for the delivery of the project, not just for managing its delivery.

The managing contractor can be distinguished from a more conventional lump-sum D&C contractor in two key aspects: role and risk.

i  Role
Although the managing contractor accepts legal responsibility for the design and construction of the project, its key role is project management, as it is usually obliged to subcontract all its design and construction obligations. The only services carried out by the managing
contractor itself, using its in-house resources, are the management and advice services provided throughout the project, and the provision of on-site preliminaries such as hoarding, plant and sheds.

A key difference between this model and a conventional D&C contract lies in the degree of control that an owner retains over the selection of subcontractors. While a D&C contractor has autonomy to appoint subcontractors of its choosing, a managing contractor must undertake subcontracting in close consultation with the owner, who will retain the ultimate authority to approve or reject tenderers. This right is consistent with the obligation falling upon the owner to reimburse the managing contractor for costs incurred in the design and construction.

Another important difference between a managing contractor and a conventional D&C contractor is the point in the project development process at which they are engaged by the owner – the managing contractor is appointed much earlier.

The project would normally proceed as follows. First, the owner invites tenders from potential contractors for management services and defined common site facilities. Once a successful tenderer has been chosen as managing contractor, it will coordinate the feasibility stage of the project, including hiring any consultants required and providing advice to the owner as needed. If the project does not progress past the feasibility stage, the contract may be terminated.

Next is the design phase; this will be carried out by the managing contractor, from design brief through to detailed documentation. Throughout this process, the managing contractor will consult closely with the owner, who has the final say on all decisions made. First, the managing contractor will prepare a design brief that must be approved by the owner. Then tenders for the design subcontract will be invited. Although the managing contractor can recommend a candidate, again the final decision is subject to the owner’s approval. When the successful tenderer has completed the design, this must again be approved by the owner before construction can begin. This procedure differs from a conventional D&C arrangement, under which the owner minimises its involvement in the design phase to avoid diluting the D&C contractor’s design liability and affecting any warranty for fitness for purpose.

During the construction phase, the managing contractor has a variety of responsibilities, which include:

- advising on the appropriate contract strategy for each package;
- managing the tender process and award of packages;
- engaging subcontractors to execute the construction work;
- programming and timetabling the construction work;
- supervising the construction to ensure it accords with design specifications;
- managing and administering the subcontract;
- instituting a system of cost control;
- managing community relations; and
- managing industrial relations on the project.

Consistent with the philosophy of collaborative contracting, the process of selecting construction subcontractors is performed by the managing contractor in close consultation with the owner. Again, the owner exercises significant control over the decision through its right to finally approve a nominated candidate; this procedure is identical to that used in the selection of a design contractor.
The final stage of the project in which the managing contractor is involved is the commissioning phase, during which contractor coordinates the handover of the project and ensures any defects that become apparent during the defects liability period are rectified.

ii  Risk
The other feature distinguishing the managing contractor from a D&C contractor is the risk it bears. The managing contractor is exposed to lower risks in terms of both cost and time than a conventional D&C contractor.

In respect of cost, while a D&C contractor is normally remunerated with a lump sum, a managing contractor is generally remunerated on the basis of a combination of lump sum and reimbursable components. The purpose of the lump sum component is to pay for management services and site facilities, and allows the contractor to extract a profit. The owner separately reimburses the managing contractor for all amounts paid by the managing contractor to subcontractors and consultants. This remuneration arrangement shifts all the project cost risks onto the owner, except those relating to management services and site facilities. The managing contractor is only reimbursed for any costs that it incurs reasonably. Costs incurred from unauthorised variations, rectification of defects, breaches of contract or wrongful acts by the managing contractor that give rise to liability to third parties are usually excluded from the reimbursement regime.

Time-delay risk is often also borne by the owner. The managing contractor will only have a ‘soft’ time for completion obligation, in the sense that it will be required only to use its best endeavours to achieve a target date. Accordingly, a failure to achieve timely completion will not expose a managing contractor to liability for liquidated or general damages, so long as it tries its best to achieve the target date. However, because the managing contractor is paid a fixed lump sum for its management services, it is clearly in its own commercial interest to achieve completion as early as possible to preserve its profit margins. The incentive for timely completion is not the threat of damages claims but the alignment of commercial interests.

iii  Benefits
The managing contractor model allows for early involvement of the contractor in the project, with close collaboration throughout. This means that the owner is able to achieve completion of the project in the manner it desires, using a spread of industry involvement and expertise but without the need for high-level management commitment. The owner can share some of the risks associated with a major construction project with a contractor and can achieve maximum flexibility in determining the elements to be included in a project and the design of those elements. At the same time, it provides the owner with the management expertise of a contractor organisation to assist and advise upon the design and construction of the project while planning for and remaining within a target time and cost for delivery of the project.

III  THE DELIVERY PARTNER MODEL
The delivery partner procurement model is a recent emanation of collaborative contracting that combines elements of the managing contractor, alliancing and engineering, procurement and construction management models. The delivery partner model enables a client to supplement its internal project management capabilities by engaging one or more delivery partners to assist the client with project planning, programming, design management and construction management services.
By engaging this expertise, the client is able, with the assistance of its delivery partners, to adopt a ‘sophisticated-client’ procurement strategy involving direct engagement of suppliers and subcontractors, as opposed to engaging a major contractor to manage this process. This can result in significant cost savings and other benefits for the client.

The remuneration regime for the delivery partners is similar to the three-limb remuneration model for alliance contracting, with reimbursement of actual costs, a fixed fee covering profit and contribution to corporate overheads, and a gainshare or painshare payment. As with alliancing, better than business-as-usual project outcomes (measured against pre-agreed KPIs) will result in a gainshare payment by the client to the delivery partners, and poor outcomes will result in a painshare payment by the delivery partners to the client. Again, the maximum potential painshare payment is usually capped at the amount of the limb 2 fee, or a significant portion of it.

Unlike alliancing but similar to the managing contractor model, the delivery partners are precluded from performing design and construction services, which must be competitively tendered (unless the client specifically agrees otherwise). The client retains control or significant input over the appointment of subcontractors and suppliers, similar to the managing contractor model. But the delivery partners bear less risk in relation to poor performance by subcontractors and suppliers than a managing contractor. The delivery partner’s liability to the owner for poor performance by subcontractors and suppliers is limited to any reduction in the gainshare payment (or an increase in the painshare payment) that occurs as a result of reduced performance against a KPI. The owner has a contractual relationship with each subcontractor and supplier, and looks to them directly if they breach their contractual obligations.

The model has been employed successfully in the context of publicly funded infrastructure projects and was first used by the UK government in the construction of infrastructure for the London Olympic Games in 2012, where the complexity of the project and time-critical date for completion meant a more traditional delivery model was considered unsuitable. A delivery partner enabled the Olympic Delivery Authority (ODA) to acquire the necessary expertise if ever the ODA did not have the time to find and engage personnel of the required calibre to meet the time requirements. A wide range of infrastructure was required: key Olympic venues such as the velodrome, aquatics centre, media centre and Olympic village, as well as two kilometres of new sewers and 265 kilometres of ducts for new utilities. The project was ultimately a success, being delivered three months early and under budget.

Since then, the delivery partner model has received attention in Australia as a delivery method for government infrastructure projects and is being used to deliver the Woolgoolga to Ballina Pacific Highway Upgrade (W2B) – currently one of Australia’s largest regional infrastructure projects. Like the London Olympic venues, the W2B project is a time-critical major project involving the duplication of approximately 155 kilometres of the Pacific Highway to create a four-lane divided road at an estimated construction cost of A$4.36 billion.

The delivery partner model was chosen for the W2B project because it avoided the need for Roads and Maritime Services (RMS) to procure and deliver five separate packages of work sequentially. RMS’s business-as-usual procurement models and internal resources would have necessitated the work being divided into five packages, which could be procured and delivered sequentially. It was considered that aggregating the work into a smaller number of larger packages would have resulted in a small field of potential tenderers and sub-optimal competition.
By adopting the delivery partner model, RMS expects, with the assistance of its delivery partners (Laing O’Rourke and WSP Parsons Brinkerhoff), to achieve significant time and cost savings through repackaging the work and tendering packages on a trade or activity basis, responding to a logical sequencing of work across the entire project, unconstrained by package boundaries. Essentially, with the assistance of its delivery partners, RMS was able to implement the sort of sophisticated client procurement strategy that a major tier-one contractor would implement, without having to first engage such a contractor under a traditional D&C contract and pay the associated risk premium that such a contractor would build into its fixed contract price for the management of the procurement and integration risks.

The associated downside of this model, of course, is less certainty about cost and timing when the client contractually commits to the project. The client ultimately bears these risks without the protection that a traditional D&C contract with a tier-one contractor would provide. However, this risk is mitigated by the model’s alliance-style gainshare and painshare regime, which financially motivates the delivery partners to help the client manage these risks effectively. The margin paid to the delivery partners for their services is also less than what would have been charged by a tier-one contractor for wrapping the delivery risks, on account of the lower level of risk borne by the delivery partners.

The model is gaining broader acceptance in Australia, having been deployed on a number of significant projects, including the Sydney Metro project and Sydney’s second international airport. While the final outcomes of these projects remain to be seen, the model seems to be well suited to major infrastructure projects in which the client desires time and cost outcomes that cannot be achieved via traditional procurement models, and is prepared to embrace and manage the associated integration and other risks with the assistance of capable delivery partners.

IV CONCLUSION

Collaborative contracting provides a range of alternatives to the traditional construction contract. By seeking to align the interests of the parties and develop a culture of collaboration to replace one of conflict, collaborative contracting can create a team of organisations that is engaged and motivated to solve problems and achieve better than business-as-usual results in the areas that deliver value to the project owner and improved productivity growth across the industry.
I  INTRODUCTION

Since President Mauricio Macri took office, many of the measures introduced have reflected optimism, including the elimination of foreign exchange restrictions and negotiations with the arbiters of the outstanding public external debt, with whom, after 15 years of open fighting, Argentina has finally reached an agreement. These measures, and a tighter regulation of the economy, have generated an optimistic atmosphere in the Argentine market. The country was expected to receive a flood of new investment in the coming years, as a result of the confidence that the new government has instilled, and the return to a trusted market economy after the 2001 bottomless crisis and more than a decade of populism. However, the economic situation proved to be worse than imagined by the Macri administration and an agreement with the International Monetary Fund was reached in mid 2018.

Elections are due to be held in Argentina in 2019. Therefore, this may be a year in which no relevant political or economic measures may be taken by the government in office.

II  THE YEAR IN REVIEW

In 2018, the Argentine energy sector continued to receive attractive incentives from the government, as in the previous year. In particular, regarding the renewable energy sector, the government tendered various construction projects.

The industry has been optimistic because of the positive political changes affecting mining since the change of administration in 2015.

In September 2016, Law No. 27,271 was enacted. This law created an inflation-adjusted unit called the UVA, an instrument for savings, loans and investments for natural and legal persons or for the public sector, to be used for the long-term financing of the acquisition, construction or extension of real estate property in Argentina. This law also modified Article 2210 of the Civil and Commercial Code, establishing a new maximum term for mortgages of 35 years.

The mortgage system in Argentina was virtually non-existent until mid 2017. However, with Law No. 27,271 and some other regulations issued by the Central Bank, national and private banks began to grant 30-year mortgage loans in Argentine pesos for housing. During 2017, national and private banks were flooded with requests from prospective residential
property purchasers, which has resulted in a rise in house prices. Unfortunately, the 'mortgage boom' was considerably diminished in mid 2018, owing to an economic crisis as a result of inflation, but house prices were not modified.

In December 2017, Argentina enacted a comprehensive tax reform (Law No. 27,430), which in general is effective as of 1 January 2018. The tax reform introduced amendments to the Income Tax Law, Value Added Tax Law, Tax Procedural Law and Criminal Tax Law, among others. Some of these amendments were further regulated by the Argentine Executive Branch.

In December 2018, Argentina enacted Law 27,467, which amended the Argentine Customs Code to include the export of services within the scope of exports in the Customs Code, thus allowing export duties to be applied to them. On January 2019, the Argentine Executive Branch issued Decree No. 1,201/2018, establishing a duty on exports of services (i.e., services carried out in Argentina whose effective use is carried out abroad) until 31 December 2020. The duty applies to exported services rendered and invoiced since 1 January 2019.

III RISK ALLOCATION AND MANAGEMENT

As mentioned in Section I, the Argentine project finance sector is no stranger to financial and political risks. Once beset by military dictatorships, Argentina has had a democratically elected government since 1983 and has adhered to a system of representative democracy ever since. Politically, Argentina has been stable, with some exceptions, for the past few decades; economically, it has experienced both surging growth and daunting setbacks. Therefore, while political risks are minor, Argentina's recent economic history has left a legacy of regulations that continue to dramatically affect project finance and construction contracts.

The most salient example arose as part of the Law of Convertibility in 1991: a prohibition on indexation of contracts and payments. A valuable tool used by private parties to manage changes in price levels, indexation involves writing into a contract an upward adjustment of nominal payments based on standardised inflation rates. With this law, the government prohibited indexed contracts, including all forms of currency updates, cost variations and debt restatements. Although the prohibition on indexation was specifically promulgated in tandem with the Law of Convertibility, the prohibition on indexation inexplicably remained even after the Law was scrapped in 2002, and technically continues today.

The architects of project finance and construction contracts have become creative in their use of legally permissible methods to stem rising costs, notwithstanding this prohibition. Those used most frequently include price increases and a combination of fixed and variable prices. For example, a three-year lease may provide for a fixed increase in rent each subsequent year, such as US$100 for the first year, US$125 for the second and US$155 for the third. While this may seem like indexation, Argentine courts have confirmed that these price increases do not fall foul of the law. In addition, investments in construction projects often involve a combination of fixed down payments and subsequent instalments that vary in cost based on the cost of construction materials.

Indeed, because of the prohibition on indexation, gradual inflation is difficult to compensate for in construction contracts except in the manner described above. The next question becomes whether force majeure clauses can be invoked in cases of hyperinflation. While no legal codes exist to that effect, the answer is almost certainly ‘no’. In Argentina, force majeure clauses are permissible, but their applicability is limited to situations in which
the events are extraordinary and unpredictable. In Argentina’s case, hyperinflation is not an extraordinary occurrence. As a result, the majority view is that an inflation crisis – even a crisis of hyperinflation – constitutes an expected phenomenon that does not merit the exercise of a force majeure clause. The message is clear: inflation is a foreseeable evil for Argentinians, and prudent parties ought to invoke other measures to manage the risk.

IV SECURITY AND COLLATERAL

As in other parts of the world, security interests in Argentina can be obtained through pledges and security assignments, and be ensconced in trusts or tucked into mortgages.

Argentina has a two-tiered system of ordinary and registered pledges. The ordinary pledge functions as one would expect: the debtor physically transfers the pledged property into the possession of the creditor or into the custody of a third party. Unlike the previous Civil Code, which required a creditor to sell an asset in a court-administered auction, disclaiming self-help remedies to foreclose on a pledge, the new Unified Civil and Commercial Code does not require necessarily a court-ordered foreclosure procedure, since it enables the parties to agree on the creditor keeping the pledged property if a default occurs, as well as on a private sale of the asset. If nothing is specified in the contract, the creditor can choose from any of the possibilities foreseen in the Code.

When a security interest takes the form of a registered pledge, the debtor retains possession of the property instead of transferring it to the creditor. As Law 12,962 describes, that pledge must be filed with the Registry of Pledges, through either a public deed or an authenticated private instrument, before the pledge becomes enforceable against third parties. When that act of registration occurs, the creditor must also decide whether the pledge will be ‘fixed’ or ‘floating’. If the pledge is fixed, then the registration only encompasses the particular asset and nothing more. In contrast, if the pledge is floating, the creditor captures any changes the asset may undergo while it is registered and any additional assets that derive from those changes. The choice between a fixed and a registered pledge has another consequence: jurisdiction. If a fixed pledge is chosen, the assets fall under the jurisdiction of the registry of pledges in the place where they are located. In contract, floating pledges fall under the jurisdictional wing of the registry of pledges located where the debtor is domiciled.

Trusts, security assignments and mortgages round out the various forms of security interests. Crucially, when property is placed in a trust, the secured assets are protected from the prying fingers of a debtor’s other creditors. Argentina expressly regulated trusts in 1995 with the enactment of Trust Law 24,441, imbuing trusts with one key quality: limited liability for the trustee. Moreover, the Trust Law also establishes that trust property will be treated separately from property belonging to either the trustee or the trustor. Largely because of these two protections, trusts have become a popular component of project finance transactions in Argentina since the Trust Law was enacted.

Notwithstanding this, the new Unified Civil and Commercial Code has amended a significant majority of the legislation applicable to international transactions, including the Trust Law. However, the key components of this law remain unchanged. Security assignments share some characteristics with trusts, but differ in that assigned assets are generally limited to rights or credits. Trusts are free from this limitation, and can encompass most forms of assets, including movable property and real estate. Mortgages, for their part, grant security interests over real estate, ships and aircraft, and usually secure the principal amount plus accrued
interest. Created by means of a notarised deed, a mortgage only becomes valid in relation to third parties once it is registered with the public real estate registry in the jurisdiction in which the property lies.

Indeed, registration is obligatory to ensure the validity of most security interests. Mortgages and registered pledges must be catalogued – and fees paid, which are calculated on the basis of the total value of the secured asset. Certain descriptions must also be included. When registering mortgages, the value of the collateral security must be specified in the deed; if that step is overlooked, there is a risk of the entire mortgage being invalidated in accordance with Section 2189 of the Unified Civil and Commercial Code. Similarly, the value of the collateral must also be noted when registering a pledge, in addition to information regarding the applicable interest rate and the method of repayment. Finally, when executing a mortgage, notary public fees must be paid as well.

V BONDS AND INSURANCE

In accordance with the Public Works Law, contractors are required to deposit 1 per cent of the total cost of a project to submit their proposal and must maintain their tender within the time limit set on the basis of this tender. Pursuant to this regulation, this deposit may be made using one of the following methods: cash, certified cheque, public debt securities issued by the federal or provincial government, bank guarantee, surety insurance or demand note.

Surety insurance may be used both in public and private contracting and can be effected in different forms, such as: (1) a bid bond that ensures the bidder on a contract will enter into the contract and furnish the required payment and performance bonds if awarded the contract; (2) a performance bond that ensures the contract will be completed in accordance with the terms and conditions of the contract; (3) a down payment or collection that ensures that the policyholder will use the advance payments received for the material supply; or (4) funds for reparation orders.

VI ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The process of foreclosing on a pledge differs depending on whether the pledge is ordinary or registered. As mentioned in Section IV, the new Unified Civil and Commercial Code does not necessarily require a court-ordered foreclosure procedure for ordinary pledges, since it enables the parties to agree that the creditor will keep the pledged property if a default occurs, as well as on the private sale of an asset. If nothing is specified in the contract, the creditor can choose from any of the possibilities foreseen in the Code. If the pledge is registered, the foreclosure process varies in accordance with whether the secured party is classified as a financial entity under the Financial Entities Law No. 21,626, as decreed by the Central Bank. If the secured party is not a financial entity, then the lender must pursue a judicial foreclosure proceeding similar to that described below for mortgages. If the lender is a financial entity, then the court’s presence is circumscribed.

Mortgages are foreclosed through either a summary proceeding in court that ends with a public auction of the property, or a speedier, more simplified process in which the creditor can assume a greater role. In a traditional judicial proceeding, the property is sold to the highest bidder at auction (the lender is permitted to bid on the property as well), as long as
the debtor does not offer any successful defences. After the sale, the proceeds are deposited in a bank under court order and the creditor’s claim is satisfied against those proceeds. This traditional foreclosure process can take anywhere from one to two years from start to finish.

If a debtor is insolvent, the procedures differ yet again depending on whether it decides to pursue a judicial reorganisation or a bankruptcy proceeding. The reorganisation procedure can only be instigated by the individual or corporate debtor in question, who must file a petition for relief under the Bankruptcy Law with evidence of both its inability to satisfy debts and its ability to reorganise. Once this petition has been filed, all claims by unsecured creditors are in effect stayed, although creditors may proceed with claims relating to mortgages and pledges – but only if they give notice to the bankruptcy court. That is to say, the creditor will have to request admittance of his or her credit and collateral to the relevant court.

Bankruptcy proceedings can be commenced either voluntarily by the debtor or involuntarily by his or her creditors. In contrast to the reorganisation process, the debtor is not allowed to manage its own assets; a trustee is appointed as administrator in its place. All creditors – including preferred creditors – must submit evidence of their claims to the debtor’s trustee. Certain creditors do retain an advantage, however, when the time comes for distribution of the debtor’s assets. Creditors with a lien over a particular secured asset are granted a special preference by law, which entitles them to priority over the proceeds from the sale of that asset. In addition, Section 239 of the Bankruptcy Law provides for the subordination of debt, with the result that senior creditors will be paid before subordinated lenders. It is important to note, however, that lenders will not incur liabilities if project assets are foreclosed.

VII SOCIO-ENVIRONMENTAL ISSUES

Beyond the litany of usual permits needed for a particular building project, Argentina has one licensing requirement that applies specifically to foreign citizens and companies; that is to say, foreign nationals who wish to acquire land in a border security zone must seek special permission from the National Commission of Security Zones to complete their purchase. Generally speaking, border security zones encompass land that lies within 150km of Argentina’s borders or within 50km of the sea. This permission is typically granted within about six months. Note, however, that local companies controlled by foreign nationals are deemed to be foreign companies for the purposes of this legislation, in contrast to standard corporate legislation. Moreover, this licensing requirement applies even if a foreign company decides to acquire shares in a local company that already holds land in a security zone; if management of the local company shifts into foreign hands, permission from the National Commission of Security Zones must be granted before the transaction can proceed.

With the amendment of the Constitution in 1994, environmental legislation – and sanctions for environmental violations – has increased in tandem. As stated in Section 41 of the Argentine Constitution: ‘All inhabitants are entitled to the right to a healthy and balanced environment fit for human development . . . and shall have the duty to preserve it.’ Furthermore, the Constitution requires that a person or company who damages the environment has the ‘obligation to repair it according to law’. If a person believes that his or her environmental rights are being infringed, he or she can file a Section 43 summary proceeding (an amparo) for immediate injunctive relief. Environmental legislation exists at both the federal level and the provincial level. At the federal level, Congress has the power to set forth minimum standards legislation for the protection of the environment, which is
applicable throughout the country. Conversely, the provinces may establish supplementary legislation to these minimum standards either by enacting more stringent regulations or by passing their own environmental regulations in areas in which the federal government has not established any minimum standards.

Certain environmental legislation specifically prescribes criminal penalties for environmental transgressions (e.g., the National Hazardous Wastes Law No. 24,051 and the Buenos Aires Special Wastes Law No. 11,720 hold representatives of companies liable for environmental damage caused by the activities of their companies, to the extent of their participation in the action). Further, some courts have invoked Section 200 of the Criminal Code regarding crimes against public health to sanction people who release hazardous substances into the environment. Otherwise, administrative sanctions, injunctive relief or civil penalties usually accompany environmental offences.

VIII PPP AND OTHER PUBLIC PROCUREMENT METHODS

Public-private partnerships (PPPs) have not been as popular in Argentina as in other Latin American countries in the past decade, though the country already had regulations regarding PPP such as those provided in Decree 967/05 and Decree 966/05 of ‘Private Initiative’.

However, Decree 967/05 was abolished by Law No. 27328, which was enacted in 2016 and establishes the terms and conditions for PPPs, and in February 2017, the Executive issued Decree 118/2017, implementing Law 27,328. This legislation governs PPPs at the federal level and was implemented in anticipation of the significant increase in investment in infrastructure that is expected in the next few years.

PPPs have not had the impact since 2018 that was expected. The government is therefore establishing a trust by which PPPs will be implemented, which was created by Decree 153/2018. The aim of the trust is to ensure transparency and integrity in the execution of PPP contracts, considering especially the ‘Notebook’ case, which is being investigated before the federal courts and involves incidences of corruption relating to the public works and construction industry under the previous administration.

Under this new legislation, several projects have drafted (e.g., road construction), which means big opportunities for PPP investments in areas such as highways, railways, hospitals, schools and prisons, among others. For example, the first project that was launched and is currently being executed is the Highways and Safe Routes PPP, which covers the construction of more than 2,800km of highways and 4,000 of safe roads. The location of the project is in the provinces of Buenos Aires, La Pampa, Santa Fe, Córdoba, Mendoza, Santiago del Estero, Tucumán, Salta, Jujuy, Misiones, Corrientes and Chaco. The parties have already signed the contracts and currently each section of roadworks is under construction. In the energy sector, a high voltage transmission lines project and ancillary works has recently gone out for public tender. Each project can be consulted in detail at https://www.minem.gob.ar/.

IX FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

According to the Business Associations General Law No. 19,550, foreign companies may only engage in isolated activities in Argentina if they are not registered in the country. Although an exact definition of ‘isolated’ is not provided by the law, a project finance transaction would not be likely to fall under its scope. Thus, to perform regular activities in Argentina, a foreign company has to register either a branch or a local subsidiary. If it fails to do so – and carries
out ‘regular’ activities nonetheless – the company assumes the risk that its activities will be unenforceable and its representative held jointly liable. Therefore, it is advisable that project finance transactions are organised locally.

The most convenient forms of legal entities for foreign investors include stock corporation, limited liability company and branch. The first two forms limit the liability of shareholders with respect to third parties; however, if an entity is set up as a branch, the foreign parent company can be held liable for its activities. Consequently, project companies are usually organised as a stock corporation, both to limit liability and to invoke the favourable tax treatment given to corporations.

With the exception of investments in certain sectors, including rural land, energy and broadcasting, foreign investors are granted the same rights under the Argentine Constitution as local investors and may invest in any economic or productive activity. In terms of taxation, foreign investors are also treated largely the same as locals: they, too, must pay federal, state and municipal taxes, although dividend payments are exempt from taxation. But there is one salient difference: profits from the sale of shares in an Argentine company are not taxed as income if the seller is a non-resident investor.

From 2007, many foreign exchange restrictions were set concerning funds entering the country and being transferred abroad. Fortunately, these restrictions, which limited foreign investment in Argentina, have been relaxed by the government since December 2015.

X DISPUTE RESOLUTION

Argentine courts do not jealously guard their jurisdictional power. Parties to a contract can choose to submit to the jurisdiction of a foreign court as long as there is a connection to the chosen jurisdiction and the dispute is pecuniary. There is an exception to this openness, however – Argentine courts claim exclusive jurisdiction over debtors domiciled in the country. If a debtor’s domicile is abroad, insolvency proceedings in Argentine courts will only touch those assets held in the country.

With regard to the choice of law, contractual parties are generally free to choose which laws will govern their agreements. The major caveat is that foreign law will not be accepted if it flouts Argentine public policy. As a consequence, disputes involving bankruptcy, tax, criminal and labour laws will be governed by the Argentine public policy laws corresponding to those areas. Specifically, Argentine law shall also govern rights and legal actions relating to real estate and movable property located permanently in the country.

Foreign judgments and arbitral awards, for their part, are enforceable in Argentina, either in accordance with international treaties or the Unified Civil and Commercial Code. If a country has signed a treaty with Argentina regarding foreign judgments, those procedures will prevail; if not, the Unified Civil and Commercial Code shall apply in federal court. (Each province has its own rules for enforcement of foreign judgments in its local courts.) Article 517 of the Code sets out several requirements that a foreign judgment must meet for it to be enforced in Argentina. The judgment must have been issued by a competent court, as determined by Argentine law; be final and valid in the foreign jurisdiction, and later authenticated according to Argentine law; and cannot conflict with Argentine public policy, or with a prior or contemporaneous judgment in Argentine courts. Finally, the defendant must have undergone due process of law, including a proper summons and a chance to defend itself.
Once all these prerequisites are fulfilled, a number of procedural requirements must also be satisfied before enforcement can occur. The petitioner must file a statement proving that the aforementioned legal requirements are satisfied; all documents in a foreign language must be translated into Spanish by a translator registered in Argentina; a copy of the foreign judgment must be notarised and filed with the appropriate Argentine court; and all pertinent documents must be authenticated by the Argentine consulate located in the foreign court’s jurisdiction. Finally, a 3 per cent court tax must be paid upon enforcement.

The enforcement of foreign arbitral decisions follows the same framework. As long as both the legal and procedural steps are fulfilled, foreign arbitral awards will be accepted by Argentine courts. If a treaty applies, however, its procedural and substantive requirements take precedence. Notably, Argentina has been bound by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 1988.

XI OUTLOOK AND CONCLUSIONS

This chapter should be taken as a mere outline of the project finance landscape in Argentina. While the legal framework does not differ much from other Latin American countries, decisions regarding investments in public works have been unusually politicised in recent times. Previous governments did not pursue PPPs unless they were to achieve a particular political outcome.

As mentioned above, an election year in Argentina is a time for caution, especially for foreign investors. Therefore, future projects are likely to involve the maintenance of existing structures. As described, the government has taken the required measures to facilitate this, which has led to marked optimism in the business community and many steps are being taken to implement huge infrastructure projects through PPPs.
INTRODUCTION

Australia is a dynamic and commodity-rich nation, whose wealth of natural resources has historically created opportunities for the government and corporations to embark upon major infrastructure and construction projects. The country’s approach to infrastructure development during the past 15 years has been focused on access to commodities for export. However, Australia’s economy remains in a state of transition (and to some extent is playing catch-up), and in more recent years has embraced renewables projects, with a push by the construction sector to upskill and take advantage of this burgeoning market.

As a number of the major project works relating to mining and gas developments are now well into the operational phase, significant federal, state and local government funding has been directed towards filling the gap by focusing on urban transport and renewal projects in the metropolitan centres. Coupled with this is a resurgence of the tourism sector and private sector funding, particularly from Asia into the cultural sector.

This rebalancing brings opportunities for the construction sector to shift its focus towards renewables, infrastructure (such as road, rail and telecommunications projects) and tourism, which, in recent years, have not attracted the investment required to cater for increased population growth. By 2033, it is projected that more than 30 million people will call Australia home. All levels of government are therefore assessing requirements of the community across the country, with a number of multibillion-dollar nation-shaping projects currently being undertaken, predominantly relating to urban congestion and national and regional connectivity. These include large metro and light rail projects in the capital cities, the roll-out of the National Broadband Network, and improved airport and port access for new freight links.

Australia has a sophisticated legal and regulatory framework in place to govern such projects and their proponents. It remains a jurisdiction in which projects can be completed with minimal sovereign risk and therefore is still an attractive destination for foreign investment.

Any discussion about Australia’s legal and regulatory landscape must be prefaced with an explanation of its status as a federation. Australia consists of six states (Queensland, New South Wales (NSW), Victoria, South Australia, Western Australia and Tasmania) and two
self-governing territories (the Australian Capital Territory (ACT) and the Northern Territory). Each state and territory has its own legislative, judicial and executive arms of government. There are three levels of government in Australia: federal, state and local.

The legislative powers of the federal government are constrained by the Australian Constitution and include subjects as diverse as corporations, defence, taxation, telecommunications, immigration, foreign affairs and trade. The state governments have unfettered legislative jurisdiction, subject to the qualification that federal legislation will prevail over state legislation to the extent of any inconsistencies. Local governments are primarily responsible for planning and development, and the provision of local services to communities.

Australia has a common law system, which it inherited from the United Kingdom. Each state and territory has its own courts, appeals from which may be heard in the High Court of Australia. There are also federal courts that hear matters arising under federal laws.

II THE YEAR IN REVIEW

The real game changer in Australia during the past two years has been the widespread public acceptance of renewables, which has seen an increase in support at both federal and state levels, creating more certainty for industry and in turn a greater appetite for investment. The federal government’s renewable energy target requires that by 2020 at least 23.5 per cent of Australia’s electricity will be generated by renewable sources – the level is currently around 20 per cent of total power generation. However, most states and territories now have their own renewable energy and emission reduction targets, ranging from 100 per cent for the ACT by 2020 to 50 per cent for Queensland by 2030. We are even seeing major international resource houses that have traditionally worked in the coal sector moving into renewable energy. Indian energy giant Adani, for example, is continuing its development of two solar generation plants, one near Moranbah in central Queensland and the other on the northern outskirts of Whyalla in South Australia. Australian universities have also embraced the uptake of renewables, with the University of Queensland (UQ) committing to offset 100 per cent of its energy consumption with renewable technology. UQ’s first major step towards this has been embarking on the construction of a 64-megawatt solar project outside Warwick in south-west Queensland. This expansion into the energy sector by non-traditional players is being replicated by local governments, property developers and hospitals across Australia.

The energy debate in Australia has largely focused on the intermittency risk associated with generating solar and wind power. The centrepiece of the federal government’s energy policy is the construction of Snowy Hydro 2.0, which will add 2,000 megawatts of pumped hydro energy generation to the Snowy Mountains hydroelectricity facility, providing storage for the network to assist when solar and wind facilities are not generating enough electricity at peak periods. This significant project is government-funded and is an example of the continuing public investment in non-resources infrastructure. This is not to say that resources projects have completely dried up. In fact, some of the largest mining projects in the world are under construction or about to start development in Australia. For example, Adani’s Carmichael Coal project is being constructed as a 60 million-tonne (product) per annum coal mine, including both underground and open-cut mining. Coal will be transported to port facilities via a privately owned rail line that is connected to the existing rail infrastructure.
There is also an increased interest from miners in metals projects beyond the traditional iron ore space. In NSW, for example, Bowdens Silver is undertaking the approval process of one of the largest undeveloped primary silver deposits in Australia.

Much of the talk about energy is largely the result of the steady rise in Australia’s population and how the major cities will cope with the forecast growth. During the past year, there has been significant government and private investment in social and transport projects. Three kilometres of George Street in Sydney is occupied by building sites, including a major extension of the A$2 billion Sydney Light Rail network through the city and to the eastern suburbs, which is due to be completed in 2019. Light rail (trams), which was once Australia’s most popular form of public transport before the car, is now back in vogue as the Australian and various state and local governments try to move personal vehicles off roads in the central business districts (CBDs) and encourage commuters to use efficient public transport networks.

Rail construction as a whole has seen a revival, with significant projects aimed at creating increased connectivity between capital cities and outer suburbs, such as the 12.6-kilometre Moreton Bay Rail Link in Queensland and Australia’s largest public transport project to date – the A$12 billion Sydney Metro, which involves the underground construction of rail lines covering 75 kilometres. Construction is progressing on the A$2 billion Forrestfield to Perth rail link, which will connect Forrestfield to the city, opening up Perth’s eastern suburbs to the rail network for the first time. In Brisbane, known as the River City, work has begun on the long-awaited Cross River Rail, which will be an underground rail line through central Brisbane. The A$5 billion project involves building a 5.4-kilometre tunnel under the Brisbane River and the Brisbane CBD, creating five new inner-city station precincts. Nationally, following market testing, a new key piece of major freight infrastructure will be constructed that will link Melbourne to Brisbane via central-west NSW and Toowoomba, a significant investment by the federal government for this A$10 billion Inland Rail Project. In April 2018, the government promised A$5 billion for a Melbourne airport train line to expedite the commute from the airports to the CBD.

Capital city congestion is a clear priority for the federal government, which is evidenced by the allocation of A$100 billion in the 2019 Federal Budget to be spent on infrastructure during the next decade. It is proposed that the federal government will co-fund a high-speed train service between Melbourne and Geelong in the State of Victoria, cutting travel time by about half thanks to trains proposed to travel at an average speed of 160kph. The federal government will also fund business cases for high-speed train services between Sydney and Wollongong and Sydney and Parkes in NSW, Melbourne to Albury-Wodonga and Melbourne to Traralgon in Victoria and Brisbane to the Gold Coast in Queensland.

This theme of connectivity through social infrastructure is helping to shape the Australian construction sector. Telecommunications provides an obvious example of this...
as the roll-out of the National Broadband Network continues with more than five million activations. This A$50 billion project is delivering Australia’s first national wholesale-only, open-access broadband network to all Australians.

It has been important for the construction sector to have these nation-building government-funded projects as the residential building sector starts to plateau, given the massive increase in multi-unit dwelling construction during the past five or so years. However, this does not mean that building projects have declined. In Victoria, the Fishermen’s Bend Framework was released in October 2018. With plans to develop 485 hectares of land in inner Melbourne, it is expected to be Australia’s largest urban renewal project, the aim of which is to provide housing for 80,000 residents by 2050. Draft precinct plans are expected to be released by mid 2019.

In NSW, the next stage of the Barangaroo commercial, residential and parkland development has created what could be seen as a satellite CBD on the edge of the current CBD and the next stage will include the construction of Sydney’s first six-star hotel and casino. Sydney’s other major urban renewal project, one of the largest in the world – The Bays – lies two kilometres west of the city and consists of 95 hectares of largely government-owned land that is being transformed into a technology hub, among other uses. There is also what can only be described as the creation of whole new suburbs on former industrial land in some cities, such as Sydney’s first new town centre in almost 100 years – Green Square, 4.5 kilometres from the CBD – and in Brisbane, the Newstead commercial, retail and residential development on the site of a former gasworks.

Particular mention should be made of western Sydney, which is a major growth area, for which the federal and NSW governments are funding a 10-year, A$3.6 billion road investment programme. The Western Sydney Infrastructure Plan will deliver major road infrastructure upgrades to support an integrated transport solution for the region and capitalise on the economic benefits from developing the proposed Western Sydney Airport at Badgerys Creek. Western Sydney also has the A$2 billion Parramatta Square redevelopment. In Liverpool, the gateway city to Western Sydney Airport, there is a plan to create Sydney’s third CBD, for which discussions are being held between the Uniting Church and private landowners for a new commercial property development worth A$200 million, the submission of plans by Binah Group for a A$104 million, 35-storey mixed use development and a pledge by the local government to contribute A$75 million towards the redevelopment of Liverpool Civic Place.

Another major geographical growth area has been, and will continue to be, the Northern Territory. Current major projects include the Darwin luxury hotel development; the Darwin Port lease; the Inpex LNG project, which is nearing completion; the Mount Isa to Tennant Creek railway project; the Northern Gas Pipeline; the Palmerston Regional Hospital project; and the Royal Darwin Hospital Expansion project. The federal government’s A$5 billion loan programme to support infrastructure projects in northern Australia combined with the Northern Territory White Paper, which sets out a policy platform for realising the full economic potential of northern Australia, also promises to create exciting opportunities for economic development. The Northern Territory strategically benefits from physically neighbouring the Asian economies and is well positioned as a transport and logistics hub for business and tourism.

With the Australian dollar trading much lower against the US dollar than in previous years and Queensland’s second-largest city, the Gold Coast, having hosted the 2018 Commonwealth Games, there has been a revival in the tourism and cultural sectors across
Australia. It is no surprise that Chinese investment in this area has led the way. The most impressive examples of this are Yuhu Group’s redevelopment of Gold Fields House, Fairfax House and the rugby club at Circular Quay in Sydney into a five-star hotel tower and mixed use residential tower, and the Jewel development on the Gold Coast, which will comprise three towers, including a five-star hotel with 170 rooms, more than 500 residential apartments and high-end retail spaces. Jewel is the first beachfront residential resort to be constructed on the Gold Coast in more than 30 years. Work has also started on IHG’s Holiday Inn Sydney Central, which will be a 305-room hotel developed by China’s Linzhu group in the Central Park precinct at the southern end of the CBD. Nowhere in Australia is tourism helping to shape the skyline more than in Australia’s ‘new world city’, Brisbane, where Star Entertainment Group, Far East Consortium (Australia) and Chow Tai Fook Enterprises are facilitating the delivery of the Queen’s Wharf Brisbane integrated resort development, where work started in 2017. The development includes five new premium hotel brands, including, notably, the Ritz Carlton and Brisbane’s first six-star hotel.

North Queenslanders have been waiting decades for a new stadium in Townsville to host rugby league games and construction has now started. In Perth, the construction of Perth Stadium and Sports Precinct has concluded. Cranes from large building projects are casting shadows across the skylines of Australia’s capital cities: from the A$1.2 billion Perth New Children’s Hospital to the A$700 million Darling Harbour hotel known as The Ribbon, which is being built between the ramps of the Western Distributor Freeway. There is also the demolition and rebuild of the Sydney Football Stadium at Moore Park, the refurbishment of the ANZ Stadium at Sydney Olympic Park and the completion in 2019 of a new 30,000-seat stadium at Parramatta.

It is clear that during the past year Australia’s infrastructure sector has become more balanced, with a much greater range of projects across roads, rail, renewables and commercial building.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Corporations undertaking projects physically located in Australia would normally use one or more Australian-resident companies as the primary participants, particularly for the owners and operators of assets, but also for major contractors involved in construction.

If there is a sole project owner, separate Australian subsidiary companies may be used by the project owner to conduct different aspects of the project. For example, separate subsidiaries may own the project assets, act as a financing vehicle to hold internal or external debt to fund the project and employ labour. Similarly, in certain projects, it is common to have a separate operator that outsources some or all of the day-to-day operations to third-party service providers.

The use of separate corporate entities in an onshore Australia group structure may facilitate the limitation of liability, ring-fence specific risks, simplify project financing and meet other commercial objectives.

Joint venture structures

A project that has multiple equity investors may commercially be referred to as a joint venture. A joint venture can encompass a wide range of legal structures. A joint venture structure can take the form of an incorporated joint venture, which involves one or more special purpose
project companies, the shares in each of which are owned by multiple equity investors in the same proportions. In such cases, relations between the shareholders and their conduct would be governed by a contractual shareholders’ agreement.

Under the Australian taxation system, an incorporated joint venture company or corporate group cannot be treated as a pass-through entity. As a result, the losses and depreciation of an incorporated joint venture or structure are trapped within the entity or structure. While some Australian states allow for the formation of limited partnerships, they are taxed at the same rate as corporations (currently 30 per cent).

**Unincorporated joint ventures**

An unincorporated joint venture structure is most often used when there is a desire for a flow-through of gains, losses and depreciation to underlying owners. This is of particular importance when an investor has other Australian interests and there is a desire to offset taxable profit, losses and deductions from different projects in which the investor has an interest.

Unincorporated joint ventures are particularly common in the mining and oil and gas industries. It is a commonly understood structure and is familiar to investors, local advisers and regulatory authorities, as well as to banks and project financiers.

In mining joint venture structures, each unrelated participant will undertake to contribute, by way of cash calls, its proportion of the relevant costs of developing and operating a mine. A separate corporate manager (often owned by the participants in the same proportions as their interest in the joint venture) would normally be appointed to undertake the day-to-day activities of the project as agent for the participants. Each participant then takes its share of the output from the mine and, depending on the contractual terms, may have an ability to deal with it separately. In some cases, though, each participant will appoint the same sales agent (also often a corporate vehicle owned by the participants in the same proportions as their interest in the joint venture) to sell its share of the product to third parties.

Under a unincorporated joint venture structure, each participant includes in its own tax calculations its share of the costs and depreciation deductions of the project and separately accounts for its own proceeds from the sale of the product.

If it is not feasible to take a separate share of the output of the relevant project (such as the construction of an infrastructure asset that has a single revenue stream), an unincorporated joint venture will be considered to be a partnership for tax purposes and a separate return is required to be lodged on behalf of the joint venture. However, there is a flow-through of the income or loss from the project if this is the case.

**Infrastructure trusts**

Another structure commonly used when there are multiple investors in an infrastructure asset with a positive cash flow and income stream is a fixed unit trust. This type of trust facilitates the distribution of free cash in excess of the taxable income of the project, without immediate tax consequences for investors when, for example, the tax income is partially sheltered by depreciation or capital works deductions for infrastructure.

**Bespoke and standard form contracts**

Traditionally, projects within Australia have been undertaken pursuant to standard form contracts published by Standards Australia. These standard form documents have been heavily amended over time to reflect the decisions that have been handed down by the courts.
While Australian Standard contracts remain the most commonly used agreements for large commercial projects within Australia, as a result of the increasing involvement of international engineering-procurement-construction-management (EPCM) contractors on major projects, the contractual landscape has been modified. There have been more imports of bespoke contracts that reflect the contractual environment of the EPCM contractors’ home jurisdictions.

**International Federation of Consulting Engineers contracts**

Despite a high degree of enthusiasm within the legal profession and industry bodies, the International Federation of Consulting Engineers (FIDIC) suite of standard form contracts is yet to be fully embraced in Australia. Instead, FIDIC contracts tend to be used by foreign companies engaging in business in Australia and by Australian-domiciled companies who have had exposure to the contracts as a result of their involvement in projects overseas. FIDIC contracts are commonly used on projects being undertaken in South East Asia.

**IV RISK ALLOCATION AND MANAGEMENT**

Limitation of liability clauses are commonly incorporated into contracts as a method of managing risk.

Contractors will generally seek to limit their liability by including caps in their contracts both on aggregate liability and on the amount of liquidated damages that may be levied against them in the event of late completion (the liquidated damages cap being generally between 5 and 10 per cent of the overall adjusted contract sum).

It is also common for parties to limit their liability in respect of consequential loss to avoid becoming exposed to claims, for example for loss of profits, loss of use, loss of production and loss of revenue that may result from the way in which they conduct or administer a project. In the Australian context it is very important to identify the types of losses that are being excluded rather than use the term ‘consequential loss’, as the legal meaning of that term is far from settled in the various Australian jurisdictions and does not correspond to the equivalent meaning under English law. These provisions are particularly important in the mining and resources sector because of the extent of the losses that can be caused by the shutdown of a mine, processing facility or associated rail infrastructure and the associated loss of production.

**V SECURITY AND COLLATERAL**

Secured transactions are primarily governed by federal law in Australia; however, for transactions involving certain rights and industries (for instance, mining rights or land) transactions are additionally regulated by state legislation. Legislation between each state differs, but there are often substantial similarities.

Some 10 years ago, Australia introduced a personal property securities regime similar to that already in place in Canada, New Zealand and some parts of the United States. The regime allows for, and in some instances requires, the registration of security interests in personal property. The definition of ‘personal property’ extends essentially to any property other than land, with some limited exceptions.

The legislation relies on the concepts of attachment and perfection in determining whether a security interest has been created. For a security interest to be enforceable
against the grantor, the security interest must attach to the personal property being offered as collateral. Attachment occurs where the secured party is given value, the grantor has a transferable interest in the collateral and the grantor and secured party enter into a security agreement or the secured party has possession of the collateral. The interest must ordinarily then be perfected to allow the secured party to obtain priority against third parties. Perfection can occur by registration (the most usual method), possession or control (with the concept of control only being relevant to certain limited assets, such as shares).

Unsurprisingly, the regime affects the structuring of financing arrangements and investments and the operations of contractors (foreign and national alike) in Australia. A lender taking security over Australian shares and assets (including income or contracts) will need to consider this regime carefully when structuring their lending arrangements in Australia. However, a wide range of standard contractual arrangements, outside the finance arena, are also potentially affected by the legislation.

Contracts under which rights to obtain property arise on default (e.g., step-in rights). Supply contracts with retention of title clauses, deferred-payment arrangements, subcontracting arrangements, equipment hire and leasing arrangements, and joint ventures and shareholder agreements all potentially involve the granting of security interests, which may necessitate the registration of that interest for it to be enforceable against third parties. The regime also affects the holder of the legal title to the relevant assets if the holder has given up possession of the relevant asset: the owner’s title to that asset can be defeated by others, for example by third parties with a registered security interest in the property, third parties taking free of the owner’s interest or on the insolvency of the grantor when the security interest has not been perfected.

The personal property securities regime is a relatively new area of law and there is ongoing debate in Australia as to whether certain interests will (or will not) amount to ‘security interests’ for the purposes of this regime. This will only be resolved by court consideration and legislative clarification over time. Until this doubt is resolved, there is an inherent risk that secured parties who do not adequately protect their security interest under the personal properties securities regime may lose their interest in the relevant goods to others who have adequately protected their interest under the regime. In an example of the evolving jurisprudence in this area, and an illustration of the risks incurred by owners of property who are leasing or hiring out that property to third parties and who do not adequately protect their interests in that property under the personal property securities regime, the NSW Court of Appeal recently held that the ownership interest of the owner and lessor of four mobile turbine generator sets, which had not registered its interest (under the lease arrangements) in those turbines, vested in the lessee of those turbines immediately before the lessee entered into administration. Accordingly, the lessee (and its secured creditors, who had registered their security interests over the assets of the lessee) had better title to the turbines than the owner and lessor.

Ownership of land is recorded by a registration system known as the Torrens Title system. Each state and territory administers its own Torrens Title register for land situated in its jurisdiction. The main object of the system is to make the register conclusive (subject to limited exceptions, such as fraud). Owners and other interest holders can prove their ‘title by registration’, searchable on a public database, which is a pivotal concept of the system.

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For financiers, the system ensures that as a registered mortgagee on title, the financier has certainty regarding its security interest over the land at the exclusion of other unregistered competing security interests. If there is more than one mortgage registered on a land title, the order of registration on the title determines priority (unless contractually modified between the mortgagees).

VI BONDS AND INSURANCE

In the Australian construction industry, security is generally given by contractors and subcontractors to parties above them in the contractual hierarchy. The Australian Standard suite of contracts contain provisions that allow for the bilateral granting of security, but this is rarely seen in practice.

Typically, bank guarantees and, on large-scale projects, performance bonds are given by contractors and subcontractors to secure the performance of their contractual obligations (including the rectification of any defective work for an agreed term following the completion of the project, referred to as the defects liability period or maintenance period).

These instruments are irrevocable and commonly provided on an unconditional basis (although they can also be provided with attached conditions), meaning that they are effectively as good as cash in the hands of the beneficiary and can simply be presented at the issuing financial institution and converted without first obtaining the consent of the party who provided them.

While courts are generally hesitant to restrain a party from having recourse to the security it holds, they are prepared to grant injunctions in certain, limited circumstances (such as fraud, or where an unconscionable attempt is made to have recourse to security that would cause damage to the reputation of the party who provided it). There have been a number of court decisions considering the issue of security for performance and, by extension, the notion that security requested under a construction contract is regarded as a form of risk mitigation in the event that there is a dispute at the conclusion of a project.

Although some construction contracts provide for cash retentions to be deducted from progress payments that are made to contractors and subcontractors, these arrangements are uncommon on large-scale projects because of the effect they may have on the contractor's cash flow.

In some Australian jurisdictions, legislative provisions have been enacted to restrict the amount of security that a party to a construction contract may lawfully require another to provide, as well as the circumstances in which recourse may be had to the security that is withheld. In NSW, head contractors on projects whose value exceeds A$20 million are required to establish trust accounts into which retention monies that are withheld from subcontractors must be deposited.

Under most contracts, a proportion of the withheld retention or security will become due for release when the works reaches completion, with the balance becoming due following the expiry of the defects liability period (assuming that it has not been called upon prior to this date).

Similar to the Grenfell Tower fire in London in June 2017, there was a significant fire at the Lacrosse Tower in Melbourne in 2014, involving aluminium composite panels on the exterior of a building. Fortunately, and unlike the Grenfell incident, no lives were lost. However, the Lacrosse Tower fire has significantly affected the construction insurance market in Australia following the recent determination of a litigated claim involving that incident.
The owners of the Lacrosse Tower succeeded in recovering substantial damages against
the original builder, who had installed non-compliant aluminium composite panels on the
exterior of the building – this caused the rapid spread of a fire that had started because of a
cigarette butt carelessly discarded by a resident.3 In turn, the builder was able to shift almost
the entirety of its liability for the claim to the building consultants who were engaged to
design and certify the construction of the building, including the architect, the building
surveyor and the fire engineer, all of whom failed either to select appropriate cladding or to
ensure that the selected cladding material was compliant.

Notwithstanding this decision, the outcome of which turned largely on the contractual
relationships between the builder and the design and certification consultants, it remains
difficult for parties affected by the use of non-compliant cladding to establish the existence of
a duty of care in a claim for negligence for pure economic loss in the Australian jurisdiction.

The reaction of insurers to the crystallisation of risks associated with non-compliant
cladding has been as swift as it has been predictable: cover for construction contractors and
consultants who may have been involved in projects using both compliant and non-compliant
cladding is now particularly difficult to secure, as it is for building owners corporations. In
addition, recent poor claims experience in the Australian and London construction insurance
markets, preceded by a lengthy period of excess insurance capacity and competition among
insurers for market share, has now seen a sharp reversal in the availability of all lines of
commercial cover. It is expected that it will take some time for the market to stabilise.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The Australian regime for security enforcement and bankruptcy proceedings is based on, and
is similar to, the jurisdiction in the United Kingdom. Secured lenders in Australia, however,
retain the right to appoint a receiver over all the assets of a security provider (obligor) upon a
default (contrast for instance, the United Kingdom, where the right to appoint administrative
receivers (as they are referred to there) has been removed for security documents dated on or
after 15 September 2003). Despite this, the appointment of receivers is now increasingly rare
and only done as a last resort.

A secured lender would usually enforce its rights as a secured lender first by negotiation
with the obligor with a view to satisfactory arrangements being reached as to the restructure
or refinance of the secured debt. If those negotiations do not result in a satisfactory outcome,
the action the secured lender takes next will depend on the nature of the lender. Most secured
lending in Australia is provided by banks. The banking sector has been under great scrutiny
by way of various parliamentary inquiries and more recently a Royal Commission. This has
led to banks being extremely reluctant to do anything (such as enforcing their security) that
could lead to negative publicity. Therefore, if a secured lender is a bank, rather than taking
steps to enforce its security, the bank is likely to freeze further lending or demand repayment
of the secured debt with the knowledge that is likely to make the obligor insolvent (because
of its inability to repay the secured debt when demanded) and wait for the directors of
the obligor to place the obligor in a formal insolvency process, such as administration or
liquidation (as discussed below), which they would do to avoid personal liability for trading

3 See decision of Owners Corporation No.1 of PS613436T, Owners Corporation No.2 of PS613436T, Owners
Corporation No.4 PS613436T and Ors v. LU Simon Builders Pty Ltd, Stasi Galanos, Gardner Group & Ors
the obligor while insolvent. Only when the obligor is in administration or liquidation would a bank be likely to appoint receivers. If the lender is a non-bank lender who is not subject to such high levels of public scrutiny, the lender is more likely to enforce its security earlier.

When a secured lender appoints a receiver during an administration or liquidation, the receiver controls the secured assets rather than the administrator or liquidator. A receiver acts in the interests of the secured lender that appointed it and will take such steps as are necessary to recover the secured lender’s debt (usually by selling the secured assets).

Secured lenders can also enforce their security over collateral by taking possession of it and selling it themselves. Possession can be taken without a court order if an obligor does not take steps to make peaceful and lawful repossession possible. Once the secured lender has possession of the collateral, the secured lender must comply with obligations placed upon it by both federal and state legislation when realising it.

The ranking of priority between secured lenders with security over the same collateral is generally determined by the order of registration of the security on relevant statutory registers or by agreement between the lenders. Secured lenders have priority over all unsecured claims (including tax liabilities) other than employee claims, which have priority over the proceeds of circulating assets (i.e., cash, inventory and debtors that are not controlled by the secured lender).

The ability of secured lenders to enforce their security has been affected by the introduction of laws that prevent secured lenders relying on contractual rights (such as a right to enforce) in contracts entered into after 1 July 2018 that arise solely because a company goes into receivership, administration or an insolvent scheme of arrangement. These are commonly referred to as ipso facto rights. However, these laws do not prevent secured lenders enforcing their security if there are other events of default (such as repayment defaults or covenant breaches), which commonly will be the case.

The two main formal corporate insolvency processes in Australia are administration and liquidation. Administration allows an independent qualified insolvency practitioner to take control of the operations of a company with a view to attempting to restructure its affairs via an arrangement agreed with its creditors (similar to a plan of reorganisation in the United States under Chapter 11, without the need for court approval). Secured lenders with security over the whole or substantially the whole of an obligor’s property can also appoint an administrator to the obligor. Liquidation is a terminal insolvency process whereby the liquidator winds up the company’s affairs and distributes any surplus after the costs of the liquidation to the creditors and (rarely) shareholders.

**VIII SOCIO-ENVIRONMENTAL ISSUES**

Australia enjoys a stable commercial climate with few significant social issues that are likely to affect project development. That said, greater scrutiny of a company’s social licence to operate continues to drive reform by government and innovation by companies. This section details what businesses involved in projects and construction may expect at the state and national levels of Australian government, and commonly recognised international standards relevant to project finance.
i  Business expectations from state-level government

State governments throughout Australia are the primary assessment and approval authority for new projects. In some circumstances, driven by the location of a project and the nature of its impacts, further assessment at the federal level may be triggered. That said, efforts continue to avoid duplication by establishing a ‘one-stop shop’ for environmental assessments.

As part of a routine environmental impact assessment process for a significant project, independent environmental state government agencies are responsible for assessing environmental management and third-party stakeholders are invited to comment on the impacts. This allows landholders and interest groups to have their say on proposals and developments, adding motivation to ensure that early and effective stakeholder engagement is in place. Emissions and renewable energy policy tends to be driven from a state level, influencing national action. Precipitated by significant energy events, such as the major outages in South Australia and calls from industry for government to address rising costs and availability issues, state governments have set renewable energy targets and are increasing their focus on large-scale renewable energy delivery developments.

With vast renewable resources remaining largely untapped, significant inbound investment in renewables is occurring, although there remains scope to increase this interest to meet the state energy targets. Almost all states have now set individual renewable targets that complement those set at a federal level. This includes 40 per cent by 2025 for Victoria, and 100 per cent by 2020 for the ACT. In Queensland, a target of 50 per cent by 2030 is gathering momentum and support for renewable energy projects is growing. Recent examples of the exercise of ministerial powers to call in the assessment of renewable energy projects are the Kidston Solar Project (Phase One) and the Coopers Gap Wind Farm as matters of state economic and environmental significance. The 50-megawatt Kidston Solar Project is part of a suite of 12 projects attracting A$1 billion in investment, which, once completed, will triple the amount of electricity produced from solar energy in Australia. In addition, Coopers Gap Wind Farm will feature 115 wind turbines with a maximum capacity of 460 megawatts. The A$700 million project, scheduled for completion in 2020, will support 350 jobs during construction and create 20 operational positions.

ii  Existing framework and new developments at the national level

The federal government has continued to target economic growth programmes particularly in light of the shifting economy. Under a broad federal mandate to drive innovation, the government has identified reducing the regulatory burden on industry as a key objective. Often referred to as a policy of ‘green-tape reduction’, at a federal level there are significant developments under way whereby the government is aiming to repeal or amend regulation that might be viewed as stifling these economic growth objectives. Mirroring support at the state and territory level, the federal renewable energy target for large-scale generation of 33,000 gigawatts per hour in 2020 will double the amount of large-scale renewable energy being delivered by the scheme compared with current levels. In addition, the plan will result in approximately 23.5 per cent of Australia’s electricity generation in 2020 being sourced from renewable energy projects. Support for this target is directed by the independent Australian Renewable Energy Agency (ARENA), which coordinates support for renewable energy technologies from the research and development stage through to commercialisation and deployment. In addition to marketing renewable energy projects to investors, ARENA ensures the information and experience gained from its projects is shared throughout the industry to benefit future projects. As with the state targets, major investment is expected...
to realise the targets being set and significant international interest is expected in this sector to help with this movement. In 2017, the federal government kick-started investment by announcing a A$2 billion expansion of the Snowy Hydro project, which has operated since 1974.

To complement the focus on strengthening social infrastructure projects across Australia, the government has developed national guidelines for the delivery of infrastructure projects to promote cross-government consistency and the use of best practice approaches. Additionally, the government is seeking to attract further private investment in public sector infrastructure projects to meet increased demand for infrastructure during the next decade, with opportunities for both domestic and international companies to invest.

Australia’s unique history and the continued connection of indigenous communities with parts of the country have led to an important cooperative process whereby traditional indigenous owner groups may be afforded a right to negotiate regarding the development of projects. A mining applicant, for example, is often required to address native title rights and interests in the land before proceeding to production.

iii International standards

Australia also recognises certain international standards. For example, the Equator Principles are an internationally recognised standard for managing social and environmental risk management within financial institutions involved in project finance.4 As in the United States, while there is no legal requirement to adopt this measure, some major financial institutions have voluntarily implemented the principles in their internal operations. This includes the Australian Export Finance and Insurance Corporation and Australia’s four largest banks.

Significantly, in light of the interest in renewables, Australia remains committed to the 2015 Paris Agreement on climate change. Australia has targeted a reduction of emissions by 5 per cent below 2000 levels by 2020 and a further reduction of 26 to 28 per cent below 2005 levels by 2030. As noted, significant investment is needed to meet these targets. In a landmark decision,5 New South Wales Land and Environment Court cited the climate change targets in the 2015 Paris Agreement as grounds for refusing a development proposal for a coal mine reiterating, at least on a state level, Australia’s commitment to the 2015 Paris Agreement and tackling climate change generally. It is expected that a national policy may come into effect after the Federal Election in May 2019.

Collectively, the laws and standards contribute to a balanced framework that protects the social and environmental aspects of commercial life in Australia.

IX PPP FUNDING METHODS

The Council of Australian governments endorsed a National PPP Policy and Guidelines in 2008, which apply to all Australian government agencies. In line with this framework, the Australian governments will consider a PPP for any project with a capital cost in excess of A$50 million. This policy framework has been supplemented by individual governments, including Victoria’s Partnerships Victoria, NSW’s New South Wales PPP Guidelines and Queensland’s Project Assessment Framework. Despite the policies, there remains concern

4 See https://equator-principles.com/about/.
regarding the level of risk transfer to the private sector, the costs incurred in bidding for PPP projects and the decision of the current Victorian government to cancel the A$5.3 billion East West Link PPP project several months after the PPP contract had been signed by the previous Victorian government. On the other hand, there have been many international contractors participating in bidding consortia for major road and rail infrastructure PPP projects.

Positive developments in the funding of PPP projects include the establishment by the federal government of the Northern Australia Infrastructure Facility to offer up to A$5 billion in concessional finance to encourage and complement private sector investment in economic infrastructure for the Northern Territory that otherwise would not be built or would not be built for some time, and the provision by the federal government of a A$2 billion concessional bridging loan to the NSW government to enable it to accelerate the WestConnex project.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

i Foreign investment

As a large, resource-rich country with relatively high demand for capital, Australia relies heavily on foreign investment to fund significant projects. Foreign investment is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), its regulations and the foreign investment policy. The Australian Federal Treasurer, through the Foreign Investment Review Board (FIRB), administers the FATA, its regulations and foreign investment policy. The Treasurer is responsible for determining whether to allow certain foreign acquisitions of interests in Australian land, companies (including offshore companies with Australian assets), trusts, assets or businesses. As a general rule, FIRB must be notified of all proposed foreign investment activity unless it is below the notification threshold or a specific exemption applies. FIRB approval will be granted unless the proposed investment would be contrary to Australia’s national interest.

FIRB has the power to prosecute non-compliance and to unwind acquisitions deemed not to be in the national interest. If the relevant regulatory process has not been followed, penalties and even imprisonment may be imposed. In practice, if an acquisition is found to be contrary to the national interest, the most common consequence, alongside monetary penalties, is a forced divestiture of the assets or restrictive conditions imposed on the ownership of those assets.

Applications for FIRB approval must address the national interest considerations set out in the foreign investment policy, including national security, competition, Australian government policies (including tax), the effect on Australian economy and community, and the character of the investor. Foreign government investors (including companies in which foreign governments have an aggregate interest of 20 per cent or more) face more strenuous FIRB notification and approval requirements. Foreign investments in certain sensitive sectors (for instance, civil aviation, banking, shipping, telecommunications and media) also have additional approval requirements and ownership restrictions. The FIRB requirements will obviously be relevant for financiers seeking to take a security interest or enforce their security as the step-in by the financier can amount to an acquisition of an interest requiring prior FIRB approval, unless specifically excluded by the policy or the FATA (e.g., taking or enforcing a security interest is specifically exempt from the requirement of obtaining FIRB approval in the context of certain genuine money-lending arrangements).
More lenient screening thresholds apply for certain investors, including those from the United States and New Zealand. Higher monetary thresholds are included in the free trade agreements with China, South Korea and Japan. However, lower monetary thresholds still apply to foreign government investors and in prescribed ‘sensitive’ sectors of Australian industry, such as media, telecommunications, military-type goods and services, transport and the extraction of uranium.

Historically, the vast majority of foreign acquisitions have received approval, which in most cases is obtained within the standard 40-day statutory limit. However, the federal government has been increasing the level of scrutiny applied to a proposed investment, particularly in the residential and agricultural sectors. This heightened scrutiny has been applied most notably during the application phase, when applicants are now frequently asked to provide detailed tax and structuring information to demonstrate that their proposed and existing investments are in accordance with Australian tax law and policy. This has also meant increased delays in processing applications. In practice, FIRB is able to extend the time for considering an application for as long as is required.

The federal government charges fees for foreign investment applications, ranging from A$2,000 to more than A$125,000 with uncapped fees of approximately 1 per cent of the purchase price being imposed on residential land acquisitions. These fees are non-refundable if an application is rejected or, more likely, withdrawn because the transaction is no longer proceeding.

Approvals involving foreign government investors (including state-owned enterprises) are also under increased scrutiny, as are transactions involving agricultural land and water. Time limits for approvals in such cases can be significantly longer. Although only a small number of foreign investment approval requests have been denied in the past, in some cases conditions (sometimes onerous) have been attached to approvals to ensure that the investment is not contrary to the national interest.

### ii Foreign workers

In March 2019, the federal government announced a new population policy with a focus on the regional workforce. One of the key features of this policy is the introduction of two regional visas for skilled workers, which require an applicant to live and work in regional Australia for three years before being able to access permanent residency.

Generally and separate from the regional visa programme, a large number of Australian visas allow holders to work in Australia. There are specific categories that enable an employer to sponsor temporary foreign workers for up to four years (depending on the occupation of the worker). A foreign worker must be employed in an approved occupation and have the skills necessary to perform that occupation.

The employer may be a business that operates in Australia or a business that does not formally operate in Australia but is seeking to establish a business operation in Australia or fulfil obligations for a contract or other business activity in Australia. Depending on the type of visa, an employer may be required to register as a business sponsor and demonstrate a commitment to employing and training local people. In most cases, there is also an obligation on the employer to ensure equivalent terms and conditions of employment to prevent the Australian workforce from being undercut, which means that minimum pay thresholds must be met and market salary rates be paid to foreign workers.
Taxation issues

There are various taxes and charges at each level of government. Of these, the most substantive tax for Australian projects is income tax (including capital gains tax), which is levied by the federal government.

Australia-resident companies are subject to a tax rate of up to 30 per cent of taxable profits. Branches or permanent establishments of non-resident companies are taxed at the same rate.

If a company pays dividends to a non-resident shareholder from profits that have been subject to Australian tax, no withholding tax applies. However, if Australian income tax is not paid at the Australian company level, distributions of profits will be subject to withholding tax at a rate of up to 30 per cent (noting that withholding tax rates are generally reduced to 15 per cent or, in some cases, to 5 per cent or zero under Australia’s income tax treaties with offshore jurisdictions).

Interest expenses are normally deductible against Australian income, though thin capitalisation limits apply. Under safe harbour rules, interest-bearing debt to equity can broadly be in the ratio of up to 1.5 to one without denial of interest under the thin capitalisation rules.

Interest withholding tax normally applies at a rate of 10 per cent, but in some limited cases this can be reduced to zero per cent (for example, in respect of payments to financial institutions in certain countries under double tax agreements, and in respect of certain offshore debt raised by Australian companies).

Australia has a broad-based capital gains tax regime that applies to the disposal of assets and entities. In the case of non-residents, however, capital gains tax only applies to the sale of assets, such as assets used on the conduct of an Australian permanent establishment, land and mining tenements and interests in companies where a non-resident and associates have a greater than 10 per cent interest in the relevant company and the majority underlying value of the entity lies in Australian land, leases and mining rights.

Accordingly, non-resident shareholders may generally dispose of interests in Australian resident companies without Australian capital gains tax if the company is not land-rich in Australia, or if the non-resident’s interest in the Australian entity is less than 10 per cent.

In addition, each state has its own regime of taxing new property purchases. For example, in NSW, stamp duty is payable on any transfer of property (subject to a few exemptions) based on the purchase price and calculated on a sliding scale. Further, foreign purchasers must pay an 8 per cent surcharge on the value of any residential land bought in NSW. The foreign purchaser surcharge is not payable on commercial residential property, such as hotels, making it still attractive for foreign investment in this area. The other states and territories have similar provision for foreign purchasers.

6 The corporate tax rate will increase in future years, depending on a company’s annual turnover and its income earning activities. For example, for the income years ending 30 June 2019 and 2020, an entity whose annual turnover is less than A$50 million and is comprised of no more than 20 per cent passive income (for example, dividends, rent, royalties and interest) will be subject to tax at a rate of 27.5 per cent. The rate for such entities is scheduled to progressively decrease to 25 per cent by the income year ending 30 June 2022. All other companies are subject to a corporate tax rate of 30 per cent.
Other taxes
Australia has a goods and services tax (GST), which is a broad-based consumption tax applying at a rate of 10 per cent to most goods, services and supplies. GST is typically passed on and is normally creditable in business-to-business transactions. It does not normally apply to exported goods.

Various state-based mineral royalties apply to the production and sale of minerals extracted in relevant state jurisdictions. Petroleum resource rent tax also applies in respect of oil and gas projects conducted onshore, within Australia’s territorial waters and other areas offshore.7

iv Licensing requirements
Within some states and territories, contractors who intend to undertake building and construction work and engineers who are supervising projects or undertaking design work are required to be licensed.

The consequences of carrying out unlicensed work can be severe and affect a contractor’s entitlement to recover payment as well as rendering it liable to prosecution. Accordingly, any foreign entrant to the Australian construction market should fully investigate whether any licensing and pre-qualification requirements must be met before embarking on a project.

XI DISPUTE RESOLUTION
It is a universal maxim that where there are construction projects, disputes will follow. The Australian construction industry is no exception, given the scale of commercial activity occurring within the industry at any given time and the innovation that is involved on the projects under construction. Construction disputes are inherently complex and often turn on highly technical questions of fact and law. As a result, they are especially prone to being protracted and costly for the parties involved.

There are a number of forums in which construction, engineering and infrastructure disputes may be heard and resolved, either finally or provisionally. The primary methods used by disputants within the construction industry remain arbitration, statutory adjudication and litigation. Other forms of alternative dispute resolution are available, however, including expert determination.

For the moment at least, the focus remains on dispute resolution, rather than dispute avoidance. Australia has not followed the global trend of embracing dispute avoidance mechanisms, such as dispute review boards (DRBs), given the perception that they are not cost-effective on projects under a certain monetary value. Nevertheless, DRBs have enjoyed some support, mainly on large-scale government projects.

The three primary methods by which construction disputes are resolved in Australia are arbitration, adjudication and litigation, as outlined below.

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7 For example, the North West Shelf project area. The government has recently legislated to remove onshore petroleum projects from the scope of petroleum resource rent tax from 1 July 2019.
Arbitration

Arbitration as a preferred method of dispute resolution is undergoing a resurgence following widespread reform to legislation throughout Australia. Each state and territory has introduced uniform domestic commercial arbitration legislation that essentially enacts the UNCITRAL Model Law. The introduction of the uniform Commercial Arbitration Acts has simplified Australia’s legislative regime and enabled the courts to have reference to Australian decisions construing the UNCITRAL Model Law in the context of the International Arbitration Act 1974 (Cth), and to overseas decisions that consider the UNCITRAL Model Law.

The Australian Centre for International Commercial Arbitration (ACICA) administers international arbitration and the Resolution Institute administers domestic arbitration. Both institutes have a modern set of rules based on the UNCITRAL Arbitration Rules.

Further, for international commercial arbitration in Australia, recent amendments to the ACICA Arbitration Rules address the difficulties that can arise in multi-party or multi-contract disputes by providing a mechanism by which an arbitral tribunal can join parties to the arbitration or consolidate multiple arbitrations occurring under related contracts. This is a particularly useful feature in international construction disputes, which often involve multiple parties or multiple contracts.

The Resolution Institute Arbitration Rules address industry concerns about costs and time for arbitration processes by including a schedule that caps arbitrator and recoverable party costs on a scale based on the amount in dispute.

With the adoption of the uniform domestic Commercial Arbitration Acts, which align with the International Arbitration Act, Australian jurisprudence has been able to demonstrate that Australian courts adopt a pro-arbitration approach and fulfil their mandatory statutory obligation to uphold arbitration agreements and arbitral awards.

Australia’s united legislative regime has put the country in an optimum position to continue to build its reputation as a stable jurisdiction for both domestic and international commercial arbitration.

Adjudication

Since December 2011, every state and territory in Australia has enacted legislation providing for the interim statutory adjudication of construction disputes (commonly referred to as security of payment legislation).

Although they differ in content and procedure, the rationale underlying each of the legislative regimes is to establish a rapid means of securing interim progress payments to secure cash flow and reduce the instances of insolvency within the industry (which can have a cascading effect on a project down the contractual chain). Adjudication determinations do not finally determine the parties’ positions inter se and payments made pursuant to them are made ‘on account’ only.

Despite its ubiquitous presence within Australia, the security of payment legislation lacks national uniformity. Instead, the nation’s legislative regimes may roughly be divided into two categories: (1) the West coast model, which is intended to operate in a similar way to the Housing Grants, Construction and Regeneration Act 1996 (United Kingdom)
and has been implemented in the Northern Territory and Western Australia, and (2) the East coast model, which operates in NSW, Queensland, Victoria, Tasmania, the ACT and South Australia.

iii Litigation

Litigation is acknowledged to be a costly and often protracted process. These characteristics are only compounded when courts are called upon to determine construction disputes, with all their attendant complexities. For this reason, and given the availability of comparatively efficient, confidential and less expensive alternative dispute resolution procedures, litigation remains an option of last resort by the parties to construction disputes.

While Australia does not have specialist courts whose sole function is to hear and determine construction disputes, certain jurisdictions (such as NSW and Victoria) have specialist case lists to facilitate the management and hearing of construction litigation. Judges with expertise in construction litigation are appointed to preside over these lists.

In recent years, legislation has been enacted to improve the case-flow management of matters that are before the courts.

XII OUTLOOK AND CONCLUSIONS

Australia remains an attractive jurisdiction for both domestic and foreign investment, largely because of its mining and resources projects, as well as projects involving the construction of significant public infrastructure.

The key constraints affecting Australian projects remain the availability of a suitable workforce to undertake the projects and the volatility of commodity prices underpinning project valuations. The ability of international companies to introduce their highly skilled workforce to Australian projects and reduce project operating costs will be critical to the completion of these projects within budget and on time.

It is expected that the ongoing investment of Chinese and Indian companies in major Australian projects will continue to fuel the expansion of construction activities. Major infrastructure spending is under way and increases are forecast. Although the resources sector remains a dominant component of the Australian economy, other sectors, such as agriculture, tourism and social infrastructure, are rising to prominence.
Chapter 6

BELGIUM

Rony Vermeersch, Olivia de Lovinfosse and Mitch Windsor

I  INTRODUCTION

The Belgian projects and construction sector continued its recovery in 2017, with a number of projects reaching financial close. The recent political agreement to extend the European Fund for Strategic Investment (also known as the Juncker Plan) until 31 December 2020 (EFSI 2.0) will breathe further life into Belgian projects. EFSI 2.0 also increases the pan-EU target for investment to €500 billion. A number of projects in various sectors (infrastructure, energy, research and development) are currently at the funding approval stage.

The much-awaited publication in September 2016 of Eurostat’s guidelines for the statistical analysis of public-private partnership (PPP) structures continues to positively influence PPP financing after the previous years’ retrenchment owing to budgetary cuts and uncertainty about the application of the European accounting rules for PPPs.

II  THE YEAR IN REVIEW

Major project approvals continued their upward trajectory in 2017. The Liège tram project finally received approval from Eurostat in March 2017. Certain major infrastructure projects, including the PPP renovations of the Leopold II tunnel (Belgium’s longest underpass), reached financial close. The €100 million PPP project for the construction of a new police headquarters in Antwerp also reached financial close in November 2017.

The construction of a new iconic national stadium in Brussels, allowing Brussels to host the opening game of the 2020 UEFA European Football Championship, was further postponed in 2017, leading UEFA to remove Brussels as a host city for Euro 2020 and move the assigned matches to London.

Labour costs remain high and margins low for contractors, pushing general contractors to cut back on their own Belgian labour force and work more and more with foreign subcontractors. To fight social dumping and unfair competition, decisions have been taken at both national government and EU level, and concrete measures are being implemented by the sector.

In addition, skilled general contractors continue to export their know-how and take up work where margins are more enticing, such as in Africa and the Middle East.

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1 Rony Vermeersch is a partner and Olivia de Lovinfosse and Mitch Windsor are associates at Stibbe. The information in this chapter was accurate as at June 2018.
III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In the Belgian market, the transactional structure in particular depends on whether a public building project is concerned, with a public entity as principal. Regarding government-funded infrastructure projects on public property, there is a tendency not to transfer property or (other) rights in rem to investors. However, if specific circumstances so require, granting rights in rem is possible.

More eagerness to obtain rights in rem can be noted on the part of private investors, quite often completed by the standard types of security. In project-financed deals, obviously, the ‘non-or limited recourse’ character of the financing contradicts the need for rights in rem. Several ownership structures are used, again depending on the particulars of the project, without there being one particular dominant structure. Hence models such as build-own-operate-transfer and build-operate-transfer (BOT) – although rarely identified as such – are all present on the Belgian market, but none of them is viewed as the market standard.

As regards PPPs, the design-build-finance-maintain (DBFM) model dominates the Belgian market. This model implies that a private party designs and builds the infrastructure, maintains it for an agreed period (completed with an ‘operate’ component or facility services, or both, as the case may be) and secures the required financing. In the most straightforward situations, this does not imply a transfer of property (resembling a BOT). However, a limited number of DBFM projects do provide rights in rem for the investor, but in such cases the rights in rem serve either as security or are provided for tax reasons.

ii Documentation

Using a PPP project as an example of a complex project-financed transaction in the Belgian market, the following are the main documents required:

a DBFM (or other integrated contract) between the principal and (most often) a special purpose vehicle (SPV);
b shareholder agreements and agreements to provide subordinated debt;
c financing agreements and security documents agreed between the SPV and the lenders. Often these are based on models of the Loan Market Association;
d in relation to subcontractors of the SPV, design agreements (with an architect, if legally required), engineering procurement construction (EPC) or other types of construction contracts, and operation and maintenance contracts;
e an interface agreement; and
f a set of direct agreements.

iii Delivery methods and standard forms

The Belgian construction market (both public and private) is still dominated by the ‘classic’ procurement model. An employer contracts a designer, an engineer and – if required – an architect, arranges funding and appoints a building contractor.

When public contracts for work, services or delivery of goods are concerned, a specific set of rules is applicable. The Royal Decree of 14 January 2013 provides a detailed set of the general execution rules (GERs), that is, contractual terms and conditions applicable to all public contracts for work, services or delivery of goods. A public authority can only deviate
from these rules in specific circumstances. The GERs were most recently amended by way of Royal Decree dated 22 June 2017, which added (inter alia) extensive provisions relating to subcontractors and contract variations.

Nonetheless, in particular in a project finance context where predictability of the eventual revenue is even more important, the DBFM model is increasingly dominant, and the GERs do not apply to this model.

Independent use of integrated contracts, such as EPC and design-build, has also increased. In respect of international model construction contracts, the International Federation of Consulting Engineers (FIDIC) suite of contracts is increasingly widespread in Belgium, especially on energy projects (both onshore and offshore). The release of the 2017 FIDIC suite and its surrounding commentary has increased the exposure of the form to the Belgian market. Other standard forms have not yet penetrated the market.

Although standard forms of Anglo-Saxon inspiration are being used more frequently, and provide the comfort of being recognisable to lenders and foreign investors, their application and enforcement will, in particular with respect to notices and notice periods, not be as strict, literal or rigorous as under common law, but will rather be tempered by the legal principle of good faith proper to civil law.

IV  RISK ALLOCATION AND MANAGEMENT

i  Management of risks

Probably the most important risks in a project finance transaction or a construction contract are the risks of insolvency of the other party, loss of the infrastructure that is being built, and risks such as force majeure or ‘hardship’. In a standard construction contract, in fact, little is provided to manage these risks, mostly because Belgian law provides an answer to most legal issues in this respect.

To limit the risk of insolvency of the counterparty (on top of what is already provided for in Belgian law), contractors will attempt to be paid in regular tranches or according to milestones, as close as possible to a ‘cash-neutral’ or ‘cash-positive’ position. If so required, contractors will (attempt to) suspend further execution (invoke the exceptio non adimpleti contractus) until their invoices are paid. Principals, on the other hand, will require a performance bond, an advance payment bond, a deposit blocked on a bank account or will withhold a part of the sums due (retention). In public works contracts, contractors should take into account the negative cash flow that the contract will generate.

The risk of loss of the infrastructure prior to completion is usually borne by the contractor. The standard method of mitigating this risk, of course, is through appropriate construction all-risk (CAR) insurance.

There is a lot of variety in the market for managing situations of force majeure or hardship. Legally speaking, the risk of force majeure is shared among parties. However, parties are free to contractually regulate force majeure as they deem fit. Hardship would normally be a risk borne by the party affected by it, and may be mitigated somewhat in the case of public contracts under which contractors can often obtain additional time or payments in situations that would qualify as ‘hardship’. When PPPs are concerned, as the financing of the project usually depends on the cash flow generated by the project, funders will never accept the reimbursement of their funds being dependent on chance. Hence, in PPP projects, much
effort is put into identifying all risks relating to the project (sometimes through a risk matrix), allocating those external risks and clearly defining the contractual consequences in terms of money and time in the event that the risks occur.

ii  Limitation of liability

Under Belgian law, limitations of liability in the construction industry are a gradually increasing phenomenon.

As to basic liabilities relating to a construction contract, the liability for hidden defects and the decennial liability must be mentioned. In addition, general rules of contractual responsibility apply.

Decennial liability under Belgian law, although based on Article 1792 of the Civil Code, is a contractual liability, relating to the safety and stability of immovable works. If the safety or the stability of these immovable works is affected or endangered by a defect, a designer or contractor can be held liable for its consequences for 10 years. It is not possible to limit or contract out of this decennial liability as it is part of Belgian public policy.

However, liability for hidden defects constitutes an autonomous ground for (contractual) liability. Contrary to decennial liability, it is possible to contract out of the application of the liability for hidden defects. Under Belgian law, this liability ends 10 years after acceptance of the work but it is not uncommon to limit this period, for example, to one or two years. However, to the extent that a hidden defect triggers decennial liability, an exoneration or limitation of liability for hidden defects will have no effect.

In principle, liability for indirect or consequential losses, or for loss of business or profits, can validly be limited or excluded by contract (except in the case of decennial liability). Yet, there are limits to these limitations or exclusions of liability. A party can only limit its liability as long as the limitation or exoneration does not strip the essential contractual obligations of ‘their contents’. If a clause limiting liability implies that as a result a debtor has no genuine obligation to perform, the limitation is invalid. To exonerate for gross negligence, explicit wording must be inserted.

In application of the principle of law referred to as fraus omnia corrumpit, pursuant to Belgian law it is not possible to exonerate liability for one’s own wilful misconduct. Therefore, in principle, a clause aiming to exonerate liability for wilful misconduct has no effect. Exoneration is only permitted for the specific situation of wilful misconduct by employees of the concerned party.

Although admissible under Belgian law and a token of good practice, liability caps are not standard practice yet in all construction contracts. For instance, the GERs for public procurement contracts do not contain any limitations of liability.

As force majeure is a concept enshrined in Belgian contract law, force majeure clauses are not a necessity. Nonetheless, customised force majeure clauses are enforceable and even customary in more complex transactions (especially when a lender is involved). The concept of hardship, however – sometimes referred to as application of the clausula rebus sic stantibus – is not part of general Belgian contract law. Only when public contracts are concerned can a concept close to hardship be invoked. Hence, particularly in private contracts, a hardship clause could prove useful.
iii Political risks

Political difficulties have had little effect on the performance of project finance or construction projects in Belgium. As a result, other than standard force majeure provisions relating to war and civil disturbance, among others, particular arrangements to mitigate political risks are rarely provided.

Few doubt that, in the case of revocation of a contractually valid agreement or of nationalisation or expropriation, the involved counterparty would be indemnified. Indeed, contractual and other rights, including those of foreign investors, are well protected in Belgium.

V SECURITY AND COLLATERAL

For ordinary small-scale financing, the funder is usually granted a mortgage on both soil and structures, to secure at least part of the financing. Mortgages are ranked according to their date of inscription in a special register. To limit costs relating to a mortgage, sometimes only a power of attorney is provided in favour of the funder, which allows the funder to unilaterally obtain a mortgage when this proves necessary. When relevant in view of the specific project, it is common practice to require rights in rem. These provide economic rights of property over the assets concerned, and as a result constitute a powerful security.

In other situations it is common to require securities such as a commercial pledge, that is, a possessory right of pledge entitling the creditor to have the pledged asset sold and be paid preferentially out of the sale proceeds. A pledge on shares (e.g., of an SPV) or a pledge on bank accounts is customary.

On 30 May 2013, Parliament adopted the new Act on security interests on movable assets. This Act significantly changed the legal framework for the creation, perfection and realisation of security interests on all kinds of movable assets, whether tangible or intangible, including receivables. In particular, the Act introduces, in addition to the traditional possessory pledge, a non-possessory pledge on movable assets, which will be subject to registration in a newly created public register. These legal changes aim to modernise, simplify and make the rules on security interests on movable assets more coherent.

Parties or lenders sometimes require a parent company guarantee, or – when contracting with entities created by public authorities – a state guarantee by the concerned public authorities.

Step-in rights for funders – which allow them to take over rights and obligations – are also admissible in Belgium. These rights are contained in most funding agreements and are standard practice when direct agreements are concerned.

VI BONDS AND INSURANCE

Where standard public works contracts are concerned, performance is secured through a ‘deposit’ of 5 per cent of the price. In private contracts, a variety of mechanisms can be observed, including the mechanism of withholding part of the price or invoiced amounts until provisional or final completion.

When project finance is involved, in particular with international elements, it has become customary to require bank guarantees to secure performance, in addition to parent company guarantees. In smaller or local transactions, contractors are reluctant to provide bank guarantees, in particular the ‘on-demand’ type.
The common insurances in a construction context are:

a. civil liability insurance, which covers damage to property, life or health of a third party;
b. CAR insurance, covering risks that are usually associated with a project in the course of construction;
c. decennial liability insurance, which covers decennial liability (see Section IV.ii); and
d. professional liability insurance, covering contractual liability of the designers involved.

Only architects are currently under a statutory obligation to carry insurance for their contractual liability. Decennial liability insurance requires the involvement of an independent control agency (such as SECO, AIB Vincotte, Socotec) to sign off to the insurance company that the insurance may be granted. As decennial liability insurance is considered by the market to be expensive, it is not standard practice for all projects. One is likely to encounter such insurance when project finance is involved or for project development projects.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Outside the context of a bankruptcy proceeding, a security can only be enforced if a debtor has failed to meet a payment obligation on its maturity date or any other obligation deemed essential under the (funding) agreement. The debtor should be given notice (notice of default) that it must comply with its obligations on the due date. If the debtor is still capable of meeting its obligations, the creditor should, in writing, allow a reasonable period to remedy this breach, unless it is sufficiently clear that the debtor is, or will no longer be, able to meet them.

A business that is in financial jeopardy, but can still be saved from bankruptcy, can apply for reorganisation proceedings. The Belgian version of Chapter 11, the Act of 31 January 2009 on the Continuity of Enterprises, introduced a new form of reorganisation proceedings and a system to enable enterprises in difficulty to recover their financial health. The aim of the new system is to sustain the continuity of businesses as much as economically possible by making reorganisation more accessible to debtors suffering financial difficulties and presenting options for recovery.

A business must file for bankruptcy if it has permanently ceased its payments and lost the confidence of its creditors. Only individuals or legal bodies conducting a business can be the subject of bankruptcy proceedings. Also, creditors such as lenders can set off the court proceedings leading to a bankruptcy – declared by the commercial court – and the nomination of a receiver.

There is a ‘suspect period’, starting when payments ceased, and ending on the declaration of bankruptcy. Once a request for bankruptcy is filed, all (other) enforcement measures are suspended.

Once the business has been declared bankrupt, in principle all creditors are equal. However, if creditors have conflicting rights in relation to the proceeds of a bankruptcy, the distribution of proceeds is as follows:

a. statutory claims: specific preferential rights granted by law to specific classes of creditors or over specific assets, but limited to those assets. An example is the preferential right granted to the unpaid seller of machinery. General preferential rights also exist, for instance regarding workers’ wages, social security contributions and tax;
b. secured creditors: creditors holding a mortgage, commercial pledge, retention right, general business charge, among others; and
c unsecured creditors, who are treated equally: the net proceeds from the debtor assets are distributed in proportion to their claim.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and social dumping

A major distinction should be made between EU nationals and all others in terms of labour. Nationals of EU Member States enjoy the benefits of free movement of workers within the European Union. All other workers need a work permit to work in Belgium.

European companies often post employees to another EU country to work there temporarily. These posted workers must be paid at least the minimum wage of the host country, yet their wages can be lower than the wages of local workers. There is no ‘same pay for the same work at the same place’.

Posted workers are EU citizens who have an employment contract in their home country and are temporarily posted to a host EU country by their employer when their employer provides a certain service, for example, if a Bulgarian construction company builds a house in France. Belgium is one of the countries where the number of posted workers is highest.

A number of safeguards are in place to protect the social rights of posted workers, according to the Posting of Workers Directive (Directive 96/71/EC), adopted in 1996 and in force since December 1999. In October 2017, the European Council agreed on a general approach to slightly amend and modernise the 1996 Directive. Further developments were expected during 2018. Posted workers are subject to the host country’s laws, regulations or administrative provisions concerning:

- minimum rates of pay (i.e., minimum wage), including overtime rates;
- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- conditions of hiring out workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth, of children and of young people; and
- equal treatment between men and women and other provisions on non-discrimination.

In the construction sector, where the core conditions of employment listed above are laid down by collective agreements or arbitration awards that have been declared universally applicable, Member States are also obliged to ensure the application of these conditions to posted workers.

While minimum wage requirements of the host country apply to posted workers, posted workers continue to pay their social security contributions in the Member State where they are normally based for up to two years. During this period, they do not pay social security contributions in the Member State where they are temporarily posted. Companies providing cross-border services therefore have a cost advantage when social security contributions are lower in their home country than in the host country.

There have been various abuses, some relating to exploitation of posted workers and others to subcontracting, in which posted workers have sometimes not been paid, and others of a company disappearing or not ever having existed (letterbox company).
To combat this, the European Commission proposed an Enforcement Directive in March 2012, which was approved on 13 May 2014 (Directive 2014/67/EU). The related implementation Act for Belgium came into force on 1 October 2017 with immediate effect, giving the social inspectorate new powers to monitor compliance with the Posted Workers Directive. This includes the designation, by an employer who wishes to use posted workers, of a liaison officer who is responsible for providing any information requested by civil servants in respect of the posted workers.

The most striking development from the Enforcement Directive for the construction industry is the introduction of possible joint and several liability for the employer and main contractor in respect of the supply chain. It is therefore likely that in arm's-length subcontractual arrangements, the employer or contractor will require an indemnity from its contractor or subcontractors in respect of any liabilities arising from the Posted Workers and the Posted Workers Enforcement Directive.

At the national level, Belgian industry stakeholders identified 27 national and 13 EU measures to fight unfair competition. Key measures include:

a. the compulsory Limosa registration system, to better supervise the number of foreign employers in Belgium; and

b. the compulsory registration (since March 2016) of attendance on construction sites for any worker on a construction project with a value of more than €500,000 (known as the Checkinatwork scheme).

ii Permits
Belgium has extremely broad and detailed legislation regarding urban development, environmental issues and sustainability. This legislation is based on EU directives to a very large extent. The baseline is that, for building work, a rigid procedure must be followed to obtain a building permit and an environmental permit prior to starting the work. In the Walloon region, these can be combined into one permit and, since 2017, this has also been the case in the Flemish region, where these permits will be combined into an ‘all-in-one permit for physical aspects’. In fact, permits are the Achilles heel of many proposed construction and infrastructure projects.

Besides these particular rules, Belgium has extensive legislation on air pollution, discharge of water, environmental impact assessment, general sustainable development and carbon emissions, among others.

iii Equator Principles
Nearly all financial institutions dominating the Belgian project finance market, in particular PPPs, adopted the Equator Principles. As a result, it can be assumed that most project finance transactions and construction contracts, insofar as they apply, are subject to the Equator Principles.

iv Responsibility of financial institutions
Financial institutions are subject to general Belgian law. Hence, all criminal, contractual and tortious liability legislation applies to financial institutions. There is a mechanism to convert a theoretical punishment for corporate criminal liability from imprisonment into a pecuniary punishment.
In administrative terms, the Financial Services and Markets Authority is the most important entity in Belgium. It supervises the rules of conduct applicable to financial institutions, to maintain confidence in the financial markets and to ensure that investors and financial consumers are treated honestly, fairly and professionally.

**IX PPP AND OTHER PUBLIC PROCUREMENT METHODS**

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**i ESA accounting rules**

A main driver for public authorities opting for the PPP model is its potential for an off-balance treatment under the ESA 2010 accounting rules of the European Union. The ESA 2010 rules operate a ‘binary’ system: the assessment is that the project is either a wholly owned government asset or else it is a non-wholly owned asset (i.e., on or off-balance sheet).

In recent years, Eurostat (the European agency in charge of monitoring the national accounts) had adopted a much stricter application of said rules towards certain countries, including Belgium, leading to uncertainty and public authorities (temporarily) abandoning important infrastructure projects.

To clarify its statistical treatment of PPPs, Eurostat released a comprehensive document in September 2016, in cooperation with the European PPP Expertise Centre of the European Investment Bank, and published under the aegis of both institutions. This 150-page document examines in detail the project structure of a typical PPP deal, and highlights particular risk allocations that it considers will point to a project being treated as on or off-balance sheet.

The Eurostat guidelines give all stakeholders clear indications of an appropriate fiscal and project risk allocation for the public sector body to assume in a PPP project, and practitioners in Belgium have welcomed the important clarifications.

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**ii Procurement methods**

Belgian public procurement legislation distinguishes between four types of procurement procedures referred to as sale by auction, call for tender, the negotiated procedure and competitive dialogue.

In the event of a sale by auction, the contract must be granted to the tenderer who has submitted the lowest regular tender. In the case of a call for tender, the contract must be granted to the most advantageous tender, according to the award criteria (e.g., price, quality or timing) mentioned in the contracting documents. The contracting authority has a free choice between these procedures, both of which may be awarded by means of an open or restricted procedure. In an open procedure, all interested contractors may submit tenders; in a restricted procedure, only those contractors so invited by the contracting authority may submit tenders.

The negotiated procedure allows the contracting authority to consult the economic operators of its choice and to negotiate the terms of the contract with one or more of them. PPP transactions are still usually tendered through the ‘negotiated procedure’, although recently the competitive dialogue has also been introduced into the Belgian legal system. Most PPPs involve a selection phase followed by one or more offer phases, consisting of

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rounds of negotiations leading to subsequent offers, and usually a ‘best and final offer’. Finally, after the preferred bidder is selected, final negotiations are conducted and the contract is closed. Usually, ‘contract close’ concurs with ‘financial closure’ between the contractor and its funders.

Belgian legislation on public procurement has been updated and was codified in the Act of 17 June 2016 concerning public procurement (the new Public Procurement Act). This Act contains the core of the coordination and codification of all existing public procurement regulations and the transposition into Belgian law of the 2014 European Procurement Directives. There are, in addition, several royal decrees implementing this Act.

The 15 June 2006 Act was replaced on 17 June 2016 by new legislation to implement the following European directives:


b. Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; and


The new Public Procurement Act entered into force in mid 2017. Public tenders launched before 30 June 2017 are still subject to the previous Act of 15 June 2006 on public procurement contracts and certain contracts for works, supplies and services.

Contracting authorities must in addition always respect the general principles relating to good administration and the fundamental principles of the Treaties of the European Union when they award public procurement contracts. Of these general principles, the most relevant in terms of public procurement are equal treatment and non-discrimination, free competition, transparency, legal certainty and proportionality. These principles can also be used when interpreting Belgian (and European) public procurement law and have to be taken into consideration in situations where no explicit regulation exists.

The suspension or annulment of the decisions taken by contracting authorities are brought before the Council of State, except in cases where the contracting authority is not a public authority in the sense of the legislation on the Council of State. In this case, suspension or annulment actions are brought before the civil courts. Applications for review do not have an automatic suspensive effect.

The civil courts have the exclusive competence for damage claims, for the suspension and annulment of public procurement contracts and for all disputes concerning the execution of these contracts.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

The Belgian economy is open to foreign lenders, investors and contractors. There are no specific restrictions on foreign investments and ownership. On the contrary, Belgian legislation contains certain particularities that should attract foreign investment, such as the ‘deduction for risk capital’ (also known as ‘notional interest deduction’), which is a tax incentive to reinforce Belgium as an attractive location for investors.

In relation to public works licensing, it is essential that both national and foreign contractors are ‘licensed to build’, or are able to prove that they have equivalent experience and skills to entitle them to a licence. These licences are granted in different grades according to the size of the construction work, and in different categories and subcategories.
As Belgium has an open economy, there are no real currency controls that would make it difficult or impossible to change operating funds or profits from one currency to another, nor any controls or laws that restrict removal of profits and investments.

XI  DISPUTE RESOLUTION

i  Special jurisdiction

There are no specific courts or tribunals in Belgium that deal with project finance transactions or construction contracts. Depending on the specific circumstances, disputes fall under the jurisdiction of the civil or commercial courts. In practice, each court will have a specialised construction chamber.

Nevertheless, two administrative courts are important in a project finance context: the Council of State, at the federal level, and the Board of Permit Appeals in the Flemish region. The latter is competent to rule on (appeals against), inter alia, building permits in the Flemish region, and the former is competent to rule on administrative decisions taken by most public authorities.

ii  Arbitration and ADR

The use of alternative dispute resolution (ADR) in the Belgian market is increasingly popular. Nonetheless, its market share is still limited, and disputes regarding projects or construction are usually dealt with by the courts, quite often combined with expert advice to the courts. In particular regarding public contracts or strictly national transactions, ADR is applied only occasionally.

In a commercial context, the use of arbitration precedes mediation or any other ADR mechanism. The governing legislation regarding both (international and domestic) arbitration and mediation can be found in the Judicial Code. The general rules on arbitration can be found in Part 6 of the Judicial Code, which was completely revised as of 1 September 2013 (largely based on the UNCITRAL Model Law). The rules on mediation constitute Part 7 of the Judicial Code.

The importance of expert determination in construction contracts is growing, in particular regarding large or long-term projects, requiring an efficient settlement of certain categories of disputes. In general, the use of expert determination is limited to technical issues. Dispute resolution or adjudication boards are still rare. In recent PPP projects, however, dispute boards do appear. Typically, they act as an intermediate procedure, prior to falling back on the courts or arbitration. Most probably the foreign influence on the structures used for these PPPs and the standardisation in this field explains why these boards start to appear.

The most prominent Belgian organisation for institutional arbitration and ADR is CEPANI, providing rules on arbitration, mediation and (technical) expertise. New CEPANI arbitration rules and CEPANI mediation rules entered into force on 1 January 2013.

The Belgian courts take a rather neutral approach to arbitration, neither favouring it nor showing a particular bias against it. Tax disputes or criminal matters are excluded from arbitration. When an individual is concerned, caution is required, as use of arbitration in consumer, insurance and labour matters is restricted. Automatic domestic arbitration does not exist in Belgium.

4  www.cepani.be.
The New York Convention entered into force in Belgium in 1975. Upon ratification, Belgium declared that it will only apply the Convention to recognition and enforcement of awards made in the territory of another contracting state. If an award is contrary to public policy or the dispute was not arbitrable, enforcement will be refused. Enforcement of a foreign award will also be refused if one of the grounds for setting aside the award exists.

Belgium ratified the ICSID Convention in 1970 and has signed a large number of bilateral investment treaties, providing for either ad hoc or ICSID arbitration. The very first ICSID arbitration against Belgium under the ICSID Convention was dismissed in 2015, while Belgian investors have initiated several proceedings against foreign countries.

XII OUTLOOK AND CONCLUSIONS

A healthy pipeline of projects is available, including the projects coming out of the Juncker Plan. The extension of the plan through EFSI 2.0 will prolong and extend this pipeline until at least 2020. The clarification by Eurostat on the application of the ESA 2010 rules continues to be welcome in the PPP sphere.

From a political point of view, there were local elections in October 2018 and regional, federal and European elections in early to mid 2019. The incumbent right-wing government has been able to implement necessary economic reform to render the Belgian economy more efficient. The resulting investor confidence is expected to continue throughout 2018 and the appetite for infrastructure investment is still strong nationwide.
Chapter 7

BRAZIL

Júlio César Bueno

I INTRODUCTION

i Brazil’s economic history

Brazil is a federative republic divided into 26 states, a Federal District (with Brasilia as the capital since 1961) and 5,565 municipalities. With more than 209 million inhabitants, Brazil is the fifth most populous country in the world after China, India, the United States and Indonesia. Brazilians share a common multi-ethnic and multiracial background, and because of Portugal’s influence, Brazil is the only Portuguese-speaking nation in the Americas. Immigration from Europe, Africa and Asia (mostly Japan) was the primary source of Brazilian population growth up to the 1930s.

Inflation was a major problem in Brazil during the 100 years that followed the proclamation of the Republic in 1889. The problem became more severe after the 1970s and several measures were taken to control inflation in the 1980s and early 1990s. During a period of 27 years, Brazil had seven different currencies and the rate of inflation reached an historical high of 6,821.31 per cent in January 1990. After the failure of six monetary changes, the Real Plan was created in 1994 by the then Finance Minister, Fernando Henrique Cardoso, who launched the plan as the base of his presidential run a couple of months later. The success of the Real Plan was the hallmark of Cardoso’s two terms as President.

The economy’s solid performance during the 2008 financial crisis and its strong and quick recovery, including growth in 2010 of 7.5 per cent, have contributed to the country’s transition from a regional to a global power. Nevertheless, Brazil’s economy continues to face its worst recession for 25 years. This entire scenario, combined with Operation Car Wash (see Section II.i), has deeply affected the construction industry in Brazil such that it is no longer the fourth biggest ‘construction site’ in the world, a position it held until recently.

The Brazilian multinational petroleum corporation Petrobras has implemented significant cuts, taking its long-term spending plan to its lowest level in eight years, and from now until 2019 the company plans to invest 41 per cent less than it has done previously over comparable periods. The move is designed to reduce the company’s debt pile and restore some of the eroded investor confidence in the firm. Because of the size of the company and its importance to the Brazilian economy, the drop in Petrobras’ level of investment in Brazil may reduce the growth of national gross domestic product this year by a full percentage point. This is all taking place at a time when investment is needed to restart growth in the parlous Brazilian economy.

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1 Júlio César Bueno is a partner at Pinheiro Neto Advogados. The information in this chapter was accurate as at June 2018.
In May 2017, lawyer Michel Temer became President after Dilma Rousseff’s impeachment trial began. A general election was due to take place in October 2018; it is hoped that the new President will bring expertise and integrity to the role, and restore a sense of calm, which the country desperately needs.

ii The role of governments in the development of the infrastructure business

Governments usually have an important role in the development and finance of infrastructure projects, for which political will and sustained political support are needed. There was a global tendency in 1980s and 1990s to diminish the role of the state, with the privatisation and concession of public services. In this context, between 1990 and 1994 the federal government privatised 33 state-owned companies tied to strategic sectors.

Nevertheless, as private companies are quite often unable to compromise their budgets during the long course of the maturation of infrastructure projects, commercial banks, multilateral agencies and export credit institutions became important financiers of infrastructure projects through project finance.

Project finance is usually defined as the financing of long-term infrastructure, industrial projects and public services based on a non-recourse or limited recourse financial structure, in which the project debt and equity used to finance the project are paid back from the cash flow generated by the project. It is a financing technique that generally allows a company to raise funds to set up a project based on its feasibility and its ability to generate revenues at a level sufficient to cover construction and operational costs, as well as debt service and a return for the investor.

The country has seen considerable activity in projects and construction in the past two decades, and an increased use of more complex financing structures, especially project finance and public-private partnerships (PPPs). As a financial model that adapts well to the funding needs of private sector projects, project finance represents an important instrument to make investments in Brazilian infrastructure viable.

In recent years, project finance has developed an advanced and sophisticated legal framework, based upon a diversified security package that includes direct and indirect securities, and the assignment of different rights under the security agreements.

II THE YEAR IN REVIEW

i Operation Car Wash

Brazil is no stranger to corruption. However, several attempts to bring major cases to trial have failed to achieve convictions; sometimes this is because of police work, sometimes because Brazil’s anti-corruption laws offer innumerable possibilities for technical challenges, particularly when evidence comes from wiretaps, and frequently because the convoluted judicial system allows cases to drag out until they expire, particularly if elected officials are involved.

Presently, Brazil finds itself in the grip of its biggest and most shocking scandal to date. The Petrobras scandal, known locally as Operação Lava Jato (Operation Car Wash), has rocked the country socially, economically and politically. The operation has exposed the extent to which the tendrils of corruption have spread through Brazil’s economy.

The scandal began as a money-laundering investigation in March 2014, but quickly transitioned into a wider exploration of allegations of corruption at state-controlled Petrobras and a number of other firms, uncovering a vast and intricate web of political and
corporate racketeering. Some of Petrobras’ directors have been accused of taking bribes from
construction companies in return for awarding lucrative contracts. The elaborate nature of
the racket established by Petrobras and its fellow conspirators has shocked many – especially
as the company was once considered the world’s ‘most ethical oil and gas company’.\(^2\) Its
standing in Brazilian society has tumbled in light of the revelations.

In Operation Car Wash, police and prosecutors are bending over backwards to
avoid previous errors. To date, there have been several arrests and billions of dollars have
been seized by investigators. The secret of the success of Operation Car Wash has been
in persuading suspects to provide detailed confessions in exchange for reduced penalties
(rewarded collaboration). The Organisation for Economic Co-operation and Development
(OECD) Working Group on Bribery, in its latest (Phase 3) report on implementing the
OECD Anti-Bribery Convention in Brazil, published in October 2014, calls it ‘cooperation
agreements and judicial pardon’.

Collaboration has existed in Brazilian criminal law since at least 1995, but formalised
agreements have only come into their own with Law No. 12,850/2013, known as the
Organised Crime Law. This defines organised crime, lists acceptable investigatory methods
and provides a detailed road map for collaboration. One or more of the following results
must be achieved: identification of co-authors and participants in the criminal organisation,
and of their respective crimes; exposure of the hierarchical structure and division of functions
within the organisation; total or partial recovery of proceeds; prevention of further crimes;
and the safe release of victims. Prosecutors can ask the judge to grant a full judicial pardon,
reduce the collaborator’s sentence by up to two-thirds, or substitute imprisonment with a
lesser penalty.

Collaboration is voluntary, with defence lawyers present, but collaborators must tell the
truth – and the whole truth. Any future discovery of lying, concealment or omission can lead
to the agreement being revoked. The process starts with a signed statement detailing what
the suspect will reveal and the leniency that prosecutors will recommend in return. For each
collaboration agreement, prosecutors weigh factors including the importance and novelty of
the information to be provided about the crimes and those responsible, the evidence to be
offered and the amounts to be recovered.

Operation Car Wash has entered a crucial phase, as accusations have been made
not only against former Presidents Luiz Inácio Lula da Silva and Dilma Rousseff, but also
against current President Michel Temer. Despite the fact that it may be considered the
biggest corruption scandal in world history, Brazilians hope Operation Car Wash will mark
a crossroads and herald a permanent and stable change, with standards moving towards the
desired levels of ethics in business. Lula da Silva has recently been convicted for corruption
and money laundering. Three judges at the federal appeals court in Porto Alegre voted
unanimously to uphold the sentence that Lula da Silva was handed by Judge Sérgio Moro –
from a lower court in the city of Curitiba – and increased the penalty from nine-and-a-half
years’ imprisonment to 12 years and one month.

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The Investment Partnerships Programme

Just a few hours after becoming President, Michel Temer created a new programme for infrastructure projects: the Investment Partnerships Programme (PPI) through Provisional Measure No. 727/2016, which became Law No. 13,334/2016.

The PPI is intended to expand and strengthen relations between the state and the private sector, so that they can run joint public infrastructure projects and undertake other privatisation measures through partnership contracts. The partnerships between the state and the private sector under the PPI encompass not only concessions, PPPs, grants of permits and leasing of public assets, but also any other public-private arrangements that have the same legal structure as the aforementioned – and, therefore, involve similar risks, levels of investment and complexity.

The federal public projects that adopt the PPI partnership model will be specified and regulated by presidential decrees, which will also determine projects’ strategic guidelines and main legal aspects, and will establish long-term policies for investment. The decrees will also determine the federal policies regarding partnerships in public infrastructure projects in Brazil’s states, cities and Federal District, and will establish other privatisation mechanisms. The PPI represents an institutional rearrangement in Brazil, modifying the way undertakings are structured, improving their licensing procedures and requiring the adoption of better conduct and working practices.

Furthermore, the PPI created a PPI Council and a PPI Executive Secretary, which both answer directly to the President. The Council assists the President in managing the PPI and consolidates the functions of three entities: the PPP management office, the National Council for Integration of Transportation Policies and the National Council of Privatisation. The Executive Secretary will lead, monitor and evaluate all the action taken in the course of the PPI. The Brazilian Logistic and Planning Company will now report to the Executive Secretary instead of the Ministry of Transport, and will provide support to the PPI Council. The PPI also authorises the Brazilian Development Bank to create and participate in the Partnership Structuring Support Fund, with a view to enabling partnerships approved within the scope of the PPI. The fund will run for a term of 10 years, it will be private in nature and have its own capital – distinct from that of its administrators and shareholders.

Licensing procedures should be improved for PPI projects and licences should be issued efficiently and on time to meet the PPI’s priorities and schedules. The entities and authorities from the federal government, states, the Federal District and municipalities will have to work together to enable efficient licensing procedures. As regards the structuring of the projects, it is now possible to open a preliminary procedure to support the definition of the basic characteristics of a project. However, the PPI prohibits the reimbursing of the authors of such preliminary projects, which is significantly different from what happened in past concessions.

Administrative bodies with jurisdiction over matters relating to the PPI will have to adopt their own programmes of good practices according to national and international standards. To ensure fair competition and compliance with sectoral rules, the PPI emphasises public consultation prior to the issuance of rules, impact studies for regulatory changes, annual monitoring of results, and joint efforts with control bodies and with the Administrative Council for Economic Defence.
III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

According to the Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards (Basel II), November 2005, project financing is a method of funding in which the lender looks mainly to the revenues generated by a single project, both as the source of repayment and as security for the exposure. Project finance transactions require joint efforts from lenders, investors, suppliers, offtakers and sponsors to make the implementation of a project feasible. The success of project finance depends on the joint effort of several related parties, as issues such as a lack of coordination and conflicts of interest can incur significant costs.

In project finance, equity is held by a small number of sponsors and debt is usually provided by a syndicate of a limited number of banks. Concentrated debt and equity ownership enhances project monitoring by capital providers and makes it easier to enforce project-specific governance rules for the purpose of avoiding conflicts of interest or suboptimal investments. The use of non-recourse debt in project finance further contributes to limiting managerial discretion by tying project revenues to large debt repayments, which reduces the amount of free cash flow. Moreover, non-recourse debt and separate incorporation of the project company make it possible to achieve much higher leverage ratios than sponsors could otherwise sustain on their own balance sheets. Non-recourse debt can generally be deconsolidated, and therefore does not increase the sponsors’ on-balance sheet leverage or the cost of funding. From the perspective of the sponsors, non-recourse debt can also reduce the potential for risk contamination; in fact, even were the project to fail, this would not jeopardise the financial integrity of the sponsors’ core businesses. One drawback of non-recourse debt, however, is that it exposes lenders to project-specific risks that are difficult to diversify. To cope with the asset specificity of credit risk in project finance, lenders are making increasing use of innovative risk-sharing structures, alternative sources of credit protection and new capital market instruments to broaden the investor base.

Hybrid structures between project and corporate finance are being developed, in which lenders do not have recourse to the sponsors, but the idiosyncratic risks specific to individual projects are diversified away by financing a portfolio of assets as opposed to single ventures. PPPs are becoming more common as hybrid structures, with private financiers taking on construction and operating risks while host governments cover market risks.

ii Documentation

Documentation for project finance and construction contracts is consistent with international standards; usually it comprises the following main agreements:

- concession agreements;
- project agreements;
- term sheets;
- credit agreements;
- construction agreements;
- operating agreements;
- service and maintenance agreements; and
- security documentation (security agreements, subordination agreements, guarantees, collateral agreements, hedging agreements and direct agreements).
iii Delivery methods

Public sector contracts are almost exclusively awarded through formal and competitive procurement processes regulated by Law No. 8,666/1993. Design-bid-build (DBB) is the most traditional and generally used delivery method in the public sector, but the engineering-procurement-construction (EPC) model has been used more and more in large projects in the past two decades.

Private sector contracts, on the other hand, are awarded through a mixture of formal tenders and direct negotiation and award. The use of standard forms for construction contracts is not common. The most common transactional contractual or procurement structures in Brazil are DBB, EPC, and engineering, procurement, construction and management. The EPC contract has been the most commonly used, particularly for hydro and thermal power plants; however, alliance contracting has recently become more popular.

Alliance contracting

Alliance contracting has represented a viable, proven alternative to adversarial business-as-usual contracts in Brazil as it offers a unique system of project delivery whereby risks are shared between principal and contractor.

Alliance contracting is an incentive-based relationship contract in which the parties agree to work together as one integrated team. All parties are bound to a risk-or-reward scheme in which they all share savings or losses, depending on the success of the project. At first sight, the potential shortcomings of an alliance contract, such as a lack of certainty concerning project length and cost, may appear critical. However, banks are adapting their lending practices to accommodate alliance contracting by (1) conducting enhanced due diligence, (2) examining the financing structure, (3) requiring risk mitigation provisions in the contract, and (4) specially wording insurance clauses to make them effective.

Advantages

a Alliance contracting offers a unique system of project delivery whereby risks are shared between the principal and the contractor. Alliance contracting is advisable for complex construction projects, when the parties are unable to assess at the outset the costs involved and the estimated period for completion of the project.

b The parties in alliance contracting expect a reduction of the risk of disputes by relieving short-term demand pressure on the industry and setting up the foundations for longer-term structural improvement.

c Alliance contracting can relieve the pressure of the short-term demands on the industry and set the foundation for longer-term structural improvement in the way the industry works.

d Alliance contracting eliminates, or at least significantly reduces, the risk of claims and disputation between the parties through the use of inclusive and collaborative legal and commercial arrangements. These arrangements enable the parties to work together in an open and productive manner and to strive to achieve the business goals of everyone in the relationship.

Disadvantages

a In most alliance contracts, time and cost obligations are notably lacking; the emphasis is on the result (e.g., delivery of the project) and less on the road that leads to the result.
This brings with it a degree of uncertainty about budgets and delivery dates. If a project has an inflexible completion deadline or inflexible budget, then an alliance contract could lead to major problems. Unfortunately, but understandably, the dredging industry is more often than not confronted with inflexible deadlines or budgets. Government agencies, which are often the clients, do not in general have the liberty to engage in projects with open deadlines or budgets.

b The organisation of an alliance contract can also be much more difficult as soon as more than two parties are involved. With three or more parties, an alliance board may easily become unmanageable. Parties may therefore prefer a traditional contract with all the usual certainties. Also, third parties confronted with an existing alliance contract may wish to deal only with either the contractor or the client, not with both. In an alliance contract, three can seriously be a crowd.

c Third-party involvement may even lead to a conflict of interest. Nowadays the willingness to work in an alliance can be one of the selection criteria for a construction contract. However, because of obligations deriving from relationships with third parties, forming an alliance contract may prove to be difficult.

iv Standard forms
The choice of contract depends on various factors, such as the type of work and the time pressure for its execution; the parties and their capacity to be involved in one or more areas of responsibility; the procurement method; the expected risk-allocation system, including allocation of fit-for-purpose concept and design responsibility; and the costing and pricing mechanism. The most commonly used standard forms of contract, which have become increasingly popular in Brazil, are those produced by the International Federation of Consulting Engineers (known as FIDIC forms of contract).

IV RISK ALLOCATION AND MANAGEMENT
i Management of risks
The success of large projects depends on the joint effort of several related parties so that coordination failures, conflicts of interest and free-riding of any project participant can be avoided or mitigated.

Various factors affect the allocation of each risk, including political issues, the availability and economics of insurance cover, commercial bargaining power and the nature of the individual project. Often a party is prepared to take a risk only if it knows its exposure is not open-ended, and limitation of liability is frequently accepted as going hand in hand with apportionment of risk.

The management of risk requires an individual approach to each project. It is important to conduct risk assessments throughout to ensure it is being allocated correctly. This process will involve a consideration of each category of risk:

a design;
b construction and development;
c performance;
d operating costs;
e variability of revenue;
f termination; and
g any other project-specific risks.
ii Limitation of liability

Parties are excluded from liability for any indirect damages as provided in the Brazilian Civil Code. A party may include a limitation of liability clause for direct damages, but they are not allowed to simply eliminate any kind of liability they may have towards another party.

The limitation of liability for direct damages may exclude loss of business profits and restrict the responsibility for all other general losses and damages to a cap. There is no legal limit to this cap, but it is advisable to have a limitation that is compatible with the type of contract and the risks assumed by the parties in their execution of it. A liability cap does not apply in the case of gross negligence, fraud, wilful misconduct or wilful refusal to perform work that may cause the other party damage.

While insurance and liability limitation clauses are conceptually separate, they are both integral to any analysis of the limitations of liability in a contract in terms of risk to the parties involved. Contractual caps on liability can follow the limits of cover under insurance policies, and insurance policies can be seen as mitigating the contracting parties’ risk by passing on the risk and cost of certain events to a third-party insurer. Liability is not automatically capped at an agreed indemnity insurance limit unless there is express provision to this effect.

iii Political risk

Foreign investors enjoy the same property rights as those available to Brazilian citizens and there is a very low risk of nationalisation or government expropriation of assets or any other example that may characterise political risk.

The term ‘political risk’ is widely used in relation to project finance and can conveniently be defined to mean both the danger of political and financial instability within a given country and the danger that government action (or inaction) will have a negative effect either on the continued existence of the project or on the capacity of a project to generate cash flow. Examples of events that might be classified as political risks are as follows:

- a) expropriation or nationalisation of project assets;
- b) failure of a government department to grant consent or a permit necessary for starting, completing, commissioning or operating a project or any part of it;
- c) imposition of increased taxes and tariffs in connection with the project or potential withdrawal of valuable tax holidays or concessions;
- d) imposition of exchange controls restricting the transfer of funds outside the host country or the availability of foreign exchange;
- e) changes in law having the effect of increasing the borrower’s or any other relevant party’s obligations with respect to the project;
- f) politically motivated strikes; and
- g) terrorism.

There is no single way to eliminate all risks in connection with a particular project; however, one of the most effective ways of managing and reducing political risks is to lend through, or in conjunction with, multilateral agencies such as World Bank, the European Bank for Reconstruction and Development or other regional development banks. Where one or more of these agencies is involved in a project, the risk of interference from the host government or its agencies may be reduced on the basis that the host government is unlikely to want to offend any of these agencies for fear of cutting off a valuable source of credit in the future.
In this context, the publication of Law No. 13655/2018 clarifies one of the most basic values of the system – the rule of law – and aims to prioritise citizens’ good faith and confidence in the acts of the public authorities. The provisions of Article 23 of this Law are as follows:

An administrative, judicial or judicial decision that establishes a new interpretation or orientation on a rule of undetermined content, imposing a new duty or new conditioning of law, shall provide for a transition regime when it is indispensable for the new duty or condition of law to be complied with in a proportional, equitable and efficient manner and without prejudice to the general interests.

V SECURITY AND COLLATERAL

The strength of the security package on offer will also affect the ‘bankability’ of a project. Typically, lenders will seek to take security over all of a project company’s assets. However, in a project located in an emerging market with an undeveloped collateral framework, the practical reality of creating and enforcing security is that it may be expensive, time-consuming and uncertain in outcome. In practice, therefore, enforcement of security over a project company’s assets is generally seen by lenders as a last resort. For many lenders, the main driver in taking security over a project company’s assets, should the project company face financial difficulties, is to maximise the strength of its bargaining position against (1) the project company’s other creditors, (2) the host government, and (3) the project company’s sponsors. Should a project face financial difficulties, the lenders’ ability to enforce its security (with no obligation, subject to local law requirements, to share the benefits of the enforcement proceeds with anyone else) puts them in the strongest possible position in the context of any restructuring negotiations.

As a general rule, security must be granted in favour of all lenders. However, lenders may appoint a collateral agent to act on their behalf as an attorney-in-fact. The power of attorney must clearly state the matters entrusted and the scope of the authority.

Brazilian law requires that the assets given as collateral be described so that they are identifiable to third parties and imposes different requirements for perfection, depending on the type of asset. Therefore security interests in Brazil are usually created by means of several security agreements, each covering assets with similar perfection requirements. Security interests in Brazil can be obtained through pledges and security assignments, and be ensconced in trusts or tucked into mortgages. Owners and lenders also typically require insurance (performance) bonds, bid bonds and bank guarantees. A project loan typically will be secured by multiple forms of collateral, including:

a a mortgage on the project facilities and real property;
b assignment of rights and operating revenues;
c a pledge of bank deposits;
d assignment of any letters of credit or performance or completion bonds relating to the project under which the borrower is the beneficiary;
e liens on the borrower’s personal property;
f assignment of insurance proceeds;
g assignment of all project agreements;
h a pledge of stock in the project company or assignment of partnership interests;
i step-in rights;
j parent company guarantees; and
k contractual guarantees for equipment and materials.
Once executed, the security agreement has to be registered with the competent public registry depending on the type of collateral and its location (e.g., the Real Estate Registry for real property and pledge over equipment and machinery, the Registry of Titles and Deeds for security interests over most movable goods and the Maritime Court for Brazilian ships). Security agreements relating to certain assets (e.g., real property and ships) require public form (i.e., the parties’ representatives must be present before a public official, who will record the agreement). Security interest over credit rights requires notification or, if required by the underlying agreements, consent of the debtor.

VI  BONDS AND INSURANCE

i  Insurance for infrastructure projects
In addition to providing performance security, contractors must often take out life and personal accident insurance for employees, as well as a performance bond, civil liability risk insurance and engineering risk insurance.

Performance bonds are generally in standard form established by the Insurance Regulatory Agency and provide funding to cover the owner’s increased costs in the event that the contractor defaults on the contract up to the value of the bond. Usually the bonding company has the option of paying these costs or taking proactive steps to complete the contract, such as appointing a replacement contractor.

ii  Green construction risks
While there have been very few reported claims for risks associated with green construction risks, they will probably rise, and carriers are increasingly aware that their insurance policies do not properly account for the new risks inherent in green construction. Although a standard commercial general liability (CGL) policy may cover most of the issues a principal or builder may face during the construction of a green building, there are situations that may be unique to green building and might fall outside the coverage provided by the CGL policy. As a result, new green builders’ endorsements are being created by several insurance companies. For example, some insurance endorsements cover the added costs of attaining a specific level of green certification if the certification standards change during construction. Other products cover delays relating to the completion of a green construction project.

Although insurance providers have started to account for some green risks, others have largely been ignored.

VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS
The enforcement of security follows the rules set out in the Civil Procedure Code and the Civil Code.

As for bankruptcy issues, Law No. 11,101/2005 (the New Bankruptcy Law) provides enhanced protection and flexibility for debtors in financial distress to reorganise while continuing to operate their businesses. At the same time, creditors – particularly secured creditors – are likely to see their debt recovery prospects improve when businesses are liquidated, giving them a more significant role in the negotiation of restructuring plans and in reorganisation proceedings than previously.

The New Bankruptcy Law gives priority to the settlement of guaranteed loans – along the lines of Chapter 11 provisions in the United States – and makes the restructuring of
firms in financial distress more cooperative and conducive to recovery. It introduced three procedures: extrajudicial reorganisation, judicial reorganisation and bankruptcy liquidation. The Law does not apply to fully or partially state-owned companies, financial institutions, credit cooperatives, purchasing pools, supplementary private pension entities, healthcare plan operators, insurance companies, capitalisation companies and other legally equivalent entities. For these types of legal entities, there are regulatory agencies that provide for liquidation when it is apparent that they do not have the ability to honour their debts.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Brazil has adopted an environmental protection policy, including:

a Law No. 6,938/1981, which provides the purposes and mechanisms to formulate and apply national environmental policy and institutes the National Environmental System;
b Law No. 4,771/1965, which establishes the Forest Code;
c Law No. 9,985/2000, for the study and conservation of wildlife (fauna and flora) in conservation areas;
d Law No. 9,433/1997, to regulate the use of water resources; and
e Law No. 9,605/1998 and Decree No. 3,179/1999, establishing civil, administrative and criminal sanctions for individuals or legal entities that breach environmental laws.

Environmental legislation and regulations are enacted at the federal, state and municipal levels. Federal agencies set out general requirements of broad applicability, while specific standards of enforcement are left to state agencies, either by regulation or by administrative orders. The states and municipalities can also issue standards of equal or more stringent requirements than their federal counterparts. In addition, the Brazilian Technical Standards Association issues technical norms and standards addressing specific environmental issues. The content of these standards is generally considered to be the best management practice. However, the standards can also be considered to be legal requirements when recommended by any piece of legislation.

Brazil is one of the very few countries (if not the only one) to employ a three-stage process, with separate procedures for granting licences at each stage. This procedure allows or contributes to transferring, restarting or revisiting old disputes during the three phases. In addition, it generates significant uncertainty and delays, and high transaction costs. The three stages of the environmental permitting process are:

a Preliminary licence: this is issued during the preliminary planning stage of a project for a maximum five-year term. The licence signifies approval of the location and design of the project, certifies its environmental feasibility and establishes the basic requirements and conditions to be complied with during the subsequent stages of implementation.
b Installation licence: this authorises construction, civil works and the installation of equipment in accordance with the specifications contained in the approved plans, programmes and projects, including environmental mitigation provisions and other conditions.
c Operating licence: this authorises operation of the development in accordance with environmental mitigation measures and operating requirements, on confirmation that the previous licensing conditions were met. These licences can be granted for between four and 10 years and are renewable within the legal time frame established by the competent environment agency.
All requirements set by the operational permit must be met during the project’s operation. Failure to meet these conditions may trigger administrative, civil and criminal liability. This could mean a range of penalties, including fines, indemnification, suspension of activities and imprisonment.

ii  Equator Principles

Worldwide, 72 banks have subscribed to the Equator Principles (EPs), including ABN Amro Group, Banco Bradesco SA, Banco do Brasil SA, Banco Santander SA, Caixa Economica Federal, HSBC Holdings plc and Itaú Unibanco SA. The EPs are as follows:

a  Principle 1: review and categorisation;
b  Principle 2: social and environmental assessment;
c  Principle 3: applicable social and environmental standards;
d  Principle 4: action plan and management systems;
e  Principle 5: consultation and disclosure;
f  Principle 6: grievance mechanism;
g  Principle 7: independent review;
h  Principle 8: covenants;
i  Principle 9: independent monitoring and reporting; and

Adoption of the EPs by a financial institution is voluntary, but once they have been adopted by an entity, that entity must take all appropriate steps to implement and comply with them. Every adopting entity declares that it has or will put in place internal policies and processes that are consistent with the EPs and that it will report publicly (as required by Principle 10) regarding its implementation experience. As part of the review of a project’s expected social and environmental impacts, EPFIs use a system of social and environmental categorisation, based on the environmental and social screening criteria of the International Finance Corporation.

iii  Responsibility of financial institutions

Financial institutions must comply with applicable federal and regulations, and may be subject to administrative, civil or criminal liabilities; however, lenders can hardly assume environmental liability for financing an infrastructure project in Brazil.

However, if control of a project company by lenders is too tight, financial institutions may qualify as shadow directors and, hence, become liable to a certain extent for the activities of the borrower. Therefore, the structuring of the supervision of the project company in the credit agreement is crucial for the lenders to avoid liability.

IX  PPP AND OTHER PUBLIC PROCUREMENT METHODS

The authorities have authorised PPP projects in many areas, including transport, irrigation and water resources, and even football stadiums. States and municipalities may also enact their own PPP laws to govern state or municipal PPPs. The states of São Paulo, Rio de Janeiro
and Minas Gerais, for example, have already enacted their own state PPP Acts. At municipal level, several laws have been enacted. The cities of São Paulo, Rio de Janeiro and Minas Gerais, for example, have already enacted their own municipal PPP Acts.

Law No. 11,079/2004 (the PPP Law) defines PPPs as administrative concession contracts of two types:

a. sponsored concession: a concession contract for the provision of public services or public construction work (with subsequent provision of a public service), established by Law No. 8,987/1995, under which the public administration provides a direct payment in addition to the tariff charged to and payable by the users; and

b. administrative concession: a contract under which the public service, which may involve carrying out public construction work or supplying and installing fixed assets, is provided directly or indirectly to the public administration, which, in turn, provides all the compensation to the private partner for rendering this public service.

The legislation promotes risk-sharing, with risks allocated according to which the party is best placed to control. A contractor's risks for the cost of future maintenance as well as quality control on PPPs may be mitigated by performance and risk-shifting contract provisions.

Contract selection must always be made through competitive public bids under the pre-qualification system and preceded by a public audience. The tender process must comply with the procedures set out in the legislation that regulates tenders and administrative contracts. The most significant transactions that have been structured or completed to date include:

a. urban renewal – Porto Maravilha, in the City of Rio de Janeiro (municipal level);
b. metro – line 4 and line 6 of the São Paulo Metro and the Salvador Metro (state level);
c. water and sewage – Rio das Ostras (municipal level), System Water Producer Alto Tietê and São Lourenço – SP (state level) and Jaguaribe Ocean Disposal System – SP (state level);
d. road concession – MG 050 (state level) and Bridge and Road to Paiva's Beach – PE (state level);
e. prison – Itaquitinga Integrated Resocialisation Centre PE (state level);
f. hospital – Hospital do Suburbio – BA and Couto Maia Institute – BA (state level); and

g. stadiums – Fonte Nova – BA (state level) and Dunas – RN (state level), Pernambuco Stadium, Maracanã Stadium and Fortaleza Stadium (state level).

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Foreign enterprises may do business in Brazil without having to establish either Brazilian companies or joint ventures with Brazilian contractors and designers. Also, Brazilian law does not require local partners to control a joint venture. In fact, general policy is to admit foreign capital and treat it in the same way as local capital, and except in clearly, defined areas (such as mining, coastal navigation and alike), 100 per cent foreign ownership of local companies and joint ventures is normally permitted.

The most common forms of business organisations in Brazil are limited companies and joint-stock companies. Limited companies have a much simpler structure than joint-stock companies, and are more often adopted for closely held companies; they are also more cost-effective for simpler structures and their organisation is cheaper than that of joint-stock companies. Establishment of joint ventures is common in Brazil. A major motivation for establishing joint ventures is to pair specific know-how and technical cooperation between domestic and foreign firms to compete in segments of the government procurement market or in other markets subject to government regulation, such as telecommunications and energy. Usually, the foreign company partners supply technology and financial support to Brazilian companies leading in the local market.

There are no rules governing the incorporation of joint ventures, and they may be in the form of a limited or joint-stock company by way of a formal contract. The joint venture agreement is intended to establish a close relationship between the participants to attain common business goals, whether or not this implies a capital contribution or the organisation of a new company. There are no rules in regard to the participation of each company, which may differ according to the interest in maintaining stock control.

i  Currency controls

Pursuant to Law No. 10,192/2001, payments of monetary obligations enforceable in Brazil must be made in reais at face value. Contractual provisions for payment stated in or indexed to any foreign currency are expressly prohibited and are deemed void. The only exceptions are:

a contracts and bonds relating to imports or exports of goods;
b finance agreements or collateral agreements relating to exports of domestic goods sold by means of credit facilities abroad;
c foreign exchange contracts in general;
d any obligations involving a party that is resident and domiciled abroad, except lease agreements relating to real property located in the Brazilian territory;
e assignment, delegation, transfer, assumption or modification of obligations involving a party that is resident and domiciled abroad; and
f leasing agreements entered into by and between parties resident and domiciled in Brazil involving funds raised abroad.

Bank accounts in a foreign currency are only permitted in very specific cases, such as accounts held by diplomats, tourism agencies, credit card companies and insurance companies. The foreign exchange rules have been amended over time, and presently there is considerably greater freedom for remittances of funds to and from Brazil.

ii  Removal of profits and investments

Until the mid-2000s, Brazil was subject to a strict system of foreign exchange control, and the inflow and outflow of funds were subject to specific rules and regulations enacted by the National Monetary Council and the Central Bank of Brazil (BACEN). This control has been relaxed over time and new measures have been provided that are expected to further ease existing controls. Pursuant to the foreign exchange rules currently in place, any individuals or legal entities resident in Brazil have freedom to remit funds to or from other countries without any limits, provided that any such remittances are processed by a local agent duly authorised to deal in foreign exchange, based on the legal grounds of the transaction and taking into account the responsibilities of the parties defined in the underlying documents.
The registration of foreign capital with BACEN is provided for by Laws No. 4,131/1962 and No. 4,390/1964, guaranteeing equal treatment of foreign and domestic capital. Foreign capital is defined as goods, machinery and equipment imported into Brazil without prior foreign capital disbursements for the production of goods or services, and financial resources remitted to Brazil for application in economic activities, provided that, in both cases, the foreign capital belongs to individuals or legal entities resident, domiciled or with a head office abroad.

Foreign capital must be registered with BACEN in its original currency within 30 days of the entry of the funds into the country. This registration represents official recognition of the investment and allows for the remittance of profits and dividends (as from 1996, exempt from income tax), repatriation of the invested capital and reinvestment of profits at any time, without applying for any further authorisation.

XI  DISPUTE RESOLUTION

i  Special jurisdiction

There are no specific courts or tribunals in Brazil dealing solely with project finance transactions or construction contracts. Generally, such matters would be litigated in the federal courts (this is mandatory if the federal government is involved), state courts or in arbitration.

ii  Arbitration

General aspects

Although arbitration is a fairly recent development in Brazil (since 2001, it has begun to be a real choice in contracts), it is now a reality and is widely used, especially in projects, construction and engineering disputes. Arbitration proceedings are governed by Law No. 9,307/1996 (the Brazilian Arbitration Law) and significant events have affirmed the use of arbitration for resolving disputes in Brazil, namely:

a  recognition by the Brazilian Federal Supreme Court of the constitutionality of the Brazilian Arbitration Law in 2001;

b  the enactment of Federal Decree No. 4,311/2002, which ratifies the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention); and

c  ratification of the Panama Convention, the Montevideo Convention and the Buenos Aires Protocol on International Commercial Arbitration in the Mercosur.

The Brazilian Arbitration Law provides for two kinds of arbitration agreements, both in writing: the arbitration clause (the parties to an agreement elect to submit to arbitration any controversies arising from it) and the arbitration commitment (the parties agree to submit a specific dispute to arbitration).

The arbitration clause may be inserted either in the agreement text or in a separate document referring to it, and shall indicate whether the arbitration will proceed under the supervision and in accordance with the rules of a given institution, or the rules expressly selected by the parties to govern the arbitration.
The arbitration commitment may be entered into by the parties either in court or out of court, by means of a public or private instrument (to be executed also by two witnesses) and must indicate:

- the parties' names and personal data;
- the arbitrators' names and personal data or a reference to the institution that shall appoint them;
- the subject matter of the dispute; and
- the place in which the award shall be issued.

Each party should appoint one or more arbitrators and may also appoint alternatives to those arbitrators. If an even number of arbitrators is appointed, they may appoint another arbitrator; if they do not reach an agreement, then the parties shall request that the court make the appointment. The appointment of an arbitrator may be challenged whenever there are questions about his or her impartiality. Also, by means of the arbitration agreement, the parties may set further restrictions as to the appointment of arbitrators.

What constitutes an arbitral award in Brazil?

Arbitral awards are as binding as court decisions and are enforced accordingly. An award can only be challenged by means of a court action for nullification. To request nullification of an arbitral award, parties should demonstrate the existence of one of the requirements provided for in Article 32 of the Brazilian Arbitration Law, which are all related to procedural issues (e.g., non-existence of arbitration commitment, violation of due process, an award rendered beyond the limits of the arbitration agreement, a decision that fails to address the entire dispute referred to arbitration).

There are no appeals against awards issued in arbitration proceedings and the merits of the arbitration cannot be re-examined by the courts. The arbitral award shall be signed by the sole arbitrator or by the entire arbitration tribunal. The chair of the arbitration tribunal shall expressly indicate that one or some of the arbitrators cannot or do not want to sign the award.

The Brazilian Arbitration Law has adopted a territorial criterion that classifies the award in one of two categories: foreign or domestic. Therefore, a foreign award is considered to be one rendered outside Brazil. This distinction is important for recognition and enforcement purposes as a domestic arbitral award is not subject to appeals or to recognition by the courts and a foreign award will first have to be recognised by the Superior Court of Justice before it can be enforced in Brazil.

The role of the Superior Court of Justice

Application for recognition before the Superior Court of Justice is mandatory for the validity of a foreign arbitral award in Brazil. The award does not have to be recognised by the foreign state’s judicial courts before being submitted to the Superior Court of Justice. The application for recognition should contain the original foreign arbitration award or a certified copy thereof, duly notarised by the Brazilian consulate and translated into Portuguese by a sworn translator in Brazil, and the original agreement to arbitrate or a certified copy thereof duly translated into Portuguese by a sworn translator. The standards regarding the enforcement of a foreign arbitration award in Brazil are consistent with Article V of the New York Convention.

The Superior Court of Justice has recognised foreign arbitral awards whenever they do not violate any of the provisions of Article 38 of the Brazilian Arbitration Law. The Superior Court of Justice has analysed only formal aspects of the award. The merits of the arbitration
award have not been analysed. The Superior Court of Justice’s internal rules authorise the Court to issue preliminary injunctions during the recognition proceedings, such as freezing assets or temporary restraining orders. Once the foreign arbitration award is recognised by the Superior Court of Justice, the judgment creditor is entitled to enforce the award in the same way as a domestic award, that is, before a competent first-instance state court.

**Arbitration organisations**

Arbitration is developing quickly and strongly, and it is becoming one of the most important methods for dispute resolution in Brazil. Statistics of the International Court of Arbitration of the International Chamber of Commerce (ICC) show a steady growth in the use of commercial arbitration in the country. By number of arbitration proceedings involving Brazilian parties since 2006, Brazil is first in Latin America and the fifth of all the parties in the world that submit their disputes to the ICC.\(^5\)

One of the main reasons for this strong and steady development is the unquestionable support of Brazilian courts, in particular the Superior Court of Justice, responsible for deciding the final appeals on court cases and for recognising foreign arbitral awards for future enforcement in Brazil. The strong support that arbitration is receiving from the courts makes Brazil a convenient place for arbitration and provides foreign and Brazilian parties with a reliable, binding and faster method for dispute resolution, mainly for complex contracts.

Arbitration, a well-favoured mechanism for the engineering and construction sectors, has become increasingly predictable and user-friendly as a result of various systemic changes. The choice of an international arbitration institution or the adoption of international arbitration rules has no influence on the future enforcement of an arbitration award in Brazil. A foreign contractor is therefore free to adopt the arbitration rules of any international institution.

The best known and most frequently used of the national arbitration institutions are:

- the American Chamber of Commerce Arbitration Center;
- the Brazil–Canada Chamber of Commerce Arbitration Center;
- the Brazilian Business Arbitration Centre in the State of Minas Gerais;
- the CIESP/FIESP Chamber of Conciliation, Mediation and Arbitration;
- the FGV Chamber of Conciliation and Arbitration; and
- the Mediation and Arbitration Chamber of the Institute of Engineering of São Paulo.

With regard to Brazilian infrastructure disputes, the most noteworthy international arbitration institutions are:

- the ICC;
- the International Centre for Dispute Resolution; and
- the London Court of International Arbitration.

**Amendments to the Brazilian Arbitration Law**

The following important amendments were recently made to the Brazilian Arbitration Law:

- One of the most controversial issues in the 1996 Arbitration Law was whether public entities were allowed to be a party to arbitral proceedings. The amendments expressly allow public entities to use arbitration should the dispute relate to disposable economic...
rights. Pursuant to the amendments, arbitration involving public entities shall always remain public.

Arbitration is expressly provided for in corporate disputes. Shareholders may approve arbitration clauses in the corporate by-laws by a majority vote, giving minority shareholders the right to liquidate and be reimbursed for the value of their shares, with a few exceptions.

Parties may now opt to dispense with those arbitral institutional rules that restrict their choice of arbitrators to those on the institutions’ lists. This is one of the most controversial of the proposed changes, with opposition coming from some of the main Brazilian arbitral institutions, which assert a possible loss of institutional quality and an unconstitutional interference with the freedom of private arbitral entities to operate. Those supporting the change believe it is necessary to respect party autonomy in their choice of arbitrators, which is in line with international arbitration practice and the rules of major international arbitral institutions.

Arbitrators are authorised to issue partial awards.

The parties and arbitrators by common agreement can extend the period prescribed by law within which the arbitral award must be issued (in the absence of any other agreement by the parties, the limit is currently six months under the 1996 Law).

It is now explicitly provided that all foreign arbitral awards must be ratified by the Superior Court of Justice to have effect in Brazil.

Before an arbitration proceeding is instituted, the Law authorises parties to go to the courts to obtain protective or emergency measures. However, once the arbitration proceeding is instituted, it will be up to the arbitrators to maintain, modify or revoke these measures. After the arbitration proceeding is instituted, the parties must go directly to the arbitral tribunal to request such measures.

The arbitral tribunal may issue an ‘arbitral letter’ requesting that the courts in the territory where the arbitration proceeding is seated help to ensure that the requests of the tribunal are being carried out.

The amendments introduce a rule that the statute of limitation is interrupted by the institution of the arbitration, even if the arbitral tribunal eventually finds that it lacks jurisdiction. In accordance with the Law, the arbitration is considered instituted once all arbitrators have accepted their appointments. Nevertheless, once the arbitration is instituted, the date of the request for arbitration determines the point at which the statute of limitation is interrupted.

### iii Dispute boards

A dispute board is composed of a panel of three experienced, respected and impartial reviewers. A board is normally organised before construction begins and meets at the job site periodically. The usual process is for the owner to select a member for approval by the contractor and the contractor to select a member for approval by the owner, with the two thus chosen selecting a third to be approved by both parties. The three members then select one of their number as chair, with the approval of the owner and contractor.

Board members are provided with the contract documents, become familiar with the project procedures and the participants, and are kept abreast of job progress and developments. The board has meetings with representatives of the owner and contractor during regular site visits and encourages the resolution of disputes at job level. The board process helps the parties discuss problems before they develop into major disputes.
When a dispute arising from the contract or the work cannot be resolved by the parties, it can be referred to the board for a decision or recommendation. The board convenes a hearing at which each party explains its position and answers questions. In arriving at a decision or recommendation, the board considers the relevant contract documents, correspondence, other documentation and the particular circumstances of the dispute.

The Dispute Resolution Board Foundation has had a major role in promoting dispute boards in Brazil and in Latin America, and they are gradually becoming more popular in the region. The use of dispute boards is increasing in Brazil and has become a real choice for investors and participants to resolve disputes before, and hopefully instead of, arbitration. The basis for their success is that they help to preserve relationships and keep construction claims and delays to a minimum. Some recent developments are as follows:

a. During an annual conference of the Council of Federal Justice, several professionals who specialise in dispute resolution worked in groups to present proposals on major themes such as arbitration, mediation and other forms of dispute resolution, including dispute boards. The groups initially shortlisted the proposals in order to have them examined and submitted for approval during the plenary session. All proposals supported by the Brazilian representatives of the Dispute Resolution Board Foundation were fully approved by the Council of Federal Justice, dealing with the recognition of the validity of dispute board clauses and an express recommendation for the proposals to be adopted in Brazil. Finally, it means that the higher levels of justice – jointly with the legal community – officially recognise that (1) dispute boards are a key method of solving disputes that have arisen in both the private and public sectors, (2) dispute boards are a recommended method of solving disputes, particularly in construction and infrastructure contracts, and (3) the adjudication model of dispute boards is valid and any decision granted by a dispute adjudication board must be observed until a further review is made through the courts or an arbitration panel.

b. The city of São Paulo enacted Law No. 16.873/2018, regulating the use of dispute boards in its administrative contracts.

c. There are two proposals dealing with the implementation of dispute boards nationwide: Proposal No. 206/2018 authored by Mr Antonio Anastasia, which has been presented to the Federal Senate; and Proposal No. 9,883/2018 authored by Mr Pedro Paulo, which has been presented to the Federal House of Representatives.

iv. Mediation

Law No. 13,140 (the Brazilian Mediation Law) was enacted on 29 June 2015. It provides for mediation involving individuals and private entities, and for the settlement of disputes involving public entities. It also regulates judicial and extrajudicial mediation. Courts of law in Brazil may create judicial centres of conflict resolution to which all cases that present the possibility of agreement through mediation will be forwarded.

The provisions on judicial mediation must be interpreted with the new Brazilian Civil Procedure Code (Law No. 13,105/2015), which provides for mediation or a conciliation hearing in the early stages of most lawsuits. The Code also regulates the activities of mediators in judicial proceedings.

Extrajudicial mediation involving individuals and private entities has been already used in some cases, since it does not require a specific law regulating the matter. However, it is expected that the new legal framework will boost the adoption of mediation and provide comfort to parties that are not familiar with this method of conflict resolution.
The Brazilian Mediation Law establishes that parties to an agreement may provide for a mandatory mediation meeting if a dispute arises. As with an arbitration clause, this mediation clause will have a binding effect. According to certain studies, the binding effect of the mediation clause contributes significantly to the development of the mediation proceeding and to the resolution of conflicts without arbitration or judicial proceedings.

With respect to disputes involving public entities, the Brazilian Mediation Law provides for the future creation of administrative resolution and conflict chambers. However, it allows the immediate adoption of ad hoc proceedings while these chambers are not constituted.

The overriding considerations during mediation proceedings must be the autonomy of the parties and confidentiality. A duty of confidentiality will apply to the parties, their lawyers, their experts and any others who participate in the proceedings. This duty would extend to preventing the mediator from testifying in any subsequent court or arbitration proceedings and would apply strictly to the parties in any such proceedings subsequently. Statements and admissions made during, and documents prepared especially for, mediation proceedings will be deemed inadmissible in any arbitral or judicial proceedings.

XII OUTLOOK AND CONCLUSIONS

Operation Car Wash continues to radically affect business in Brazil. Not only has this put a major dampener on petrochemical projects but it has also affected the economic, political and business landscape across the country. Nevertheless, several important infrastructure projects are expected to be launched in 2019, creating an unprecedented opportunity for infrastructure investors and international contractors. With the economy and federal budget in crisis, other participants in the infrastructure sector – notably pension funds and the government itself – are sitting on the sidelines and may even consider selling existing projects. All this has opened the door to new players.

China takes a long view on Latin American infrastructure investment and a major wave of Chinese investment is expected in Latin America in 2019. Notably, China Three Gorges Corporation, the State Grid Corporation of China, the China Communications Construction Company and the State Power Investment Corporation plan to expand their acquisition of sizeable greenfield assets, develop transmission lines and invest in big infrastructure projects.

One of the government's major strategies therefore is to focus heavily on infrastructure and consistent project investment is required to achieve this. Yet the economy is dealing with high tax rates and high debt, de-prioritising finance for these capital-hungry projects. In attempt to alleviate this, the government and states are working on ways to develop a PPP model. Concessions are also being offered to investors and companies to finance, build and then run the infrastructure.

The focus in the medium term is expected to be on:

a. highways – often using the PPP or concession model;
b. air transport and airport facilities – often using the concession model;
c. railway facilities – potentially built and owned by private companies that need large-scale transport systems, such as iron ore or mining companies; and
d. upgrading and expansion of port facilities – often tied to rail facility developments.
The advancement of PPPs in Brazil

The PPP Law illustrates the urgency and importance that the federal government has attached to this matter in response to the pressure brought by state governments (notably, Minas Gerais and São Paulo) and the private initiative.

The driving force behind the quick congressional passage of the draft bill into the PPP Law was the well-known critical shortage of public funds for sponsoring infrastructure work and utility services, and meeting the demand resulting from a spurt in the country’s economic growth. This shortage of public funds, coupled with the private sector’s lack of interest in taking over these works and services under the traditional concession system, may help to explain why infrastructure investments have nearly halted.

The approval of PPPs has undoubtedly represented a great victory for the federal government, especially by offering a wide array of possibilities for the presence of private entities in key sectors of the Brazilian economy. Therefore, the expectations and discussions about the role of PPPs in Brazil are justifiable.

The trend towards compliance

The period 2014–2018 will be remembered for the in-depth investigations of Operation Car Wash and the development of other important investigations relating to the fight against money laundering and corruption in Brazil. During this time, the country’s business practices have undergone significant transformations. At the centre of these transformations is the improvement of systems for the detection, investigation and punishment of various infractions by public authorities.

Nevertheless, there has been progress in more robust and cooperative investigations in diverse subjects. Against the backdrop of an economic crisis and an increase in the possibility of detection and punishment of infractions of a varied nature, preventive actions taken by companies, such as compliance programmes, are becoming more critical and are encouraged by new legislative requirements and by the authorities.

The existence of appropriate strategies aimed at risk control, the adoption of procedures for their implementation, the definition of responsible persons, the incentives to report illegal practices and the possible sanctions imposed by the companies are all essential tools for companies that want to avoid financial, legal and reputational damage. Without a doubt, the adoption and enhancement of internal controls is the essential investment in corporate governance that players in the construction industry need.
Chapter 8

COLOMBIA

Carlos Umaña, Mario Forero and Rafael Bernal

I INTRODUCTION

Under a newly elected national government, Colombia is seeking to deepen its achievements in infrastructure while correcting the flaws of its legal framework, currently recognised as being at the leading edge in the regional context. The Fourth Generation (4G) of toll road concessions programme, comprising 42 projects to build approximately 4,970 miles of motorway and requiring investments of around US$24.4 billion and once the government’s most ambitious scheme to provide the country with a modern and competitive network of roads, is facing both outstanding progress and challenges. However, the general opinion is that the 4G programme has partly been compromised in the past owing to regional corruption scandals but is now back on the right rails. The government is undertaking an important institutional effort to overcome the environmental, social and financial hurdles that were delaying the project’s construction phase. Qualified people within the infrastructure industry are now raising the first requests to start planning further projects that will keep the infrastructure revolution going.

Notwithstanding the foregoing, constraints on the public budget are getting more visible as the country reaches its limit in financing public expenditure on infrastructure. The aim of the National Development Plan for the next four years – currently under discussion in Congress – is to give the private sector a bigger role in infrastructure development through initiatives such as extending port concession agreements up to 80 years. Other sectors, such as power generation, have been the focus for investors since the Ministry of Mining and Energy issued Decree 570 of 2018, which regulates public policies to implement long-term energy contracts for non-conventional renewable energy projects. In addition, the Mining and Energy Planning Unit is structuring the bidding process to select the company in charge of building the regasification plant on Colombia’s Pacific coast, a facility that is expected to be operational by 2023, providing liquefied natural gas to the centre and south of the country.

The enactment of Law 1882 of 2018 represents an improvement in the Colombian public procurement system, introducing mandatory provisions regarding transparency, competition, efficiency and specific rules of procedure for events whose regulation was unclear until now. Moreover, Law 1882 provides further solutions and regulation for issues that are considered to cause bottlenecks for projects currently under way regarding land management and environmental permits. The new Law also seeks to overcome the standstill

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in project financing as a result of corruption scandals, by means of adopting provisions to assure investors that their investments are safe in the event of the unlawful conduct of the other agents involved in the projects.

Although the National Infrastructure Agency (ANI) – the government entity in charge of structuring, tendering and supervising the performance of transport infrastructure projects at the national level – has been very successful in attracting first-tier local and international participants for the 4G programme.

The other area of PPP projects that should be closely watched and merits further attention is social infrastructure, such as hospitals, schools, libraries and prisons. Cities such as Bogotá, Medellín and Barranquilla are preparing to launch the first bundle of social PPP projects, comprised mostly of hospitals and schools.

Beyond the national level, other major infrastructure projects are being structured by local authorities. For instance, the city of Bogotá is close to awarding the concession contract for the construction, operation and maintenance of its first metro line. Six consortiums integrated by the top-tier companies in the industry are preparing bids for this project, which requires investments of around US$4 billion. The contract is expected to be awarded in the last trimester of 2019 and be operational by 2025. Furthermore, Bogotá is undertaking studies and designs for the construction of several urban highways and new dedicated bus lanes and infrastructure for the system TransMilenio, which will require investments of at least US$6 billion.

Another sector of interest relates to energy generation. Law 1715 of 2014 promotes investment in renewable energies (mainly wind and photovoltaic) and introduces tax breaks such as deductions in income tax, accelerated depreciation, exemption from VAT and a reduction of custom duties for equipment, machinery, supplies and services. In the same vein, the Regulatory Commission for Energy and Gas is issuing new regulations to ensure the bankability of these projects and foster the rebalancing of Colombia’s power generation portfolio. These initiatives are complemented by regional transmission line projects being undertaken by the Mining and Energy Planning Unit, which are under tender, to transmit power generated in the northern part of Colombia.

The significant number of PPP projects that have been awarded and structured indicates that Colombia will significantly increase its investment in infrastructure, which could be an opportunity to reinforce and improve the new but solid legal framework in this field, as well as the capabilities of its public institutions to supervise the projects while managing potential crises.

II THE YEAR IN REVIEW

The year 2018 was marked by the comeback of the 4G concessions to the financial markets. Three projects achieved financial closure, the most significant of which was the Barrancabermeja–Yondó project, and eight more are expecting to do the same in 2019. The national government focused its efforts on ensuring the proper conditions for the continuity of several infrastructure projects across different sectors, including roads, oil and gas, airports, energy, railways and ports.

With regard to the progress of the 4G programme, projects in the first wave have now reached the final stage of work prior to completion, while second and third wave projects are advancing and initiating the construction phase. For example, the Honda–Puerto Salgar–Girardot project (part of the first wave of PPP road projects awarded) has achieved a
work progress rate of 92 per cent, having completed construction of a new bridge over the Magdalena river, and the Cartagena–Barranquilla project, with a progress rate of 97 per cent, is close to being the first 4G project to be completed. A major milestone for this project was the construction of the largest viaduct in the country (at 4.7 kilometres) using cutting-edge technology that protected the environmentally sensitive location.

After performing maintenance and reconstruction activities in the Bogotá–Belencito railway corridor, the ANI successfully tested the railway line connecting the capital district with the region of Boyacá, sending a commercial cargo train from one point to the other without major stops. There have since been multiple announcements from companies interested in both using and investing in the railway line. The draft of the National Development Plan includes a goal to recover several railways for commercial purposes and to increase the current operational 250 kilometres to more than 1,000 kilometres.

Airport infrastructure has also played its part, with investment in renovation and new construction works in the country’s main terminals; for example, expansion work at El Dorado Airport, including a new, modern terminal and aircraft platforms to cope with increasing air traffic, was completed in December 2017. A further private initiative has been submitted by the holder of the airport’s current concessionaire, which entails the construction of a third runway and expansion of the passenger terminals.

In the energy field, the regasification plant near Cartagena is the first of its kind in Colombia; with investment of US$150 million (and significantly more with the inclusion of the value of the floating storage regasification unit), it is representative of the projects adopted by the national government to secure the country’s energy supply.

Colombia is overcoming the challenges it has faced in the implementation of the aforementioned projects, brought about by the corruption scandals that had spread across South America. However, Colombian authorities and institutions reacted quickly to these scandals, promoting and issuing new laws and regulations to restore confidence in the infrastructure sector, and reassuring investors that have supported the projects in good faith. The ANI is currently structuring the new PPP projects that will be awarded to complete the Ruta del Sol II roadworks, which is one of the projects most affected by the corruption scandals. In the meantime, the National Roads Institute has awarded contracts for maintenance activities along the Ruta del Sol II. Based on the progress that has been made so far this year, 2019 is looking like a year of infrastructure recovery.

### III DOCUMENTS AND TRANSACTIONAL STRUCTURES

#### i Transactional structures

The road concession contracts entered into by the Colombian government typically follow a build-own-operate-maintain-transfer (BOOMT) model. Thus, the concessionaire builds the road, operates and maintains it for a determined period, which normally coincides with the requisite period for investment return, and then transfers operations to the government. In 2013, the ANI launched a standard BOOMT contract, which will be applicable for all 4G projects. The standard contract comprises a series of elements that are typical in traditional project-financing arrangements and intended to establish the basic principles needed to achieve the bankability of the infrastructure projects that are to be developed. The standard contract includes a general part applicable to every project and a special or particular part that shall govern the specific aspects applicable to an individual project. The standard contract
encompasses a series of provisions that are relevant for bankability purposes regarding risk allocation, concessionaires’ remuneration, lenders’ step-in rights, cash-flow management and effects upon early termination, among others.

Before 2012, contractors would receive an upfront payment for the execution of the work. Upfront payments have now been abolished by Law 1508 of 2012 for all contracts awarded after 2012. Payment mechanisms to contractors now depend on the availability of the infrastructure and the level of service.

ii Documentation

The most important documents in project finance transactions are no different from those used in similar transactions worldwide. These include offtake agreements, supply agreements, engineering-procurement-construction (EPC) contracts, operation and maintenance contracts, ground leases and site purchases, parent guarantees, loan agreements, pledges, mortgages and securities.

iii Delivery methods and standard forms

The most common delivery method for large projects involving international construction companies is the EPC contract. However, when contracts are awarded within a public bidding process, there is no opportunity for the parties to freely negotiate the terms of the contract as these are unilaterally established by the contracting entity in the request for proposals, although during the public procurement procedure, potential contractors may submit comments and observations that can be voluntarily accepted by the contracting authority.

Colombian law does not oblige public entities to use specific models for infrastructure contracts. However, there is the standard contract model developed by the ANI for 4G projects as mentioned in Section III.i, above.

The main aspects that must be contained in concession contracts under Colombia’s PPP scheme are regulated, and can be summarised as follows:

a contracts must have a maximum term of 30 years, except where studies approved by the National Council for Economic and Social Policy (CONPES) justify a longer duration;
b all project funds should be administered through a trust agreement;
c contracts should contain payment mechanisms to determine early termination payments;
d each contract should identify the property that will be returned to the government or contracting authority on expiry of the contract; and
e debarment and unilateral termination clauses should be stipulated in the contract.

In addition, lenders must have step-in rights should the contractor breach its duty to complete the concession contract or the financing documents.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

There is no regulation for risk allocation in private law contracts and the parties are free to allocate the risks as they see fit. The risk matrix for these contracts is similar to corresponding international contracts.

Article 4 of Law 1150 states that requests for proposals should identify, estimate and assign foreseeable risks arising from proposed contracts. Contractual risk is generally understood as any circumstances that may arise during the development of a contract and can alter its financial balance.

For the purposes of risk regulation, the CONPES Guidelines distribute contractual risk in five branches or categories, which include foreseeable risks, unforeseeable risks, contingency risks, risks covered by performance bonds and risks generated by misconduct of the contractor. The CONPES Guidelines regulate foreseeable risks allocation.

Below is the basic matrix for risk allocation as recommended by the CONPES Guidelines. In general, the guidelines try to allocate risk according to which party is in a position to best assume and manage that risk. Risk may therefore be reallocated on a case-by-case basis, depending on the parties’ positions.

<table>
<thead>
<tr>
<th>Risk allocation</th>
<th>Concessionaire</th>
<th>Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operational</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Economic</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Financing</td>
<td>X</td>
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<tr>
<td>Nature</td>
<td>X</td>
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<tr>
<td>Environmental</td>
<td>X</td>
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</tr>
<tr>
<td>Social and political</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Technology</td>
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</tr>
</tbody>
</table>

Under the latest CONPES Guidelines, land acquisition risk has been incorporated within the definition of operational risk, while regulatory risk has not been allocated to a specific party. The guidelines instead recommend a case-by-case basis for allocation of regulatory risk, dictated by the parties’ abilities to manage risk.

As an example of case-by-case risk allocation, the government has set out specific guidelines for 4G projects by means of the CONPES Guidelines 3760 of 2013 (as modified by Guideline 3800 of 2014), which include, inter alia, the following relevant rules:

a. Land acquisition risk: the contracting authority (i.e., the ANI) only assumes a portion of land acquisition risk when its value exceeds 120 per cent of the initial budget destined for land acquisition, and assumes the total value of the risk when it exceeds 200 per cent of the initial estimated budget.

b. Regulatory risk: the contracting authority (the ANI) only assumes regulatory risk when, as a consequence of the regulatory change, the concessionaire profits are affected beyond a deviation parameter as stipulated in the contract.

c. Environmental risk: the contracting authority (the ANI) only assumes a portion of the environmental risk when the value of compensation required by the environmental authority exceeds 120 per cent of the initial budget destined to be environmental compensation, and assumes the total value of the risk when it exceeds 200 per cent of the initial estimated budget.
The CONPES Guidelines also set down two exceptional circumstances whereby a public entity should assume certain environmental risks, and these arise in situations where no environmental licence is required or where such a licence has yet to be obtained prior to the closure of a public procurement process.

In cases of operational risks, the contracting entity may structure mechanisms or issue guarantees to partially cover these risks.

ii Limitation of liability
As a general rule, civil and commercial law are based on the principle that the parties to a transaction are free to agree the terms and conditions of the relevant contract, such as stipulating liability limits. Thus, parties are entitled to stipulate provisions that deviate from the rules established by the Civil Code in that respect; however, this principle is subject to exceptions.

In certain cases, the parties are required to observe rules that are mandatory because they involve public policy considerations. In this context, the Civil Code provides rules that prevent the parties from limiting liability for damages arising from gross negligence or wilful misconduct, or that might allow a party to willingly breach its obligations under a contract. These types of limitations would be invalid and unenforceable in Colombia.

Additionally, a party to a contract shall be excused from performing its duties in force majeure events, which are legally defined as unforeseen circumstances that are beyond a party’s control to avoid or overcome (Article 1 of Law 95 of 1890). Since Law 80 of 1993 does not establish exceptions or particular rules concerning limitation of liability clauses, the aforementioned general rules and exceptions to such clauses also apply to public contracts.

iii Political risks
Foreign investors are fairly well protected from political risk. Although political risk is allocated to the contractor pursuant to the CONPES Guidelines, Article 58 of the Constitution expressly forbids the possibility of expropriation without indemnification.

Specifically, Article 58 of the Constitution protects private property and other rights under civil law, so the Colombian state cannot ignore or violate those rights with subsequent legislation. However, when a law is enacted for reasons of public or social interest, and its application conflicts with the rights of individuals, the private interest must yield to the public or social interest. In such cases, expropriation will be determined by the competent judge and the affected individual indemnified by the state. In certain cases, established by law, the expropriation process may be made through an administrative proceeding, and subject to further judicial control.

Moreover, Colombia is undertaking the process of becoming a member of the Organisation for Economic Co-operation and Development, which supports additional expropriation and foreign investments protection measures. In addition, free trade agreements have been signed with Chile, Canada, South Korea, the European Union and the United States, which include similar protection measures.
SECURITY AND COLLATERAL

The concession agreements under the 4G programme, which will be developed over the next 30 years, require long-term debt, high-equity commitments from sponsors and strong support from the government. In combining several complex projects and diverse participants, the security package for Colombian project financing transactions has started to become more sophisticated. Lenders are requesting the following, inter alia:

- a blanket liens over all the assets of the project company;
- b share pledge agreements;
- c amendments to the existing trust agreement to modify the concession trust to make it a security interest trust covering the cash flows generated by the project;
- d concession rights pledge agreements;
- e construction contract pledge agreements;
- f assignment of a concessionaire’s consideration under the concession agreement to a different trust in which the lenders will be beneficiaries;
- g offshore and onshore accounts control agreements;
- h trust rights pledge agreements;
- i subordinated loan pledge agreements; and
- j material project documents pledge agreements.

The structure of project finance security packages implemented in Colombia before the 4G programme – which involved a share pledge agreement, a commercial establishment pledge agreement and a trust agreement – has now changed to a very complex structure to cover every asset necessary for the ownership, development, construction and operation of the project in the event of default by the borrower.

VI BONDS AND INSURANCE

Decree 1082 of 2015 sets out the performance bonds and insurances required in public procurement. Pursuant to this regulation, during the government procurement process, contractors are required to submit a bid bond to guarantee the seriousness of their proposal. The successful bidder is then required to submit a performance bond to ensure compliance with its contractual obligations. The risks covered by the performance bond are those relating to the breach of the terms of the bid or the awarded contract. In construction contracts this bond will normally include coverage for wages and salaries, for the quality and stability of the work, and for the quality of goods provided.

The bid bond performance guarantees may be one of the following: insurance policy, collateral trust or bank guarantee. In addition, foreign bidders without domicile or branches in Colombia may submit standby letters of credit issued abroad as guarantees. The coverage amounts of the guarantees are determined by law.

In 4G transactions, as part of the security package at the EPC contract level, parties have started to include a completion bond guarantee issued by an insurance company and designed to cover EPC contractor defaults under the construction contract, including specifically:

- a any expenses and cost overruns resulting from a change to the EPC contractor;
- b fines, sanctions and deductions applicable to the concessionaire as a result of an EPC contractor default under the construction contract; and
the capital expenditure variation between the ANI-recognised termination payment had there been no default of the EPC contractor and the actual final termination payment recognised by the ANI.

Therefore, this policy aims to cover the risk that the project will not be completed, and able to operate at the time required and at the budgeted price, because of an EPC contractor default under the construction contract.

In construction contracts, the government will also require a third-party liability insurance to be submitted by the contractor. In this case, the only accepted type of guarantee is an insurance policy.

**VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS**

Based on recommendations by the World Bank and on the UNCITRAL Model Law, and to have a complete and non-fragmented regulation regarding guarantees over movable assets, the Colombian Congress enacted Law 1676 of 2013, the purpose of which is to promote the access to credit through a complete and efficient regulation regarding the legal regime applicable to guarantees over movable assets.

Law 1676 covers three main topics:

- *a* definition of guarantee over movable assets;
- *b* creation of a universal registry of guarantees over movable assets; and
- *c* the efficient and effective enforceability of the guarantees.

Under Law 1676, a security interest over movable goods is created by means of a contract (security agreement) executed between the debtor and the secured creditor. It is important to highlight that the rights granted by the security interest shall only take effect against third parties when the publicity requirements have been fulfilled. The publicity requirement of non-possessory securities is the recording with the public registry of security interests created pursuant to Law 1676 and the publicity requirement of possessory securities is the delivery of possession or control of the encumbered asset to the secured creditor or a third person appointed, unless the parties otherwise agree. Furthermore, the constitution of a mortgage or of a pledge over assets such as vehicles, vessels or shares requires some additional procedures, such as the issuance of public deeds and registration of the security with the competent authorities.

The definition of movable assets is broad and expressly covers goods that will be acquired in the future by the pledgor, inventories over goods that are not fully identified and receivables regardless of whether or not the receivables are represented in credit documents, among other things.

Law 1676 includes a centralised and electronic public registry for all guarantees regarding movable goods in chronological order. The registry is available at a national level and will be updated with all the information regarding guarantees (amendments, extensions, cancellations, enforcements, among others).

Under Law 1676, it is possible to enforce guarantees through an out-of-court (non-judicial) proceeding before any chamber of commerce or public notary duly authorised by the government (subject to certain special rules). Furthermore, Law 1676 provides that parties to a security agreement are free to decide upon the foreclosure procedure and rules.
This would significantly reduce the time and costs of enforcement. Before the enactment of Law 1676, the foreclosure of movable assets under a pledge agreement had to be implemented through a judicial proceeding.

However, collateral over real estate is typically facilitated by a mortgage. Mortgages are perfected by (1) the mortgagor and the mortgagee executing a public deed before a notary public (or a Colombian consular officer overseas), which must include information that identifies the mortgagor, the mortgagee, the secured obligations and the real estate that is the subject of the mortgage, and (2) recording this public deed with the Registry of Public Instruments at the place where the real estate is located. The mortgage is not valid or enforceable unless and until it has been properly registered. A certificate issued by the Registrar of Public Instruments evidences the creation and validity of the mortgage.

Even though Law 1676 was enacted to regulate security interests over movable assets, it can be construed that the foreclosure regime under Law 1676 is also applicable to mortgages of real estate. As Article 2448 of the Colombian Civil Code provides: ‘A mortgage creditor, to pay itself with the mortgaged assets, shall have the same rights as those of a pledge creditor under a pledge.’ However, as this issue remains unclear, if this is the valid interpretation the foreclosure procedure of real estate assets would not strictly need to be conducted under a court proceeding. This would significantly reduce the time and costs of enforcement.

Insolvency proceedings of business entities in Colombia are regulated by Law 1116 of 2006. The main insolvency proceedings regulated by Law 1116 are business reorganisations and judicial liquidations.

The purpose of the business reorganisation proceeding is to reach an agreement between the internal creditors (shareholders) and the external creditors, and to promote the viability of the business through the restructuring of the assets and liabilities of the debtor. Generally, during the reorganisation proceedings and the performance of the reorganisation agreement, the debtor will continue to operate the business and, generally, ongoing contracts cannot be terminated because of the commencement of this type of proceeding.

On the other hand, the judicial liquidation seeks the termination of the existence of the company and the business by selling or adjudicating the debtor’s assets to the creditors. Creditors must be paid promptly with the proceeds from the sale and any remaining assets will be adjudicated pursuant to an adjudication agreement entered into by the creditors or by judicial ruling if the creditors are unable to reach an agreement. Once the judicial liquidation process has commenced, the debtor is authorised to engage only in activities relating to the liquidation of the business and those relating to the maintenance of the assets. The transfer of any asset of the debtor to satisfy an obligation caused prior to the commencement of the judicial liquidation proceedings will be ineffective.

Payments under a business reorganisation or in a judicial liquidation process must be made in the priority order set out under the law.

Law 1676 modified substantially the rules on enforcement of security interests within insolvency proceedings. In fact, Law 1676 provides that, under certain circumstances, the secured creditors may enforce the security interests even though the debtor is subject to a reorganisation proceeding, unless the asset is required for the operation of the debtor. Note that the operational assets must be identified by the debtor in the reorganisation request. However, if the secured creditor does not agree with the classification of the asset as operational, it may file an objection before the Superintendency of Corporations, which will rule on the nature of the asset and, therefore, on the possibility of the security interests being enforced by the creditor.
Furthermore, in a judicial liquidation proceeding, a secured creditor is allowed to enforce secured interests over those assets of the debtor that hold a duly registered secured interest as said assets are expressly excluded from the liquidation. Prior to Law 1676, under a judicial liquidation process those assets were deemed part of the assets subject to liquidation and distribution between the creditors depending on the priority order set forth by insolvency law.

Even though Law 1676 was enacted to regulate security interests over movable assets, in the context of an insolvency, Law 1676 expressly provides that the aforementioned rules are applicable to real estate assets.

VIII SOCIO-ENVIRONMENTAL ISSUES

The 1991 Constitution is said to be a green constitution because of the degree and importance of reference made to environmental principles and the rights given to nationals seeking protection for the environment from the government and the judiciary. The Constitution expressly states that a healthy environment is considered a fundamental right; citizens may seek protection of this right by means of class actions and civil actions, among others. These constitutional principles gave rise to a proliferation of environmental regulations.

Law 99 of 1993 introduced the most significant changes to the environmental laws, the most important being the introduction of the concept of environmental licences (now regulated by Decree 1076 of 2015). In this regard, Law 1333 of 2009 tightened the liability regime, initially established by Law 99 of 1993, for violations or other actions harmful to the environment. Thus, the use of renewable natural resources or the performance of any activity that affects the environment in Colombia is subject to strict controls.

As a general rule, an environmental licence is required to initiate any project, operation or activity that may entail the exploitation of natural resources or may have an environmental impact. Activities that typically require an environmental licence include the construction of ports, roads, railways, airports and hydroelectric facilities. The activity of the holder of an environmental licence is limited to the precise terms and conditions of the licence.

The environmental authorities may impose sanctions, penalties or fines for non-compliance with the conditions set out in the environmental licence or any other violation of environmental regulations, permits or authorisations, including the commencement of activities without the relevant environmental licence, permit or authorisation, when required. Furthermore, certain violations of environmental law are considered criminal offences, such as illicit holding or handling of hazardous substances, illicit use of biological natural resources, illicit exploration or exploitation of mines.

In addition to the foregoing, pursuant to Law 70 of 1993, for an environmental licence to be granted to a project that may affect indigenous or Afro-Colombian communities, the execution of prior consultation agreements with the leaders of these communities is required with respect to the protection of their rights and the compensation by the project sponsor of any negative effects that the project may have.

Consequently, environmental and social issues are among the most important aspects to be considered by potential infrastructure investors in Colombia. In the past few years, several large infrastructure projects have been affected by such issues, and when managed inadequately, these can lead to serious cost and deadline overruns.
IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i Public procurement

Public procurement is seen as an important tool for the achievement of state goals in the public sector, subject to certain principles and specific regulated procedures. Thus, regulation of public procurement is structured according to the principles of state and the objectives set out in the Constitution, such as the principles of free market and free competition, transparency and ensuring the nation's economic and social welfare.

Public procurement is mainly governed by the Public Procurement Statute (PPS), comprising Law 80 of 1993, Law 1150 of 2007 and numerous regulatory decrees. The PPS is applicable to almost all public agencies and procurement procedures, with the exception of certain sectors that, according to their specific needs and characteristics, are regulated independently, as is the case for residential public utilities, information and communications technologies, the domestic public loan operations of territorial entities and their regional bodies, renewable and non-renewable natural resources exploration and exploitation contracts, including mining concession contracts, and sales of state-owned property.

The PPS establishes a list of main principles to be followed by public entities in procedures for the award of public procurement contracts. In general, these principles are transparency, economy, planning, responsibility, preservation of the financial equilibrium of the contract, objective selection of bidders and respect for legal due process. In addition, the PPS establishes a reciprocity principle, allowing foreign bidders to participate in public procurement procedures to execute contracts with state entities in Colombia under the same conditions that apply to a Colombian bidder participating in procurement procedures in the foreign bidder's country of origin. The most important principles include:

a objective selection, which requires that the contracting authority selects the most favourable offer without considering any subjective factors;
b the reciprocity principle, which entails that foreign bidders may participate in selection processes to enter into contracts with state entities in Colombia under the same conditions as Colombian bidders; and
c the right to due process if any government agency wishes to use its powers to impose fines or declare a breach of contract.

In accordance with these public procurement principles, the PPS has established several procedures for the selection of bidders, which are classified depending on the purpose of the contract, its amount or the particular circumstances that motivate the contractual need of the relevant public entity. These procedures are public tender, abbreviated selection, merit-based selection, minimum amount selection and direct selection.

As a general rule, public entities are obliged to select a contractor through a public tender procedure, with the exception of those cases specifically determined by law whereby they can follow the abbreviated selection, the merit-based selection, the minimum amount selection or the direct selection procedures. In general terms, one of the main differences between the public tender and the other special procurement procedures is that it takes longer to award a contract by public tender because of the legal stages incorporated in the PPS.

The public tender procedure is the most complete and is the basis for the other public procurement procedures. In most of these, bidders are required to submit guarantees for the purposes of risk mitigation.
To address the country’s infrastructure shortcomings, and following a fast-track legislative procedure, the President of Colombia enacted Law 1508 of 2012 (the PPP Law) on 10 January 2012, incentivising the development of infrastructure projects in Colombia with a view to attracting new foreign companies to invest in this field. The PPP Law creates new opportunities to build and operate public infrastructure projects, provides additional comfort to lenders and substantially improves the country’s previous private finance initiative regime.

The main objective of the PPP Law is to use private capital for the provision of public goods and related services. Under the previously applicable legal framework, public-private initiatives were strictly limited to certain public works projects, and projects relating to public housing, courthouses, schools and prisons did not fall within their scope. The new PPP Law significantly broadens the types of permitted projects to include a wide variety of construction and infrastructure projects and their operation.

In addition, under the new regime, payments to contractors are made only once the project has reached the stage of commercial operation, and payment depends on meeting certain service levels and quality standards. In essence, contractors will not be paid for work performed until the project is completed in accordance with the original project plan.

Generally, the PPP law and Decree 1082 of 2015 provide for a maximum term of 30 years for PPP projects. However, subject to a favourable ruling by CONPES, this maximum term may be extended under special circumstances.

The PPP Law also includes elements typical in traditional project financing arrangements. For example, the Law requires that the project’s resources must be administered through a trust fund, to which all assets and liabilities of the project must be transferred. This requirement provides greater assurances to lenders with respect to outstanding payments and enforceability of any security interests. Likewise, the PPP Law expressly confers on project lenders step-in rights in the event of a default under the applicable loan agreement. Finally, the PPP Law requires that any PPP contract must include an early termination formula, which serves as additional security for the lenders.

Another important change introduced by the PPP Law is the enactment of a special procedure for contractor proposals for new projects and the award process for such private-initiative projects; this has created incentives that did not exist under the previous regime.

The PPP Law establishes two different bidding procedures, depending on whether the private-initiative project requires any public resources. Once accepted by the contracting authority, projects that do not require any public resources will be publicised for one to six months, during which time interested parties may express their intention to bid for the project. If there are no other interested parties, the contracting authority will award the contract to the original proponent, subject to certain minimum participation requirements being met. If other parties express an interest in bidding for the project, they must post the required bonds, at which point the government will open a simplified tendering process in which the original proponent of the project has the right to match a better offer submitted by a third party.

However, private-initiative projects requiring government funding (up to a maximum of 20 per cent of the project costs for road projects and 30 per cent for other types of projects, as modified by Article 17 of the current National Development Plan) will be awarded through an ordinary tender process in which the original proponent of the project will receive additional bonus points (ranging from 3 per cent to 10 per cent of the points already
awarded) for its submitted bid. By way of background, government agencies generally assess bids received and assign points to each bidder on the basis that the bidder that receives the highest scores will generally be selected for the performance of the contract.

Regardless of whether a private-initiative project requires government funding, it must comply with certain technical, socio-environmental, financial and legal requirements. The proposing contractor for any private-initiative project must meet any expenses incurred in connection with the structuring process. However, if ultimately the proposing contractor does not win the project bid, the winning contractor must reimburse the expenses incurred by the proposing contractor in the structuring of the project.

In addition, Law 1882 of 2018 provides the option to pay the concessionaire with real estate rights over properties that are not necessary in the provision of the utility associated with the infrastructure. Furthermore, Law 1882 broadens the types of projects in which it is possible to set functional units, including airports, water treatment facilities, tunnels and railways, hence facilitating the remuneration of the work performed therein. Regarding territorial entities, Law 1882 repeals the restriction that prevented districts and capital cities from executing PPP agreements in the respective local government’s last year of administration. This provision will allow local administrations to move forward with several projects that are currently being structured.

Following the first wave of PPPs in road projects, which are still being implemented, all these new regulations are intended to incentivise the structuring of PPP projects in social infrastructure and a considerable number of these kinds of projects can be expected in future.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Foreign investment is permitted in all sectors of the Colombian economy except for activities relating to defence and national security, and the processing, disposition and disposal of toxic, hazardous or radioactive waste not originated in the country. Generally, foreign investments do not require prior authorisation. However, some types of investment in the insurance and finance sectors may require prior authorisation by the relevant authority (e.g., the Financial Superintendence of Colombia). Additionally, certain percentage limits may apply to foreign participation in some sectors of the economy, such as telecommunications.

All foreign investment must be registered with the Colombian Central Bank. Only foreign investments duly registered with the Central Bank confer on foreign investors the right to:

a) transfer abroad dividends resulting from the investment;

b) reinvest dividends and income derived from the sale or liquidation of the investment; and

c) transfer abroad any income derived from:

• the sale of the investment within the country;

• the liquidation (winding up) of the company or portfolio; or

• the reduction of the company’s capital.

Additionally, however, when the activities of the foreign investors are deemed to be a permanent business, the foreign investor must incorporate a Colombian branch or subsidiary. Although Article 474 of the Code of Commerce lists some examples of activities considered to be permanent, such as the granting of a concession by the government, analysis of whether an activity undertaken by a foreign company may be deemed permanent is made in each case.
Removal of profits and investment

Colombian law allows the Central Bank to intervene in the foreign exchange market if the value of the Colombian peso is subject to significant volatility. The Central Bank may also limit the repatriation of dividends or investments temporarily whenever the international reserves fall below an amount equal to three months of imports. Generally, Colombia has some level of regulated foreign exchange liberty. This means that Colombian investors may freely transfer foreign currency if they comply with all applicable regulations and reporting requirements.

The Central Bank establishes the main regulations and procedures in connection with transactions that must be completed through the foreign exchange market, while the Superintendency of Corporations and the Tax Office are in charge of control and monitoring.

As a general rule, remittances can be carried out through the exchange market without the Central Bank’s prior authorisation. All transactions and remittances carried out through the foreign exchange market are subject to specific registration with the Central Bank and therefore to the filing of reports and foreign exchange declarations specifically regulated by the Central Bank.

The foreign exchange regime makes a distinction between the foreign exchange market and the free market.

The foreign exchange market is strictly regulated and comprises foreign exchange transactions that must be completed through authorised foreign exchange intermediaries (i.e., local banks or local financial entities) and compensation accounts (offshore bank accounts held by Colombian residents and registered with the Central Bank). Foreign exchange transactions that must be completed through the foreign exchange market include import and export of goods, foreign debt operations and investment of foreign capital in Colombia.

The free market comprises foreign exchange transactions that may be completed voluntarily through the foreign exchange market, which is the case for payments for services and transfers of foreign currency for donations, inter alia.

XI DISPUTE RESOLUTION

i Special jurisdiction

It is common for the parties involved in project finance transactions or construction contracts, including those entered into with the government, to submit their disputes to arbitration. Arbitration is generally more efficient and faster than the judicial system in Colombia. The duration of the arbitration is subject to a maximum term agreed by the parties in the corresponding arbitration clause. If the parties have not established a maximum duration for the arbitration, it can last no longer than six months from completion of the first procedural hearing. This term may be extended once or several times, as long as the total of the extensions does not exceed six months.

Since the issuance of Law 1564 of 2012 (the General Procedure Code), in theory, regular proceedings before local courts must not exceed one year for a sentence to be passed in the first instance and six months in the second instance. In practice, it has been known for judicial proceedings in Colombia to take three to five years.

Law 1563 of 2012 (dealing with domestic and international arbitration) allows parties to agree to a valid international arbitration based on foreign law, even where the contract itself will be carried out in Colombia. Arbitration is considered to be international when the following conditions are met:
the parties to an arbitration agreement had their domiciles in different states at the time
the agreement was concluded;
the place where a substantial part of the contractual obligations are to be performed,
or the place to which the subject matter of the dispute is primarily related, is located
outside the domiciles of the parties; and
the dispute under arbitration could affect the interests of international trade.

In addition, under Law 1563 of 2012, no state or government-owned company can invoke
its own right to withdrawal from an arbitration agreement.

ii Exequatur procedures

Enforcement of foreign judgments in Colombia must take place via exequatur procedures. In
addition, despite Colombia being a party to international treaties such as the 1958 Convention
on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),
foreign arbitration awards must comply with Colombian validation proceedings.

Validation proceedings must be commenced before the Supreme Court of Justice and
will be granted if the foreign judgment or award meets the following requirements:
the judgment does not relate to in rem rights vested in assets located in Colombia at the
time the proceedings were commenced;
it does not contravene public policy;
it is a final award not subject to further challenges;
it does not refer to any matter over which Colombian courts have exclusive jurisdiction;
it does not refer to a matter under pending litigation in Colombia or already ruled
upon in Colombia;
if the sentence has been handed down in contentious proceedings, the court must
provide a proper citation and the defendant will have the right to appeal, in accordance
with the law of the country of origin; and
it was rendered without fraud and complying with due process.

During exequatur procedures the counterparties to the arbitration award may also participate,
object, request and gather evidence, and file the corresponding motions. Once the validation
is granted, if the ruling or award is not fulfilled voluntarily by the losing party, the interested
party may commence collection proceedings before a lower court to enforce the foreign ruling
or award. The only defence available to the defendant is proving payment or compliance with
the ruling.

XII OUTLOOK AND CONCLUSIONS

Colombia’s ambitious infrastructure programme has attracted international attention. The
steady improvements to the legal framework foster an attractive environment for national
and international investors who are now working with national and local authorities to
ensure the successful completion of the projects. In this context, three key pieces of legislation
were enacted by Congress: a bill that aimed to provide a specific legal framework for PPPs
(approved in Law 1508 of 2012 and Decree 1082 of 2015), a regulation that aimed to
resolve the main bottlenecks that had hindered previous infrastructure projects (approved
in Law 1682 of 2013) and a regulation pertaining to security interests and enforcement of
guarantees (approved in Law 1676 of 2013). The country is now overcoming the difficulties
associated with various corruption scandals, a task that has been aided by the enactment of Law 1882 of 2018. National government has a key role in the promotion of new investments by projecting a country with a clear set of rules and procedures that respect investors’ rights and the rule of law.

In a similar vein, there will be projects in the coming years that will test the government’s aims, the principal of which is to close the infrastructure gap that prevents the country from achieving higher growth rates in gross domestic product. However, current projects nearing completion, such as the Túnel de Oriente and the Túnel de la Linea (the third- and second-longest tunnels in the country after the Túnel del Toyo), the New Pumarejo Bridge over the Magdalena river connecting Barranquilla, Bogotá’s first metro line and the 4G corridors that have already achieved more than 50 per cent completion, are positive indicators of the successful path the country has started to follow.
Chapter 9

FRANCE

Paul Lignières, Darko Adamovic, Samuel Bordeleau and Marianna Frison-Roche

I INTRODUCTION

The French President has created a more favourable climate for project investments by introducing more flexibility into employment law and reinforcing tax stability. Until the 1990s, the market for project finance was centred on concessions, which have had a key role in the development of infrastructure in France. Because of legal constraints, project finance schemes were usually not available in sectors with no, or not significant, payment coming from end users (e.g., health, education, law and order). This changed gradually until a general framework was adopted for partnership agreements in 2004. Multiple waves of projects were then successfully launched, starting with hospitals and prisons, railway infrastructure, stadiums and universities.

Project finance had a key role in the French stimulus plan for the economy during the 2008 financial crisis. Major railway projects were launched to keep the market active, most notably the SEA high-speed link, one of the largest project finance transactions in Europe.

Project finance has also been one of the major tools of the French energy transition, with 8.5 gigawatts of solar projects and 15.1 gigawatts of onshore wind projects having reached commercial operation.

France was the largest market for public-private partnerships (PPPs) in 2011. It is now a mature market, with practices, legal structures and precedents that foreign investors are often familiar with.

Because of the leading position of French construction contractors, most notably Vinci, Bouygues and Eiffage, it has always been difficult for foreign players to penetrate the French construction market.

The financing market, on the other hand, has always seen foreign investors and banks as having a major role in project finance, alongside the main French banks (Société Générale, Natixis, CA-CIB and BNPP) and the key public sector participants (the Caisse des Dépôts et Consignations (CDC) and the European Investment Bank (EIB)).

In 2017, the Cour des comptes² harshly criticised the costs of PPP projects implemented by the French Ministry of Justice. Then in early 2018, the European Court of Auditors pointed out that PPPs ‘cannot be regarded as an economically viable option for delivering public infrastructure’ as the 12 audited EU-funded PPPs, including in France, ‘suffered from widespread shortcomings and limited benefits, resulting in €1.5 billion of inefficient and ineffective spending’. The European Court of Auditors underlined that value for money and

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2 The French equivalent of the British National Audit Office.
transparency were widely undermined in particular by unclear policy and strategy, inadequate analysis, off-balance-sheet recording of PPPs and unbalanced risk-sharing arrangements. Most strikingly, its first recommendation is for Member States not to promote more intensive and widespread use of PPPs until the identified issues have been addressed.

The role of foreign players in the French market should increase in the coming years despite the somewhat protectionist image attached to France and the anticipated decline of PPPs as a project finance tool, with key opportunities to enter the French market arising from the development of the energy and brownfield markets (see Section II).

The energy market has continued to grow during the past decade. The renewable energy market is particularly booming owing to successive government policies, which have made a priority of renewables and which aim to phase out France’s coal-fired power plants by 2030 and reduce the size of nuclear energy in the overall generation capacity.

II THE YEAR IN REVIEW

The greenfield infrastructure market has reduced in size significantly since 2013 because of the stimulus plan for the economy coming to an end, the lack of need for new infrastructure after the completion of the previous waves of projects, and the new government not being very enthusiastic about PPPs. However, PPPs as private finance initiatives in the United Kingdom are more harshly criticised as an inefficient model owing to their lack of flexibility and the significant costs they imply for contracting authorities for the whole duration of a PPP contract, as compared with more traditional project finance contractual tools, such as concessions.

Project bond financings have become more popular, even for smaller ticket projects, since competition in the debt market is increasing and they can offer finance for longer periods than conventional debt. For instance, the EIB has implemented its Project Bond Credit Enhancement instrument in the context of a partly paid project bond issuance subscribed by Allianz funds for the purpose of financing a 50-year concession for the operation, extension and maintenance of the seaports of Calais and Boulogne-sur-mer.

During 2018, the Liséa high-speed railway line between Paris and Bordeaux was refinanced and the CDG Express project was closed.

Regarding the CDG Express project, the state and the shareholders of the project company (the CDC, Aéroports de Paris (ADP) and SNCF Réseau) have agreed on the financing. In addition, the state has selected the Keolis/RATP consortium as operator. Despite the scope of the work to be done and the impact on suburban transport, the state still hopes that the project will be commissioned in time for the 2024 Olympic Games. In April 2019, the French Competition Authority decided to authorise, subject to conditions, the creation by RATP and Keolis of a joint venture to operate CDG Express.

Following the privatisation of Toulouse, Nice and Lyon airports, the state is expected to privatise ADP (which operates, inter alia, Charles de Gaulle, Orly and Le Bourget airports) in 2019–2020.

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4 This unpopularity has already resulted in the French Minister of Justice announcing that 7,000 prison cells and new courts of justice would not be built under PPP contracts.
The secondary market for PPP projects also continued to strengthen further in 2018, with sponsors considering the sale of portfolios of assets that had entered their operational phase. The development of the brownfield market should remain an important trend in the coming years.

The greenfield market for energy projects presents major future opportunities for project finance. Indeed, 2,494 megawatts of new renewable projects reached grid connection in 2018 – 1,559 megawatts from onshore wind and 873 megawatts from solar plants. Market participants expect to see volumes at least as high in 2019 for onshore wind and solar plants, on course to meet the government’s objective of 74 gigawatts of grid-connected renewable capacity by the end of 2023 and keeping in sight the 2028 target of between 102 and 113 gigawatts. The first French offshore wind farms are expected to materialise in the short to medium term, including three projects being carried out as a joint venture between EDF EN and Enbridge, of which at least one is expected to reach FID and financial close in 2019. Also, with regard to the offshore wind market, the government launched the third invitation to tender (ITT) for a 500-megawatt project off the coast of Dunkirk, the results of which are expected in June 2019. The brownfield energy market also continued to generate a sustained deal flow, with several sponsors seeking to benefit from the prevailing low interest rates to repackage their assets in larger portfolios and refinance them. There were also a number of exits, with several first-generation renewable funds reaching the divestment phase and going to the market to sell their operational assets. The consolidation trend observed recently also seems to be picking up speed, with several smaller developers having been acquired by larger industry players.

In a nutshell, the French infrastructure market is now mature but further major projects are being launched and the brownfield market is well developed. France should remain one of the most attractive European markets in the renewables sector in the coming years. Going forward, many opportunities should materialise for foreign investors to enter the market, and in particular in relation to greenfield energy projects, either shovel-ready or in the late development stage, and to airport privatisations and investments in other brownfield infrastructure projects.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

PPP projects on the French market are typically developed by a special purpose vehicle (SPV). Historically, contractors viewed the PPP market as an extension of the construction industry. As the market has matured, sponsors have become more diverse and now include the concession division of contractors and specialist financial investors such as Ardian, CDC Infrastructure, Macquarie, Marguerite, Mirova and Meridiam.

PPP projects are structured as build-operate-transfer schemes. Renewable energy projects are privately owned.

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ii Documentation
In infrastructure projects, the SPV typically enters into a PPP contract with the public sector, and into engineering-procurement-construction (EPC), operation and maintenance (O&M) and financing contracts. In onshore renewable energy projects, the SPV usually enters into an offtake contract with a private aggregator and a feed-in premium contract with EDF, and into EPC (often on an unwrapped basis), O&M, grid connection and access arrangements as well as financing contracts. Offshore wind projects enter into a power purchase agreement with EDF, a customised grid connection agreement with RTE7 and develop their own suite of unwrapped construction and O&M arrangements with various contractors. Depending on the complexity of the project, other agreements can be required, such as interface agreements to deal with interfaces between construction and maintenance, and direct agreements between the lenders, the contractors or the public sector.

iii Delivery methods and standard forms
PPP contracts are not standardised, although concessions granted at state level tend to be very similar. MAPPP, the French PPP task force, has suggested standard terms, but their use is not mandatory.

The International Federation of Consulting Engineers (FIDIC) documents are well known by French players and are used for inspiration, although the major French construction contractors usually use their own standard documents as a basis for discussions.

For renewable energy projects, grid connection and access documents to be entered into with the grid operator are standardised for each technology, as is the feed-in premium contract (or power purchase agreement for offshore wind projects) entered into with EDF. Aggregation contracts for onshore wind and solar projects, although slowly converging towards standardised risk allocations, are still evolving as their implementation is recent and the market has not yet matured. Construction and O&M contracts will usually follow the standard documents proposed by contractors.

IV RISK ALLOCATION AND MANAGEMENT
i Management of risks
The management of risks is in line with international project finance standards and based on widely accepted principles, such as the transparency and back-to-back principles that govern the relationships between the SPV and its subcontractors.

On the PPP market, the risk of a third-party challenge required specific treatment because of case law being unclear on certain issues, most notably the treatment of swap breakage costs in the case of judicial cancellation of a PPP contract. This was clarified by the Ordinance relating to public procurement,8 which provides that, in the event of the early termination of a PPP contract, the costs incurred by the sponsor, relating to the financing of the PPP contract, including swap breakage costs, can be reimbursed if they have been useful.

7 France’s transmission system operator.
8 Ordinance No. 2015-899, dated 23 July 2015, relating to public procurements as ratified and amended by Law No. 2016-1691 (Sapin II), dated 9 December 2016, relating to transparency, the fight against corruption and modernisation of the economy, which created, in its Article 39, a new Article 89 of Ordinance No. 2015-899.
for the public entity counterparty to the PPP contract. Specific arrangements, known as tripartite agreements, have often been made available by the public sector to cover such costs should a PPP be held invalid as a result of a challenge.

ii Limitation of liability

Limitation of liability is accepted under French law, except in a few cases, notably gross misconduct. However, public sector clients cannot accept a complete exoneration of liability.

In PPP projects, the liability cap of the construction contractor is usually between 20 and 40 per cent of the contract price, with specific risks excluded from the cap (e.g., penalties payable by the SPV to the public sector and gross negligence). The liability cap of the O&M contractor is generally equal to one or two years of payments under the O&M. While PPP, EPC and O&M contracts regularly include liquidated damages provisions, a court can revisit them if it considers them to be unreasonably high or low.

As a general principle, contractors cannot be held liable for the consequences of force majeure incidents.

iii Political risks

Although projects in France are not totally immune from political risks, as demonstrated by the payment of compensation in the Ecotaxe project by the government and the renegotiation of motorway concession contracts, political risk is not seen as a major cause for concern given the protective legal and institutional framework.

PPP contracts can be unilaterally modified or terminated on general interest grounds, but the contractor is entitled to full indemnification of the damage resulting from such a decision. PPP contracts generally provide for protection against changes in law that would specifically affect the project. Protection is also offered under case law under the theory known as fait du prince, which entitles contractors to indemnification in the event of unilateral measures affecting the performance of a contract. Another theory, imprévision, offers protection against unforeseeable situations that have a significant effect on projects, which can cover civil disturbances and other political risks to some extent.

PPP contracts do not normally include any termination provisions in favour of the SPV. However, the SPV will be entitled to seek termination of the PPP contract and recover compensation for its losses (including loss of profits) in the event of material breach by the public-sector authority.

The rights of foreign investors, including property rights, are protected under the Constitution in the same way as those of French citizens and corporate bodies. Expropriation is possible, but only to the extent that it serves a general interest purpose and that appropriate indemnification is paid prior to expropriation. Nationalisations are possible, provided that indemnification is paid. There have been no examples since the early 1980s, when the socialist government nationalised major French corporates and French banks, which were then privatised a few years later. There is a recent example of abandonment of a project

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9 A multimillion-euro PPP contract with a consortium led by Atlantic, under which the consortium was to collect an ‘ecotax’; the government cancelled the contract following violent riots against this new tax.

10 The doctrine of unforeseen circumstances, which can protect private parties from an upheaval caused by unforeseen circumstances.
with the airport concession of Notre-Dame-des-Landes awarded to Vinci. The government finally decided to abandon this questionable project, following years of land occupation by opponents and violent riots, and to compensate the concessionaire.

Because of this protective legal framework, the intervention of the Multilateral Investment Guarantee Agency or other similar ECA cover by World Bank Group is not considered necessary within the French market.

V SECURITY AND COLLATERAL

Finance parties involved in the financing of projects in France are secured by way of a standard security package, which mainly includes an assignment by way of security under Article L. 313-23 et seq. of the French Monetary and Financial Code (the Dailly assignment) over certain receivables held by an SPV in the context of a particular project.

The package typically includes pledge agreements in respect of the shares of the SPV, the bank accounts and other movable assets and direct agreements. There is no equivalent in France to the floating charge found under English law, although specific security can be put in place for specific classes of assets.

In the context of the financing of greenfield renewable energy projects, the finance parties often also benefit from a mortgage on the real estate assets of the project, albeit securing a limited value mainly given the costs associated with the constitution of this type of security in France, which are calculated based on the amount of the debt secured by the mortgage. Mortgages are also sometimes seen in brownfield renewable energy projects.

For projects on the French market, the main security remains the Dailly assignment, through which the core receivables of the project11 are assigned in favour of the lenders. Although such an assignment may only benefit lenders (as opposed to hedging banks, whose interest is equally protected through specific contractual and security arrangements), it is usually considered as a strong, bankruptcy remote instrument as it grants to the finance parties full title over the assigned receivables. On PPP projects, lenders may also benefit to some extent from an ‘accepted’ Dailly assignment, whereby, after completion of the construction phase, the public authority is statutorily prevented from raising any defence on the grounds of the PPP agreement against the lenders benefiting from the accepted Dailly assignment. This makes the underlying loan immune from the risks of the project and results in a structure comparable to a loan extended directly to the public authority.

Standard step-in rights are usually available on projects, although the consent of the public sector will be required before substituting a new entity to the initial project company.

VI BONDS AND INSURANCE

i Bonds

Standard bonds for projects in France are performance bonds and parent company guarantees. Bid bonds are not standard in the context of French PPPs. However, for particularly large projects (such as the €7.8 billion SEA high-speed rail link), the bidding consortium

11 Such as proceeds of the termination compensation that may be due by a public authority under public-private partnership agreements, electricity offtake receivables or proceeds of the termination compensation that may be due by engineering-procurement-construction or operation and maintenance contractors under their respective contracts with the special purpose vehicle.
is, in some cases, requested to provide a bid bond to ensure that it will reach financial close within the required period. However, bid bonds will have to be issued in favour of the state in the context of renewable energy projects awarded through competitive bidding processes.

The EPC contractor usually provides the SPV with a performance bond, to secure performance of its obligations under the EPC contract. These bonds are usually in the form of first demand bank guarantees issued by financial institutions with a specified credit rating.

Defects liability risks are generally covered through contractual mechanisms and parent company guarantees. However, for important projects, construction contracts may provide for a warranty bond to be issued by a financial institution on behalf of the EPC contractor to cover the defects liability period.

Parent company guarantees are generally required in the form of a suretyship (a specific form of performance undertaking) and issued to secure the contractual obligations of both EPC and O&M contractors.

In addition, French law provides that the EPC contractor guarantees civil works for 10 years (known as a decennial guarantee) from the completion date of the works.

ii Insurance

Insurance cover for the project is divided between the SPV, the EPC and the O&M contractors. Standard insurance policies include construction all-risk, delay in start-up, business interruption and third-party liability risk. With respect to the insurance policies subscribed by the project company, the finance parties usually request to be included as co-insured or loss payee.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Security interests can generally be enforced when the secured claim is due by, for example, contractual foreclosure of title, sale of pledged assets at public auction or petition to court for asset appropriation.

Insolvency proceedings may limit the possibility of enforcement. Ahead of any cash-flow insolvency situation, French companies may seek protection from their creditors through a safeguard procedure whenever they are not able to overcome difficulties. Once cash-flow insolvent, only reorganisation or liquidation proceedings are available, the latter when the rescue of the debtor is manifestly impossible.

During these proceedings, and subject to certain exceptions, enforcement of security interests and actions for payment of pre-petition debts are frozen. This automatic stay applies during the 'observation' period, which may last up to 18 months. If a plan to continue the business is approved by the court, the secured creditor may still not be able to enforce the security or exercise its acceleration rights to the extent that the plan is complied with.

Certain security interests, such as the Dailly assignment of receivables, are not affected by the above-mentioned pre-insolvency and insolvency proceedings.

French public law entities are immune from bankruptcy proceedings and from private law enforcement measures. However, this does not mean that judgments against French public entities are unenforceable. Under a law of 16 July 1980, when a final judgment has been made against a public entity ordering the payment of a sum of money, the payment must be ordered within two months, otherwise, the representative of the state or the supervising authority for the entity in question must make the order.
If there are insufficient funds available to the public entity to meet the payment, the supervising authority must issue an injunction against the entity ordering that the necessary resources be created or made available (e.g., raise new taxes). If the public entity does not comply with the injunction, the supervising authority can impose it on the public entity or raise the necessary resources. Should the supervising authority fail to act as provided in the law, an action could be brought against the state for breach of its duties. Such an action could potentially result in the state being ordered to pay damages to the creditor for breach of public duties.

Ten years after its introduction into the French Civil Code, the regime of the security agent has been substantially reformed. The new provisions came into effect on 1 October 2017 and offer a legally straightforward and simplified system as competitive as the one governed by English law under the trust scheme.

The French legal framework for bond issues has also been modernised to foster the development of this debt instrument on the French market.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

As is generally the case throughout Europe, the main permit to be obtained is usually a building permit. Large projects often require a public inquiry. On major infrastructure projects or on renewable projects, specific environmental permits (under the Water Law or the Regulation on Classified Installations) may be required.

ii Compliance

The Sapin II Law introduced new compliance obligations into French law to prevent corruption. Companies with at least 50 employees are obliged to set up warning procedures for processing alerts raised by whistle-blowers, particularly in relation to violations of environmental regulations or risk of damage to the environment. Larger companies with at least 500 employees and a turnover of €100 million have to implement various compliance measures against corruption, including an audit of the risks, a code of conduct and training programmes. Company directors are personally liable in respect of these obligations and criminal penalties can be imposed.

In addition, Law No. 2017-399, on the corporate duty of care applicable to major French entities having at least 5,000 employees in France or 10,000 employees in France and abroad, requires that a vigilance plan be set up concerning corporate social responsibility.

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12 By Ordinance No. 2017-748 relating to the security agent.
14 The reform simplifies the legal framework, cleans up the provisions of the French Commercial Code relating to the ‘masse’ and introduces to the French Monetary and Financial Code the possibility for the issuer and the holders of bonds to organise their relationship on a purely contractual basis.
15 Or part of a French group falling within these thresholds.
16 Law No. 2017-399, dated 27 March 2017, on the corporate duty of care of parent companies and controlling companies.
iii  **Equator Principles**

The documentation for French projects does not refer to the Equator Principles, given that French environmental law is considered to require at least equivalent standards.

iv  **Responsibility of financial institutions**

Lenders to an SPV have very few obligations under the finance documentation other than to make the debt available. The only real exception is on the exercise of step-in rights under a direct agreement. Another exception is the requirement on lenders to disclose the global effective interest rate being charged to the SPV under the finance documents. Failure to do so may lead to an inability to recover the difference between the statutory interest rate (which is very low) and the margins included in the loan.

IX  **PPP AND OTHER PUBLIC PROCUREMENT METHODS**

i  **Transposition of EU directives applicable to public procurement and concessions**

Following the adoption by the European Union of modernised public procurement and concession rules on 11 February 2014, transposition work resulted in a simplification of the procurement rules and, in particular, of rules applicable to PPP contracts and concessions.

Two main sets of rules were enacted: the Ordinance relating to public procurement and its implementing Decree transposed the European directive on public procurement and reunite all rules applicable to procurement contracts; and the Ordinance relating to concession contracts and its implementing Decree transposed the European directive on the award of concession contracts and clarified the existing legal framework (replacing most notably a law dated 1993 known as the Sapin Law). This legislation was compiled in the Code of Public Procurement, which entered into force on 1 April 2019.

As a result of these new rules, multiple tools allowing the occupation of the public domain, formerly also used in PPP transactions in various sectors to satisfy the needs for the work, furniture and services of public entities, have been confined to their original function, namely the occupation of the public domain.

As from now, partnership procurement, with concessions, shall be the sole available tool for PPP transactions.

ii  **Partnership procurement and concessions**

The rules in relation to PPPs are now included in public procurement law by the Code of Public Procurement, which replaces the partnership agreement with the partnership procurement as a subcategory of procurement contracts.

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19 Ordinance No. 2016-65 dated 29 January 2016 and Decree No. 2016-86 dated 1 February 2016 relating to concession contracts.
20 Ordinance No. 2018-1074 dated 26 November 2018 on the legislative part of the Code of Public Procurement.
French public procurement law dates back to the 1830s and has been a key source of inspiration for European public procurement law. The French and European public procurement processes are based on the same principles: equal treatment, transparency, proportionality and the proper use of public funds.

If there is no payment from end users, partnership procurement is available, but only to the extent that the project has specific advantages compared with traditional procurement. The procurement value also must exceed a certain threshold (€5 million for infrastructure, notably in the energy, transport, urban planning and waste water sectors).

In contrast, concessions are allowed in almost all sectors where end users pay for the service (or at least for a significant part of its costs).

The procurement process for partnership procurement is similar to traditional public procurement. The new rules have extended the option to use the competitive dialogue procedure and the ‘competitive procedure with negotiation’, the use of both of which is widespread in relation to PPPs. The negotiation procedure remains the rule for concessions (a call for tenders is mandatory before negotiations begin).

Unsuccessful bidders can challenge the procurement process before administrative courts through an emergency hearing (the pre-contractual action). This procedure suspends the conclusion of the contract.

Once the contract is signed, the contract itself can be challenged before the courts, but its implementation is not suspended. An emergency hearing (known as a contractual action) is available to unsuccessful bidders to challenge the contract when blatant violations of public procurement law are involved.

iii Rules relating to the sale of shares by the state

The rules applicable to the sale of shares by public entities were completed and further simplified in 2015 by the Law on Economic Growth, Activity and Equal Opportunities (known as the Macron Law), which repealed almost entirely the old privatisation laws dating back to the 1990s. The Macron Law also provides that privatisations carried out by local authorities, or their groupings, involving companies with a turnover exceeding €75 million or more than 500 employees will be decided by the local assembly on the recommendation of the Commission for Shares and Transfers.

In addition, 2019 was marked by the Action Plan for Business Growth and Transformation Bill (known as the PACTE Bill), which substantially amended the rules relating to the state’s intervention as a shareholder and to companies in which the state holds (directly or through public entities) share capital. This reform mainly aims to ease and extend the regime applicable to shares giving specific rights to the state as holder (known as golden shares or specific shares), which is likely to increase the use of this golden share.

Following the announcement by the government in 2018 of its decision to privatise ADP and Française des Jeux (FDJ), and to sell shares in Engie and its subsidiary GRT Gaz (which operates the gas public transmission network), these state divestments have been authorised in the PACTE Bill, which was adopted by the French Parliament on 11 April 2019 after long and tedious debates.21 The matter of the constitutionality of the PACTE Bill was

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21 The state owns 50.6 per cent of Aéroports de Paris and may decide to sell its shares to one single shareholder or to sell different blocks of its shares to different shareholders. It owns 72 per cent of Française des Jeux. According to sources close to the matter, it is considering selling between 30 and 40 per cent of its shares through an initial public offering, while retaining double voting rights to keep some control over the
referred to the French Constitutional Council on 16 April 2019, which finally confirmed (on 16 May 2019)\textsuperscript{22} the constitutionality of the provisions authorising the privatisation of ADP and FDJ, and the divestment of the state from Engie. In addition, political critics and controversies concerning the government’s decision to privatise ADP led more than 200 members of Parliament to sign a proposal to put the question to a public referendum,\textsuperscript{23} which will require validation from the Constitutional Council and the support of 10 per cent of the electorate (around 4.5 million people). This process could therefore delay the entry into force of the PACTE Bill and the timeframe of the contemplated privatisation of ADP.

**X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES**

As a general rule, free movement of capital is guaranteed in France and, in most situations, foreign investors will be treated as French investors, either based on bilateral investment treaties or on the general principles of law.

However, in some cases, a prior declaration or authorisation can be needed before acquiring control of a company operating in certain sectors, the list of which was revised in the context of the offer by General Electric to purchase part of Alstom. The list of sectors varies depending on whether the investor resides within or outside the European Union. It covers sectors such as defence, dual-use technology, energy, transport, telecommunications and health. This list was expanded by a decree dated 29 November 2018 on foreign investment subject to prior authorisation to include the sectors of artificial intelligence, space, data storage and semiconductors. The new regulation also broadens the grounds for refusing authorisation and extends conditions that can be imposed on foreign investors: the Ministry may now also refuse an authorisation if it considers that there is a risk that the technologies and know-how associated with the activities at stake may not be preserved or that the protection of data may not be guaranteed. Conditions that can be imposed on foreign investors can now also cover technologies and know-how associated with the activities at stake and the protection of data.

The sanctions mechanism following an infringement of the prior approval obligations has been amended by the PACTE Bill. While removing the sanction consisting of the nullity of the infringing transaction, the reform gave the French government a larger palette of possible sanctions it can adapt and leverage, notably the power to suspend the voting rights of the investor, suspend, restrict or prohibit temporarily the free disposal of all or part of the assets relating to the sensitive activities at stake, or prohibit or limit the distribution of dividends to shareholders.

There have also been several developments in this field at EU level, with the adoption in March 2019 of a new regulation to screen foreign direct investments coming into the European Union on the grounds of security or public policy. This regulation creates a framework for Member States and the European Commission to share their concerns about

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\textsuperscript{22}Decision of the Constitutional Council No. 2019-781 DC.

\textsuperscript{23}Known as référendum d’initiative partagée (RIP), introduced in 2015, subsequent to the constitutional reform of 23 July 2008 and Organic Law No. 2013-1114, dated 6 December 2013, which determined the modalities of the RIP.
strategic foreign investment in the bloc. It will thus be necessary in the future not only to ensure compliance with the rules applicable to foreign investments for foreign investors in France (inbound) but also to be more vigilant regarding the content of these types of rules for French investors abroad, including in an EU Member State (outbound).

France has a bank monopoly law whereby only credit institutions can make loans in the ordinary course (subject to some exceptions such as intragroup loans). To be a credit institution, a bank must either be licensed or otherwise passported by the French Prudential Supervisory Authority (ACPR) or an equivalent regulatory authority in another EU country, provided notice is given to the ACPR of the bank’s activity in France.

XI  DISPUTE RESOLUTION

i  Special jurisdiction

Disputes between the public authorities and contractors relating to concessions, PPP contracts and more generally permits and authorisations for renewable projects are to be settled by administrative courts, because of the distinction between private and public law that exists in France, as in other continental European countries. This is also the case for disputes relating to power purchase agreements entered into for renewable energy projects.

The case law of administrative courts has often been more protective than that of civil courts. The doctrine of unforeseen circumstances, which can protect private parties from an upheaval resulting from unforeseen circumstances, has been applied by administrative courts for almost a century. Since the French contract law reform,24 the doctrine is also now implemented by civil courts. The existence of these specific courts has therefore not been a major concern for participants on the French market.

Disputes between the private parties involved in a project are settled by the civil courts.

ii  Arbitration and ADR

Arbitration is not used by the French PPP market, despite Paris being one of the main centres for arbitration. As a general rule, arbitration is not available to French public entities. Provision has been made for an exception regarding partnership agreements, but it is generally not used.25

PPP contracts often provide for a preliminary amicable settlement phase before disputes can be taken to the courts. Appointed experts can help during this phase, although their opinion is generally not binding on the parties.

Arbitration is available to private parties involved in French projects, but the parties usually choose national commercial courts for dispute resolution, even for major projects.

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25 This tendency to settle disputes by reference to national courts will have been reinforced by the controversy and criminal proceedings around the arbitration involving Crédit Lyonnais and Bernard Tapie regarding the sale of Adidas.
XII OUTLOOK AND CONCLUSIONS

During the past 10 years, the French projects market has become a mature market, with a stable legal regime and relatively stable market practices, despite the lack of standardised documentation.

Renewable energy should keep the market active for greenfield projects for the next few years.

The secure assets of the brownfield market should remain attractive, and portfolios of medium-sized projects could create new opportunities for investors, including new opportunities to enter the market.
I INTRODUCTION

As a developing nation, the aim of Ghana’s focus on infrastructure growth is driving socio-economic development and enabling greater productivity within the various sectors of the economy. The annual infrastructure funding gap is estimated at US$1.5 billion for the next decade; thus, the government and private sector participants have been challenged to develop innovative ways of bridging this gap. This has led to a growing reliance on the use of project finance for the development of infrastructure in Ghana. Traditionally, project financing mechanisms were more commonly used in raising financing for privately funded projects. However, the rise in the use of public-private partnerships (PPPs) for undertaking public infrastructure projects has resulted in an increased participation by public authorities in project financing transactions. The World Bank’s Private Participation in Infrastructure database indicates that of the 27 PPP projects that reached financial close between 1990 and 2018, only four have either been cancelled or are under duress, which is an indication of the commitment of parties to develop infrastructure through partnership arrangements. Multilateral agencies and development financial institutions, such as the World Bank Group and the African Development Bank, have had a key role in this process through the provision of funding and other credit enhancement facilities, such as partial risk guarantees to private investors and lenders. Their contributions have had a significant impact on the success of many project finance transactions in Ghana.

II THE YEAR IN REVIEW

Ghana has seen a considerable number of project finance transactions in recent years, predominantly in the energy, road, aviation and maritime sectors. The need to diversify the power generation portfolio in the country in the midst of recurrent power outages led to the development of a significant number of power projects, including the Amandi Power Plant, the Ayitepa Wind Farm, the Cenpower Kpone Independent Power Plant and the Sunon Asogli Power Project. However, during the past year, a renewed focus by the government on transport infrastructure has resulted in increased activity within the rail and maritime sectors. Notable transactions include the Eastern Railway Line, the Accra–Ouagadougou Railway Line, the AI Skytrain Project and the Takoradi Multi-Purpose Container Terminal. The legal

1 NanaAma Botchway is the managing partner and Achiaa Akobour Debrah is a senior associate at N Dowuona & Company.
and regulatory framework has not seen any changes in the past year. The PPP Bill, drafted in 2016, is being considered by Cabinet before being relaid in Parliament. In the meantime, the 2012 PPP Policy continues to apply.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Project financing transactions in Ghana are usually undertaken by sponsors through the establishment of a special purpose vehicle (SPV), incorporated as a company limited by shares, with an independent and separate legal personality from its owners. The SPV may be wholly owned by a private sponsor, or it may be a joint venture between two or more private parties or between a state (or quasi-state) entity and one or more private partners. A few projects are entirely state-owned. Various transaction models are used, depending on the specific nature of the project, the most common being the build-operate-transfer (BOT) and build-own-operate-transfer (BOOT) models. Different contractual arrangements are entered into by the SPV with contractors, operators, consultants and subcontractors with a view to mitigating the specific risk factors that may affect the success of a project.

ii Documentation

Typical documentation includes project agreements, operation and maintenance (O&M) contracts, security agreements, construction contracts, offtaker agreements, shareholders and equity subscription agreements, loan and other credit facility agreements, direct agreements, intercreditor agreements and escrow agreements.

Project agreements (usually concessions) are entered into between the SPV and a relevant public authority, under which the SPV is granted the exclusive right to develop and operate specified public infrastructure for a specified period. The relationship between the project sponsors is governed by a shareholders’ agreement. O&M contracts between the SPV and a technical partner (which may or may not be related to the project sponsors) are entered into in respect of the operation and maintenance of the asset. Bespoke and standard form construction contracts are entered into by the SPV and a selected contractor, who may also subcontract different aspects of the construction work to other companies. Various financing and security agreements between lenders and the SPV, outlining terms of repayment, interest, fees, security arrangements and other requirements concerning the loan facility, are commonly used. As part of the security package, it is also typical for lenders to sign direct agreements with the relevant public authority, which may provide for lenders’ step-in rights in the event of a default by the SPV or assumption of the SPV’s debts by the public authority (or both). Lenders sometimes insist on direct agreements with central government but this is usually resisted by the latter. However, government support agreements may be signed with the central government for strategic investments in key sectors of the economy.

iii Delivery methods and standard forms

The delivery methods for construction projects in Ghana are based on a consideration of factors such as the type of project, timelines for delivery of the project, and sources of funding and procurement methods. Project sponsors usually require delivery on an engineering-procurement-construction or turnkey basis, as this ensures that relevant risks affecting the design and construction of the project are transferred completely to the contractor, who is usually best placed to deal with such risks. In view of the role and
participation of international financial institutions and multilateral agencies in major project financing transactions, standard form construction based on the International Federation of Consulting Engineers (FIDIC) suite of contracts are usually used. The FIDIC standard form ensures a standardised approach to construction projects and offers some stability to project sponsors and lenders since there is extensive precedent to cater for any issues that may arise in practice. Therefore, bespoke construction contracts, although used, are less common.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Significant risks faced by parties involved in project finance transactions and construction contracts include the following.

Exchange rate risk

Ghana’s currency, the cedi, continues to be volatile against more robust currencies such as the US dollar, the British pound and the euro. Sponsors of projects that are financed using any of the major foreign currencies, but whose income proceeds are generated in the cedi, are therefore faced with the risk of being unable to service interest payments on loans, in the event of a rapid depreciation of the Ghana cedi against the relevant foreign currency. Where possible, project companies enter into hedging agreements with banks and other financial institutions to shift the risk of fluctuating foreign exchange rates onto such institutions. In other cases, authorisation may be procured from the Bank of Ghana to enable the project company to charge fees in a specified foreign currency. This is currently permitted only for participants in the mining and oil and gas sectors.

Market and regulatory risks

The dominance of state-owned entities in certain sectors of the economy implies that certain regulators are often unable to enforce relevant laws against state-owned entities. In some circumstances, the regulator is itself a market participant. This may result in government interference with the aim of promoting state interest at the expense of private sector participants. Market and regulatory risks are usually addressed contractually by ensuring that adequate safeguards are included in a project agreement and appropriate remedies provided in the event of the occurrence of such risks. When a government support agreement is entered into between a private party and the government, specific incentives and guarantees against such risks may also be provided.

Authorisation risk

The risk that a project agreement would be deemed void and unenforceable owing to the lack of parliamentary approval may be relevant for certain projects. Under the Constitution of Ghana, a resolution, supported by the votes of a majority of all members of Parliament, must be obtained from Parliament by the government prior to its entry into an international business or economic transaction. This constitutional requirement affects structuring for projects in which the government is directly involved, and is especially relevant for setting timelines for the commencement of a project. To mitigate against the risk of an agreement
being deemed to be void, the requirement for parliamentary approval is usually made a condition precedent to be satisfied by the public authority prior to the effectiveness of the project agreement.

Construction risks, environmental risks and O&M risks are addressed contractually and are typically allocated to the party best placed to handle them. Responsible parties then procure the relevant insurance to mitigate against the occurrence of the specified risks. Relevant agreements will usually provide remedies such as compensation or relief from, or suspension of, certain contractual obligations on the occurrence of specified risks. See also Section IV.iii, below, on political risks.

ii Limitation of liability

Parties may agree to liability caps in the event of default by one of the parties. There is no prescribed limit and agreed caps are the product of negotiations between parties. Parties may also exclude liability for indirect or consequential losses and loss of business or profit. Force majeure exclusions are enforceable and may apply to relieve parties of their respective obligations under a contract. Force majeure events are limited to events or circumstances that are beyond the reasonable control of parties and that materially and adversely affect the ability of a party to perform its obligations under an agreement. On the occurrence of a force majeure event, parties are usually contractually required to take reasonable measures to mitigate the consequences for the project. In cases of prolonged force majeure events, the parties usually contractually agree to the termination of their agreement.

iii Political risks

Political risks may manifest in the form of renegotiation by a new government of the terms of existing project agreements, following a change in government. Political risks may be addressed contractually through direct agreements and the provision of suitable remedies in project agreements in the event of changes in law and material adverse government actions. Parties may also obtain political risk insurance (PRI) from international PRI providers or partial risk guarantees from development finance institutions, such as the Multilateral Investment Guarantee Agency. There are constitutional safeguards in respect of the property rights of foreign investors that prohibit compulsory acquisition of property without fair and adequate compensation. Project companies that are registered with the Ghana Investment Promotion Centre are also guaranteed freedom from expropriation or nationalisation of their investments, except in very limited circumstances relating to the natural interest. In all such cases, the investor must be fairly and adequately compensated.

V SECURITY AND COLLATERAL

Security may be taken over a wide range of asset classes owned by the project company and its sponsors. Typical security arrangements include:

a mortgages on the project site;

b fixed or floating charges on the project assets (movables);

c fixed charges on the shares of the project company and any rights attached to them;

d fixed charges on the project company’s bank accounts; and

e assignment by way of security of the receivables of the project company.
Key project documents may be assigned by way of security to enable lenders to take over the rights and obligations of the project company in the event of a default under any of those agreements. Direct agreements entered into between lenders and various counterparties guarantee such step-in rights. Lenders may also insist on guarantees from the project sponsors and on-demand bank guarantees or performance bonds from contractors. Security documents must be stamped and are subject to the payment of stamp duty, based on the value of the amount secured and depending on whether the particular security is a principal or auxiliary security. There is no requirement for separate agreements to be entered into in respect of the various classes of security; however, each security would be subject to stamp duty separately, as though created by a separate agreement.

Depending on the type of security, registration with the Registrar of Companies, the Collateral Registry or the Land Title/Deeds Registry would be required to perfect the security interests created in favour of lenders. Charges on the movable and immovable property of the project company are required to be registered with the Collateral Registry and the Registrar of Companies within 28 days of their creation. The time limited for registration may be extended in appropriate cases. In addition to being registered with the Collateral Registry and the Registrar of Companies, mortgages on immovable property are required to be registered with the Land Title/Deed Registry. Charges that are not registered within the time limit for registration (or any extension thereof) are void and unenforceable.

Registration also determines the priority of competing security interests. Generally, a fixed charge on an asset takes priority over a floating charge affecting that asset, unless the project company was prohibited by the terms on which the floating charge was granted from granting any later charge having priority over the floating charge, and the person in whose favour the later fixed charge was created had actual notice of that prohibition at the time when the fixed charge was created in its favour. Subject to the above and agreements regarding subordination of existing security interests, the general rule on the priority of competing security interests is that, the first to be registered (by time and date) takes precedence, irrespective of the actual date of creation of the interest.

VI BONDS AND INSURANCE

Project companies may require contractors and subcontractors to post various types of bonds or guarantees during different phases of the project. Tender security, usually in the form bank guarantees, is requested by a project company from bidding contractors at the tender stage of a project. Performance bonds or bank guarantees are requested by a project company from the winning bidder as security for the performance of the contract. They typically last for the duration of the contract and ensure the payment of a fixed percentage of the contract sum in the event that the contractor fails to fully perform in accordance with the terms of the contract. Advance payment guarantees are provided by banks on behalf of contractors to the project company as a guarantee that the bank will repay any advance payments made to the contractor in connection with the project in the event that the project is discontinued by the contractor. Retention guarantees are provided to the project company to ensure that the contractor carries out all necessary work to correct defects discovered after completion of the contract and after full payment of the contract sum.

Ghana does not have a well-developed corporate bond market. Hence, the Ghana Fixed Income Market, the domestic bond market, is dominated by various government
bonds issued to fund general government expenditure on infrastructure and the payment of restructured government debt. The Ghana Fixed Income Market does not have a segment dedicated to project bonds.

**VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS**

In the event of a default under the financing agreements, a secured lender may take steps to enforce security granted by the project company. Registration of a security interest with the relevant public registries is a prerequisite to its enforcement. Under the Borrowers and Lenders Act, 2008 (Act 773), registered charges may be enforced upon 30 days’ written notice to the project company. Thereafter, the lender may take possession of the secured asset after obtaining a certificate of no objection from the Collateral Registry, following a further 30 days’ notice to the Collateral Registry. If this cannot be done amicably, the lender may seek to enforce the security through a court action. Lenders may seek assistance from local law enforcement under the authority of a court warrant to enforce their right of possession if it is not possible to do so in an amicable manner, which often is the case. A court may order the judicial sale of the asset or the appointment of a receiver or manager after hearing the lender’s application to enforce the security. Where a project lender begins the process of enforcing security, it is required under the Companies Act, 1963 (Act 179) to notify the Registrar of Companies within 10 days of entry into possession or the appointment of a receiver or manager.

In the event of the insolvency of the project company, a secured lender is permitted to commence or continue an action for the realisation of security, subject to any terms that the court may impose. During the winding up of an insolvent project company, a liquidator may give notice to a person or company to return property (or its value) that the project company transferred to that person or company to settle a debt, if the transfer was made at least 21 days before the petition for winding up was filed. Any property disposed of by the project company for less than its full value, between two and 10 years prior to the winding-up order being made and at a time that the project company was insolvent, may be required by a liquidator to be returned by the beneficiary, or the excess value repaid. Floating charges created by a project company within the 12 months immediately preceding the commencement of the insolvency proceedings may be deemed invalid and unenforceable, unless it can be proven that the project company was solvent immediately after the creation of the charge. In terms of the ranking of payments during a winding-up procedure, debts secured by fixed charges rank above all other debts and must be satisfied first. The payment of debts (not exceeding 6,000 cedis) owed to employees as unpaid remuneration for the four months preceding the liquidation, and taxes or rates owed to the Republic or a local authority that are due and payable in the year preceding the liquidation are next in line. These are followed by the payment of debts secured by floating charges, which are paid in order of priority. Debts not falling in any of the above-mentioned categories are satisfied next. Thereafter, directors, former directors or their close relatives in respect of whom the project company has incurred any debts in the year preceding the commencement of the liquidation are paid. Finally, debts that were incurred by the project company as a result of the charging of excess interest (more than 7 per cent per annum) and any preferential payments or properties reclaimed by or restored to the liquidator at the commencement of the liquidation, may be paid or repaid to the beneficiaries. No entities are excluded from bankruptcy proceedings.
VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Generally, undertakings whose activities are likely to have a significant impact on the environment are required to obtain a renewable permit from the Environmental Protection Agency (EPA). Different permits may be required during the construction and operational phases of the project. A project company may also be required to submit an environmental impact assessment if, in the opinion of the EPA, the activities of the company are likely to have an adverse effect on the environment. The application process involves the submission of a registration form to the EPA, with a site plan duly signed by a licensed surveyor and a zoning letter from the Town and Country Planning Department. Upon receipt of the form, the EPA may request the applicant to conduct a detailed study to fully understand the environmental impact of the proposal and how it would be mitigated. The applicant may also be required to undertake a scoping exercise, which involves widespread consultations with interested or affected parties, to identify all key issues of focus and to develop the terms of reference for the environmental impact assessment.

All reports must be submitted to the EPA for review. As part of the review, copies of the environmental impact statement are made publicly available at various places, including the EPA Library, the relevant District Assembly, the EPA Regional Office and at the sector Ministry responsible for the undertaking. A public notice must also be published in a national or local newspaper (or both) soliciting public comments within 21 days. A public hearing is necessary in cases where (1) a published notice results in a serious public reaction to the commencement of the proposed undertaking, (2) the undertaking will involve the dislocation, relocation or resettlement of communities, and (3) the EPA considers that the undertaking could have extensive and far-reaching effects on the environment.

Depending on the outcome of the review, the applicant may be required to pay processing and permit fees, the amount of which will depend on the EPA’s assessment of the building or project, before an environmental permit is issued. If an environmental impact assessment is required for the purpose of granting the permit, the fee for the permit shall be 1 per cent of the project cost. A company that is issued with an environmental permit is required to submit to the EPA an annual environmental report after 12 months after the date of commencement of operations and every 12 months thereafter, in the form and containing such particulars as the EPA shall direct.

Other permits and licences may be required depending on the nature of the project, the specific phase of construction or operation of the project, and the industry in which the project is being undertaken. For instance, projects in the maritime industry require safety permits to be obtained from the Ghana Maritime Authority prior to construction, and the issuance of a port facility security plan, following the conduct of a port facility security assessment upon the completion of the project, but before the commencement of operations. A building permit obtained from the local assembly, a fire permit from the National Fire Service, a licence from the Water Resources Commission and a Factories Inspectorate Division certificate may also be required.
Equator Principles

Compliance with the Equator Principles is not legally required. However, project companies may be required by lenders under the terms of the finance documents to comply with certain international standards, including the Equator Principles. To ensure that they do not breach the terms of facilities granted to them, project companies also ensure that contractors and O&M managers are subject to the same standards in their respective agreements with them.

Responsibility of financial institutions

Financial institutions are generally obliged to operate within applicable legislation and regulations. However, there are no specific provisions that impose administrative, civil or criminal liability on lenders in respect of activities of project companies that fall short of socio-environmental standards.

PPP AND OTHER PUBLIC PROCUREMENT METHODS

There is no specialist legislation in Ghana relating to PPPs. As such, PPPs are regulated by the general public procurement laws. A draft PPP Bill is currently being reviewed by Cabinet and will be laid before Parliament for consideration following approval by Cabinet. A National Policy on PPPs (the PPP Policy), on which the PPP Bill is modelled, was adopted by the Ministry of Finance and Economic Planning in 2011. Although the PPP Policy does not have the force of law, it sets out the framework for the development and implementation of PPP projects in Ghana. The government has so far procured compliance with the PPP Policy, particularly in respect of projects that are partly funded by the government, by ensuring that the recommended procedures are followed by a public entity before any budgeting approvals and disbursement of funds from the Ministry of Finance are granted or made.

Under the PPP Policy, a PPP project is defined as a contractual arrangement between a public entity and a private party, with a clear agreement on shared objectives, for the provision of public infrastructure and services traditionally provided by the public sector. The PPP Policy broadly sets out the guiding principles for all PPP arrangements. These include value-for-money analysis, appropriate risk allocation measures, long-term affordability to the public and overall budgetary sustainability, local content and technology transfer, safeguards for public interest and consumer rights, and environmental, climate and social safeguards.

PPP projects in Ghana typically take the form of concessions (under BOT or BOOT models), management and O&M service arrangements, leases and joint ventures. The use of PPP arrangements in Ghana has significantly increased in recent years, particularly in sectors involving the extraction and allocation of natural resources, including power, oil and gas, and within the ports and rail sectors. Notable PPP projects include the Eastern Railway Line, the Sunon-Asogli Power Plant, the Kpone Independent Power Plant, the Tema Port Expansion and the Takoradi Port Expansion. Under the PPP Policy, the process for government-originated projects involve the conduct of pre-feasibility and feasibility studies, procurement on a competitive basis under the rules of applicable public procurement laws, negotiation and conclusion of the PPP agreement. Various approvals must be obtained at various stages of the process from relevant authorities based on the estimated cost of a specific project. PPP projects involving an estimated project cost of more than 50 million cedis require Cabinet approval. Any that fall below that threshold may be approved by the PPP Approval Committee or the general assembly of the relevant local authority. Parliamentary approval must be obtained.
for projects in respect of which the government is required to obtain parliamentary approval under the Constitution, irrespective of the estimated project cost. Unsolicited proposals by a private entity for the development of a PPP project are considered on a case-by-case basis.

ii Public procurement

The Public Procurement Act, 2003 (Act 663), as amended by the Public Procurement (Amendment) Act, 2016 (Act 914), regulates public procurement processes. All contracts involving the procurement of goods, works and services financed in whole or in part from public funds or the disposal of public stores, vehicles and equipment are subject to public procurement laws. However, a procurement entity is permitted, with approval from the Public Procurement Authority, to undertake procurement in accordance with established commercial practices if (1) the entity is legally and financially autonomous and operates under commercial law, (2) the use of public procurement processes are not suitable, considering the strategic nature of the procurement, and (3) the proposed procurement process will ensure value for money, competition and transparency as far as possible. Further, if a contracting entity undertakes procurement with international obligations arising from a grant or concessionary loan to the government, the procurement must be undertaken in accordance with the terms of the grant or loan, subject to the review and approval of the procurement procedure by the Public Procurement Authority.

The prevailing public procurement procedure is competitive tendering; however, restricted tendering and single source procurement may be used with the approval of the Public Procurement Authority. Foreign companies can participate in bids only when the contract sum requires international competitive tendering to be used or in instances where effective competition cannot be attained locally through national competitive tendering. Procurement of goods, works and technical services valued above 10 million cedis, 15 million cedis and 5 million cedis, respectively, may be undertaken through international competitive tendering processes. Additionally, certain sectors of the economy have local content and local participation rules that may restrict participation of foreign companies. For example, a foreign company may not be granted a petroleum licence or awarded a contract unless an indigenous Ghanaian company holds at least a 5 per cent equity interest in the company.

In the energy sector, the newly passed Energy Commission (Local Content and Local Participation) Electricity Supply Industry Regulations, 2017 (LI 2354) requires a company that intends to engage in wholesale power supply activities to have an initial local equity participation of at least 15 per cent by a Ghanaian partner, which must be progressively increased to at least 51 per cent within 10 years.

The criteria for evaluating and comparing bids must be set out in invitation documents. The Public Procurement Authority has the mandate to rule on review applications in procurement proceedings. An aggrieved supplier, consultant or contractor may file a complaint with a relevant procurement entity within 21 days of becoming aware of the subject of the complaint. The procurement entity is required to make a decision within 21 days of the submission of the complaint. A review application may be submitted to the Public Procurement Authority if the procurement entity does not issue a written decision within the said period or if the complainant is simply dissatisfied with the procurement entity's decision. A right of appeal to the High Court lies against the decision of the Public Procurement Authority. An application for review by the Public Procurement Authority does not have an automatic suspensive effect to block continuation of the procurement procedure or the conclusion of a contract. However, the Authority may order the suspension of procurement
proceedings at any time before entry into force of the procurement contract, or order the suspension of performance or operation of a framework agreement that has entered into force, where it is necessary to protect the interests of the complainant, unless outweighed by the public interest. Note that a procurement entity’s decision to select a particular method or to limit a national competitive tender to local companies (and exclude locally registered foreign-owned companies) or to reject tenders, proposals or quotations based on grounds specified in invitation documents and in accordance with legal procedure, shall not be subject to administrative review.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There is no general requirement for foreign contractors to incorporate a business entity in Ghana. However, depending on the nature of activities being undertaken and the length of time involved, registration of a local branch or representative office may be required. Companies with foreign ownership that are registered to do business in Ghana are required to also register with the Ghana Investment Promotion Centre (GIPC). The GIPC Act governs investment in many sectors of the economy, with the exception of mining, petroleum and free zones sectors. It specifies the areas of investment reserved solely for Ghanaians and establishes minimum capital requirements from foreign investors to enable them to operate in specified industries on the Ghanaian market.

Investors must satisfy a minimum capital requirement of US$200,000 for joint ventures in which a Ghanaian citizen holds at least a 10 per cent equity stake, US$500,000 for wholly foreign-owned companies or US$1 million for trading companies. Additionally, there are specific local content and local participation requirements for foreign companies operating in certain regulated sectors, particularly the petroleum, mining and energy sectors. For instance, the Energy Commission (Local Content and Local Participation) Electricity Supply Industry Regulations, 2017 (LI 2354) provide that a company engaging in wholesale power supply activity shall have an initial local equity participation of at least 15 per cent by a Ghanaian partner to be progressively increased to at least 51 per cent within 10 years. These requirements must be satisfied, prior to a grant of a licence by the regulator to enable the company to operate in the sector. Under the Constitution of Ghana, foreign persons are not permitted to hold a freehold interest in land or to hold a leasehold interest in land for a term of more than 50 years at a time.

Foreign nationals are required to obtain work and residence permits from the Ghana Immigration Service to legally reside and work in Ghana. There are no restrictions that apply specifically to foreign investors in the event of foreclosure of a project company or related companies. There are incentives for foreign companies that register with the GIPC or the Ghana Free Zones Authority. Licensed free zone developers and enterprises are exempted from the payment of tax on profits for the first 10 years after the date of commencement of operation and thereafter are subject to a reduced corporate tax rate of 15 per cent. A licensed free zone entity is also exempted from the payment of withholding taxes on dividends and from all direct and indirect taxes and duties on imports. Free zone entities and GIPC-registered entities enjoy an automatic quota with respect to procuring work permits for expatriate employees. GIPC-registered businesses receive benefits that include tax incentives, absolute protection against nationalisation or expropriation, a quota of employer-sponsored work visas based on the company’s paid-up capital and a guarantee that capital, dividends and net profits may be transferred outside Ghana in freely convertible currency.
Removal of profits and investment

Under Ghanaian law, no resident of Ghana, other than persons licensed by the Bank of Ghana to do so, shall price, advertise, receive or make payment in any foreign currency for goods or services. A resident for these purposes is any person who has resided in Ghana for one year or more, any company incorporated in Ghana, any company not incorporated in Ghana but whose principal place of business or centre of control and management is located in Ghana, or a local branch of a company with a principal place of business located outside Ghana. However, resident and non-resident persons may open and operate foreign currency accounts and foreign exchange accounts with duly licensed banks. Foreign currency accounts may only be fed with unrequited currency transfers, such as transfers from abroad for investment in Ghana, and are free from exchange control restrictions with regard to their operation. Foreign exchange accounts may be fed with foreign currency generated from activities within Ghana and are subject to restrictions. Foreign exchange account holders may transfer up to US$50,000 per annum outside Ghana without restriction but may only transfer more than US$50,000 with proper supporting documentation. Businesses that are registered with the GIPC are guaranteed unconditional transferability in freely convertible currency of dividends or net profits from investments, interest payments on foreign loans and remittance of proceeds in the event of the sale of the investor’s interest in a project. Dividends are payable out of post-tax profits and are subject to a withholding tax of 8 per cent. Interest payments on debts are also subject to a withholding tax of 8 per cent.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no courts that are specially set up to deal with project finance or construction disputes. However, disputes arising out of project finance transactions or under construction contracts are typically determined by the commercial division of the High Court.

ii Arbitration and ADR

Alternate dispute resolution (ADR) in Ghana is governed by the Alternative Dispute Resolution Act, 2010 (Act 798). This Act sets the framework for the commencement and conduct of ADR proceedings in Ghana. Act 798 specifies the rules for negotiation, mediation and arbitration that are the most commonly used in Ghana. Project agreements typically provide a graduated procedure for resolving disputes, with arbitration being the final step. Foreign investors and lenders usually insist on international arbitration under the rules of the International Chamber of Commerce or the London Court of International Arbitration. The Ghana Arbitration Centre is the local alternative and experts may be appointed from such professional bodies as the Ghana Institution of Engineering or the Ghana Institution of Surveyors. Ghana has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and therefore will enforce contractual provisions and awards from nations that are also parties to the New York Convention. Ghana is also a signatory to the ICSID Convention.

The procedure for enforcement of international arbitration awards is by way of application to the High Court of Ghana. The party seeking to enforce an award must apply to the High Court by producing the original award and the agreement pursuant to which the award was made. The Court’s consideration in giving effect to the foreign award will be to consider whether there is any appeal pending against the award in any court under the
law applicable to the arbitration; whether the award was made under a competent authority under the laws of the country in which the award was made; whether a reciprocal arrangement exists between Ghana and the country in which the award was made; or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Ghanaian Parliament.

Under the ADR Act, matters relating to the national or public interest, the environment, the interpretation of the Constitution and any other matter that cannot by law be settled by arbitration are non-arbitrable. Project finance and construction agreements are not automatically subject to domestic arbitration.

XII OUTLOOK AND CONCLUSIONS

Despite the rise in the use of project finance for the development of public infrastructure, access to long-term funding for capital intensive projects in Ghana has continued to be a challenge. To address this issue, the government in 2014 established the Ghana Infrastructure Investment Fund with the core mandate of mobilising, managing, coordinating and providing financial resources for investment in a diversified portfolio of infrastructure projects in Ghana. The current government has declared its commitment to partnering with private parties in the delivery of priority projects, particularly in the transport sector. With the successful completion of the IMF programme, the government’s ability to support significantly large projects through the provision of government guarantees and other forms of government support will be restored. Additionally, recent banking reforms involving a revamping of the capitalisation and liquidity requirements have also resulted in an improved capacity for local banks to participate in medium to large-scale project finance transactions. The cumulative effect of all these developments may go a long way to addressing the financing issues of infrastructure projects in Ghana.

The government has recently announced the launch of an electronic procurement system that is due to commence in June 2019 and will make Ghana the first country in the West African subregion to establish an electronic procurement system for the public sector. The system is designed to address corruption in procurement procedures by minimising human interaction and to increase productivity of both procurement officers and service providers. This system is in line international standards and uses the Open Contracting Data Standards for reporting and display of information.

Another significant development to keep an eye on is the legislative process for the enactment of the PPP Bill. The PPP Bill seeks to establish a comprehensive legal framework for the evaluation, development, implementation and regulation of PPP arrangements and projects between public institutions and agencies and private entities for the provision of public infrastructure and services. It makes provision for 15 types of PPP arrangements and establishes the Public Private Partnerships Office to take up the responsibility of spearheading the development and implementation of PPP programmes. The promulgation of the PPP Bill, the current version of which was first drafted in 2016, will be key in driving development in the sector. The outlook for project financing transactions in Ghana is therefore positive.
Chapter 11

JAPAN

Naoki Iguchi, Makoto (Mack) Saito and Rintaro Hirano

I INTRODUCTION

The main assets for project finance in Japan are power plants and public infrastructure.

After the first project financing transaction took place in the late 1990s in relation to conventional power projects, private finance initiative (PFI) projects were at the centre of the project finance field.

The Japanese government enacted the Act on Promotion of Private Finance Initiative Funds (Act No. 117 of 1999, as amended (the PFI Act)), which initiated a boom in PFI projects. As PFI projects contemplated project finance debts, the project finance market developed in line with the expansion of the PFI market. Furthermore, after the PFI Act was amended in 2011 to introduce concession arrangements, project finance has been used for a wider range of infrastructure assets.

In addition, the Act on Special Measures on Procurement of Electricity from Renewable Energy Sources by Electricity Utilities (Act No. 108 of 2011, as amended (the Renewable Energy Act)) boosted the development of renewable solar and wind plant projects nationwide.

II THE YEAR IN REVIEW

Investment in infrastructure is one of the core initiatives of the Japanese administration, which aims to invest ¥21 trillion in infrastructure projects between 2013 and 2022. The government considers the concession scheme to be a key tool in accomplishing that goal. Since the privatisation of two international airports in the Kansai region in 2016, many airports have been or will be privatised by way of this scheme. Furthermore, the government advocates using the concession scheme for other assets, such as toll roads, water purifying plants, sewerage facilities, hydraulic power plants and convention centres. The procurement of concessions has commenced for some of these assets.

Construction of new conventional power plants has been expected in recent years because it is not clear when the nuclear plants, whose operations have been suspended, will be allowed to resume operations and many of the conventional power plants are facing renewal deadlines. However, owing to the global trend against coal-fired plants, and for commercial reasons, several projects to create new conventional power plants have been cancelled.

The growth of the renewable energy sector is expected to continue but government policy regarding the feed-in tariff (FIT) system is changing because of criticisms regarding the rapidly increasing public costs for maintaining the FIT system.

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With respect to offshore wind farm projects, while a commercial-based project has yet to emerge, a new act that provides for a legal framework in which a project company for an offshore wind farm can use the sea area for up to 30 years was passed by Parliament and its ancillary executive regulations have been promulgated. We hope this legislation will give some momentum to the offshore wind industry.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Common vehicles used as project companies are joint stock corporations and limited liability companies. Sponsors inject equity by way of pure equity (or legal equity) and subordinated loans. Regarding the latter, the Money Lending Business Act (Act No. 32 of 1983, as amended) does not fully exempt intra-group lending. Generally, a shareholder that owns less than 20 per cent would not be allowed to provide loans to the project company.

In addition to pure equity and subordinated loans, tokumei kumiai (TK) investments have often formed part of equity. A TK investment is made under a TK contract, which is a bilateral contract whereby one party (the TK operator) receives funds from the other party (the TK investor), and with those funds conducts certain pre-agreed business and shares the profit generated from this business with the TK investor. The business is conducted in the name of the TK operator and the TK investor’s liability is limited to an obligation to make an investment of the pre-agreed amount. The TK operator can enter into TK contracts for the same business with multiple TK investors, in which case, taken as a whole, the structure will be economically very similar to a limited liability partnership in which the TK operator is a general partner and the TK investors are limited partners. Under a TK contract, profit and loss allocated to the TK investors is directly recognised by the TK investors, not by the TK operator.

Under the PFI Act, although various delivery structures have been adopted, the majority of PFI projects are availability-based accommodation projects, which use the build-to-order (BTO) structure. The ownership of an accommodation facility is transferred from the project company to the procuring authority upon its completion, and the accommodation facility is maintained by the project company thereafter.

In a concession project, the right to operate a subject infrastructure facility is granted to the project company while the ownership of the facility is retained by the public authority.

ii Documentation

A typical set of documents to be entered into in a project finance transaction are as follows:

a a PFI (concession) contract between the project company and a procuring authority, or a power purchase agreement between the project company and a power utility;

b a design-and-build (D&B) contract between the project company and a D&B contractor, or an engineering, procurement and construction (EPC) contract between the project company and an EPC contractor;

c an operation and maintenance (O&M) contract between the project company and an O&M contractor;

d a fuel supply contract between the project company and a fuel supplier;

e direct agreements between the lenders and the counterparties to various project documents;

f an insurance agreement between the project company and insurance companies;
finance agreements, including senior credit facility agreements, interest rate swap agreements, intercreditor agreements and security agreements; and
a shareholders’ agreement between the project company’s shareholders and the project company itself.

In relation to a construction contract, the Construction Business Act (Act No. 199 of 1949, as amended) (CBA) requires that a construction contract be made in writing, stipulating that there must be at least 14 items provided in the CBA to make the contract terms clear and unequivocal (Article 19, CBA).

iii Delivery methods and standard forms

Project finance lenders usually require that a construction contract be a date-certain, fixed-price and lump-sum contract. As a means of satisfying this requirement, construction agreements in which project finance is involved often take the form of a D&B or EPC contract.

With regard to the delivery structure of construction projects, typically a contractor performs the work in accordance with the design provided by an owner or owner-retained designers. Typical standard forms for this delivery structure are (1) the public work standard contract (last amended in 2017) published by central government and providing the general conditions for public works, and (2) the general conditions for construction contract (GCCC) (last amended in 2017) for the private sector. The GCCC was jointly drafted by several industry associations that respectively represented owners, developers, designers and contractors. It is the most widely used standard form and is generally used with special conditions prepared by the parties. Accordingly, when the GCCC is used in a project financing transaction, it is often amended by way of special conditions so that it will satisfy the project finance lenders’ requirements.

For D&B contracts, the general conditions for design-build contract (GCDB) (last amended in 2012), drafted and published by the Japan Federation of Construction Contractors, is the only published standard form. The GCDB was prepared by a contractors’ association to promote the D&B delivery structure. Nonetheless, unlike D&B forms used in international construction projects, the design and construction parts of the GCDB are easily separable; the parties proceed to the construction phase only after the owner confirms the contractor’s design products.

For industrial plant construction work, EPC contracts are widely used. The Engineering Advancement Association’s general conditions for domestic plant construction work (the ENAA-Domestic) (last amended in 2011), drafted and published by the Engineering Advancement Association (one of the contractors’ associations), integrates design, construction and commissioning phases into a single contract; however, in reality, full turnkey EPC contracts are not frequently used for the construction of industrial plants, such as chemical process plants and power plants, unless project finance debt is procured. As a result, EPC forms are most commonly used in renewable energy projects, as they are usually financed by project finance debt. However, the ENAA-Domestic is not widely used in the market; more often, EPC forms that have been developed by contractors or project sponsors are used.

For PFI projects, the PFI Act does not specify any particular delivery structure. Various delivery structures have been adopted under this Act, including, in order of the most

For design work and supervision services for construction work, the industry associations that jointly drafted the GCCC also publish the General Conditions for Design Work and Supervision (last amended in 2015).

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Obstructions at the site

The GCCC provides that if a contractor discovers any obstructions to construction work at a site, the contractor shall immediately notify the administrative architect in writing (Article 16, GCCC). It also provides that if it is necessary to vary the scope of work, the additional amount shall be agreed by the employer, the administrative architect and the contractor, through consultation.

Unless the parties use these types of major contract forms, a contractor may have to bear the risk of unforeseen ground conditions. In a fixed-price contract, Tokyo High Court found that the contractor may not claim any additional costs, unless a court finds the situation to be extraordinarily unfair (Tokyo High Court, judgment of 29 March 1984, 1115 Hanrei Jiho 99). The Court considered certain factors to determine whether or not they were unfair, such as whether the conditions were not foreseeable by the parties and whether the conditions were not attributable to the contractor. It ultimately found that the conditions in question were foreseeable.

Force majeure

As a traditional civil law jurisdiction, Japan has the concept of force majeure but not that of frustration. Most contract forms have provisions for force majeure as a cause of extension of time or termination.

Theoretically, the core effect of force majeure is to prevent a contractor from being liable for delays to the work. Except where the work is no longer possible because of force majeure, the contractor has to resume and complete the work once the influence of force majeure ceases to be in play. Whether the contractor is entitled to claim additional costs for resuming and recovering the work is a matter of debate. However, most major contract forms provide that parties have to consult each other first, and if the parties agree that the contractor’s losses on the uncompleted work, materials and equipment were substantial, and good care of these was not taken, the employer shall indemnify the contractor for those losses (Article 21, GCCC). As such, solutions provided by the major forms are still ambiguous and limited.

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ii Limitation of liability

The concept of limitation of liability is generally accepted under Japanese law. It is common in particular types of projects, such as renewable energy. Furthermore, liquidated damages, which are caused by breach of contract, including but not limited to delay in completion and the agreed level of performance not being achieved, are also accepted under Japanese law and sometimes limit the amount of actual damages.

Foreign investors should note that a defaulting party may be liable for tort as well as for breach of contract. If there are defects in a building that jeopardise its basic safety and the defects are attributed to the design, the designer shall be liable for the damage caused by the defects incurred not only by the employer but also by a third party under the tort theory (Superior Court, judgment of 6 July 2007, 1984 Hanrei Jiho 34).

iii Political risks

The GCCC provides that either party may, by expressly stating its reason, make a claim for a necessary adjustment to the contract price if it is being used inappropriately or improperly owing to unexpected legislation (Article 29, GCCC); however, the GCCC does not provide an effective price adjustment mechanism, leaving it to the parties to negotiate and agree. This kind of ambiguity is found in the majority of domestic projects and construction contracts.

V SECURITY AND COLLATERAL

In project finance transactions, project finance lenders normally request security interests on most of a borrower’s assets. For real property, mortgages and revolving mortgages are common forms of security interest created for the benefit of project finance lenders, and these mortgages and revolving mortgages may be perfected by registration. For shares of companies and rights (e.g., rights for account receivables, rights for bank accounts, rights for insurance proceeds and leasehold rights) pledges and revolving pledges or security by way of transfer are used, depending on the type of asset. Generally, the pledge, revolving pledge and security by way of transfer may be perfected by consent from or notice to the obligor with a certified date.

Additionally, project finance lenders reserve the rights to assign to themselves, or third parties designated by the project finance lenders, project-related contracts entered into by a borrower to enhance the step-in rights of the project finance lenders.

In traditional project finance transactions in Japan, sponsors are often obliged to provide monetary support to project companies in recourse events. In the past, pure non-recourse loans, in which sponsors owe no direct contractual liability to project finance lenders, have not been widely used. However, in more recent years, there have been more non-recourse loans (rather than limited recourse loans) in project finance transactions for renewable energy power plants.

VI BONDS AND INSURANCE

With the exception of a construction agreement in relation to a conventional public procurement (without project finance debt being employed), performance bonds are not widely used in construction agreements, except for projects in which international sponsors are involved. If performance bonds are required for such a project, they often take the form of a demand guarantee under the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce.
The following are typically procured in relation to project finance:

a  erection all-risk insurance (during construction);
b  third-party liability insurance (during construction and operation);
c  delay in start-up insurance (during construction);
d  all-risk insurance (during operation);
e  business interruption insurance (during operation); and
f  any other insurance statutorily required for the business conducted by the project company.

VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Project finance lenders normally safeguard their step-in rights through a combination of (1) security interests created over most of the assets and rights in connection with the project, and (2) reservation of rights to assign project-related contracts to the project finance lenders or designated third parties. In exercising its step-in rights in the event of a default, a project finance lender will first try to assign the project to a third party that it has designated, with voluntary cooperation by the project company and its sponsors using the pressure of the step-in rights. If the project company and its sponsors are not cooperative, the project finance lender will unilaterally exercise its step-in rights, which may include foreclosure of security interests.

Generally, in a bankruptcy proceeding or a civil rehabilitation proceeding, secured creditors may still foreclose their perfected security interests outside the bankruptcy or civil rehabilitation proceeding and collect the proceeds of foreclosure. However, in a corporate rehabilitation proceeding that is applicable to stock companies (not limited liability companies), secured creditors may not exercise their security interests outside the corporate rehabilitation proceeding.

VIII  SOCIO-ENVIRONMENTAL ISSUES

i  Licensing and permits

For the development of power plants or other infrastructures, all the applicable permits, certifications and notifications relating to the development must be obtained and implemented. In addition to nationwide regulations, in most cases there are multiple layers of local regulations set by prefectures, cities, towns, villages and wards that may include a requirement to conduct an environmental impact assessment.

ii  Equator Principles

Some of the leading Japanese banks have adopted the Equator Principles, and typical covenants and representations required by the Principles commonly appear in project finance documentation.
IX  PPP AND OTHER PUBLIC PROCUREMENT METHODS

i  PPP

Before the concession scheme was introduced in 2011, most PFI projects were availability-based accommodation projects (e.g., schools, government offices, public housing, hospitals, school catering service facilities and libraries); transport sector projects, such as Haneda International Airport, were exceptions, although PFI can be used for various types of infrastructure and is flexible. The amendment of the PFI Act in 2011 aimed to change this situation and to develop the PFI regime to accommodate broader PPPs that can be used for various types of infrastructure projects. Under the concession scheme, a concessionaire is allowed to collect from the general public a commission, toll, fee or other moneys for the use of the infrastructure it operates. As such, the concession scheme is considered an appropriate form for a project in which the private sector assumes all or part of the revenue and demand risk.

In most PFI and PPP projects, the bidding process is in two stages. Only the bidders that pass the first stage are invited to the second stage, and the winner of the second stage becomes a preferred bidder. In recent projects, a competitive dialogue has been conducted during the second stage. Proposals from bidders are evaluated by scoring various aspects of the proposal based on the standards prescribed in the tender documents. The preferred bidder is usually not allowed to further negotiate a contract with the procuring authority after it has been chosen as the preferred bidder. As such, it does not take much time to conclude the contract once the preferred bidder is selected. Most of the work done after the preferred bidder is selected is in relation to the finance documents, and the project finance lenders are usually required to accept the terms of the contract agreed between the bidder and the procuring authority.

ii  Public procurement

There is no legislation in Japan that deals directly with public procurement; the Public Account Act (Act No. 35 of 1947, as amended) (in relation to procurement by central government) and the Local Autonomy Act (Act No. 67 of 1947, as amended) (in relation to procurement by local governments) refer to the permitted forms of public procurement (i.e., open competitive tender, restricted competitive tender and negotiated procedure) and their respective procedures.

Although criminal sanctions apply to persons who commit serious violations of procurement procedures (e.g., graft or cartel activity), there is no specific cause of action available to losing bidders that can stop the procurement procedure or the conclusion of the contract.

X  DISPUTE RESOLUTION

i  Special jurisdiction

Generally, litigation at court is the most popular dispute resolution procedure. Although there is no special jurisdiction of special courts for projects and construction disputes, district courts in Tokyo and Osaka have a section called the building division. Nonetheless, foreign investors should note that Japanese courts, even those with building divisions, are generally not familiar with expert analysis on delay because there are almost no experts in this area. District courts also provide court-sponsored mediation services (private mediation services are rarely used in any of the industry sectors).
Arbitration and ADR

The CBA designates the ‘construction dispute board’ (CDB) as the government-sponsored alternative dispute resolution (ADR) procedure (Article 25, CBA). There are local CDBs and a central CDB. The jurisdiction of each CDB is determined by the registered office of the claimant or the construction site in question. Central and local governments appoint a panel of mediator-arbitrators. The CDB is not frequently used as an instrument in international construction practices, but is a kind of conciliation tool purely formulated for domestic disputes. It is not advisable for foreign investors to rely too much on the CDB procedure.

The most widely recommended dispute resolution is arbitration. Although arbitration is seldom used for domestic disputes in Japan, the Arbitration Act (Act No. 138 of 2003, as amended) is modelled after the 1985 UNCITRAL Model Law. The Japan Commercial Arbitration Association is the most reliable national arbitration institution, but any foreign arbitration institution can be chosen instead. The language of arbitration is English.

OUTLOOK AND CONCLUSIONS

The project finance market in Japan still has room to expand but, in the areas of concession-type PFI projects and offshore wind farm projects (among others), the potential for expansion depends on the level of deregulation by the national government.

The role of local governments is also important as they have the power to initiate or support various projects that are potential targets for project financing.
I  INTRODUCTION

Mexico has an infrastructure development strategy sustained by a series of national and specific sector development plans, principally consisting of two official documents issued by the executive branch of Mexico.

First, the National Development Plan (PND), which gathers the strategy, national objectives and priorities for Mexico’s sustainable development. Second, the National Infrastructure Programme (PNI), aligned with the PND with a focus on boosting infrastructure development as a strategic measure for improving Mexico’s competitiveness, while increasing productivity and creating more and better paid labour opportunities. The PND and the PNI are six-year programmes mandated by each new presidential administration. Mexico held presidential elections in 2018, which resulted in a left-wing party with a populist president taking office. The PND and PNI for the 2019–2024 governing period have not yet been published by the federal government; however, the PNI is expected to establish the strategies and action points to foster sustainable economic growth during a climate of stability within the main infrastructure sectors, namely telecommunications, energy and electricity, hydrocarbon and transport. Further, the PND is expected to put a special emphasis on certain areas: gender equality, non-discrimination and inclusion, the fight against corruption and sustainable social development.

There are different legal schemes for the development of infrastructure projects in the public and private sectors:

a Concessions: mainly used in the transport sector for roads, ports and airports. The private entity is usually selected through a bidding process and is in charge of building, maintaining and operating the facilities. All investment returns are obtained through fees paid by customers.

b Financed public works: widely used in various sectors. The private entity is usually selected through a bidding process, investing and constructing a project for delivery to the public entity in exchange for a consideration equivalent to the total investment plus a margin.

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1 Vanessa Franyutti is a partner and Alejandro Alfonso is an associate at Nader, Hayaux y Goebel, SC.
2 Andrés Manuel López Obrador, the president of Mexico, began his administration on 1 December 2018 and it will conclude on 30 September 2024. The National Development Plan [PND] was released at the end of April 2019.
c Joint ventures: used in a limited manner, mostly in the hydrocarbon sector. A risk-sharing equity investment scheme between a private entity and a public entity.

d Public-private partnership (PPP) contracts: generally used for social infrastructure projects (such as schools, hospitals and prisons) and in the water and transport sectors. A PPP contract is a long-term contract through which a private entity, usually selected through a bidding process, designs, builds, finances, operates and maintains infrastructure for the provision of public services, in exchange for an economic consideration, usually on a fixed basis paid by a public entity, but can also be structured on a mixture of bases whereby the private sector can take some of the demand risk.

In recent years, there has been a notable increase in the number of finance projects developed in Mexico, mainly as a result of the enactment of substantive energy reforms in 20134 and the approval of the Public-Private Partnerships Law (the PPP Law) in 2012. Before these reforms, Mexican authorities had to rely primarily on the Public Works and Related Services Law or, for the concessions described above, the specific law applicable to the industry in question.

Although tailor-made legislation and laws that can make bid processes more efficient are still needed to boost infrastructure development in Mexico, the energy and PPP Law reforms, and general open market policies, have helped to reduce the infrastructure gap in the country.

II THE YEAR IN REVIEW

Mexico is one of the few economies that has achieved sustained economic growth in the past 10 years. According to the National Institute of Statistics and Geography, in 2018 the service sector accounted for 66 per cent of gross domestic product (GDP) and employed 62 per cent of the labour force; the industrial sector accounted for 31 per cent of GDP and employed 23.8 per cent of the labour force; and the primary sector accounted for 2.8 per cent of GDP and employed 13.6 per cent of the labour force.

During 2018, Mexico continued to implement the ‘structural reforms’5 that, according to the government, will enhance the country’s modernisation effort by increasing productivity, reinforcement and expansion of citizens’ rights, and by establishing a democratic regime. The structural reforms have allowed private companies to participate in markets that were traditionally reserved for the public sector, mainly in the energy sector, in particular in hydrocarbon and electricity (including renewable energy), which enabled substantial private investment during 2018 in comparison with previous years and other sectors.

There are currently almost 300 new infrastructure projects, 178 of which are in the execution stage, mainly in the energy, hydrocarbon, social (hospitals, universities, prisons

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4 The new administration seems inclined to slow down the effects of the 2013 energy reform; however, to formally do so would require amendment to the Federal Constitution, which, at the time of writing, does not seem to be one of the priorities of the new administration.

5 The structural reforms consist of a series of amendments to the Mexican Constitution and secondary laws implemented between 2012 and 2018 for the energy, antitrust, telecommunications, tax, finance and labour sectors.
and tourism) and communications (bridges and toll roads) sectors. Examples of projects that are currently being considered for development or are under development are outlined in the table below.6

<table>
<thead>
<tr>
<th>Project</th>
<th>Sector</th>
<th>Estimated investment</th>
<th>Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mayan train</td>
<td>Transportation</td>
<td>US$7.5 billion</td>
<td>Planning</td>
</tr>
<tr>
<td>Cancun-Tulum train</td>
<td>Transportation</td>
<td>US$2 billion</td>
<td>Pre-investment</td>
</tr>
<tr>
<td>Interconnection of Baja California, Baja California Sur and Sonora</td>
<td>Transportation</td>
<td>US$1.6 billion</td>
<td>Pre-investment</td>
</tr>
<tr>
<td>Electric System and the National Interconnected System</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Programme for the development of the Tehuantepec isthmus</td>
<td>Transportation</td>
<td>Pending definition</td>
<td>Planning</td>
</tr>
<tr>
<td>Dos Bocas Refinery, Tabasco</td>
<td>Hydrocarbons</td>
<td>US$8 billion</td>
<td>Planning</td>
</tr>
<tr>
<td>Licence agreement for hydrocarbon exploration in deep waters in the</td>
<td>Hydrocarbons</td>
<td>US$7.424 billion</td>
<td>Execution</td>
</tr>
<tr>
<td>Gulf of Mexico, in a block of 1,285km² for light oil extraction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gas pipeline ‘Sur de Texas-Tuxpan’</td>
<td>Hydrocarbons</td>
<td>US$2.111 billion</td>
<td>Execution</td>
</tr>
<tr>
<td>Photovoltaic power plant in the State of Hidalgo</td>
<td>Electricity</td>
<td>US$3.34 billion</td>
<td>Assignment</td>
</tr>
<tr>
<td>CFE interconnection SIN-BCS transmission line</td>
<td>Electricity</td>
<td>US$1,604,964,888</td>
<td>Pre-investment</td>
</tr>
<tr>
<td>Photovoltaic power plant in the State of Chihuahua</td>
<td>Electricity</td>
<td>US$581 million</td>
<td>Execution</td>
</tr>
<tr>
<td>Multi-modal transfer station, Taxqueña, Mexico City</td>
<td>Social infrastructure</td>
<td>US$265 million</td>
<td>Execution</td>
</tr>
<tr>
<td>Papantha prison complex</td>
<td>Social infrastructure</td>
<td>US$191,402,173</td>
<td>Pre-investment</td>
</tr>
<tr>
<td>Mazatlan Aquarium</td>
<td>Social infrastructure</td>
<td>US$76.22 million</td>
<td>Execution</td>
</tr>
</tbody>
</table>

### III DOCUMENTS AND TRANSACTIONAL STRUCTURES

#### i Transactional structures

In a public or public-private infrastructure project, a contract or concession is awarded through a bidding process to an entity. Generally, these projects would be structured through the creation of a special purpose vehicle (SPV) in the form of a limited liability company in charge of the contract or concession. If the project falls within the scope of a specific area in which a licence, permit or concession is needed, the ancillary rights may be granted as part of the contract.

The contract will state that the SPV will carry work or provide services to the public entity. Hence, the structure of the contract differ depending on the public needs and the sector involved. For instance, water projects, prisons, hospitals and toll roads would usually involve design-build-operate-transfer structures or operation and maintenance services. Although the enactment of the energy reform was a milestone in Mexican legislation, the hydrocarbon sector still needs further regulation to ensure the bankability of the projects.

The funding of the project will also vary depending on the structure. For example, according to the PPP Law and the PPP Regulations, a PPP project may take the following form, depending on the source of funding:

- **pure PPP project**: if the funds are obtained solely through budgeting in the federal budget or a public trust known as a national infrastructure fund;
- **self-sustainable PPP project**: if all the funding and investment is obtained through private resources or end users; and

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combined PPP project: if the above-mentioned funding schemes for pure and self-sustainable projects are combined.

The following funding and financing options are available to long-term PPP projects:

- **a** Federal funds through the Federal Expenditure Budget (PEF): prepared by the Ministry of Finance (executive branch) and approved by the House of Representatives (legislative branch). The PEF is one of the most important public finance documents as it defines the amount, distribution and destination of public resources.

- **b** National Infrastructure Fund: a public entity that supports infrastructure projects by providing non-refundable economic resources, issuing subordinated debt or entering into credit agreements with private developers.\(^7\)

- **c** National development banks (such as Banobras, Bancomext, Nafinsa and FOCIR): usually complement commercial bank funds with applicable financial products for each PPP project.

- **d** Multilateral development banks: Mexico has benefited from the participation of multilateral organisations in infrastructure projects such as the Inter-American Development Bank, the International Finance Corporation and the World Bank. These organisations have supported Mexican infrastructure especially in the water, education, health and transport sectors.

- **e** Commercial banks: there has been active participation from commercial banks worldwide in the funding of infrastructure projects. Thanks to regulatory entities (such as the National Banking and Securities Commission and the Bank of Mexico), the banking system in Mexico can rely on a safe investment environment.

- **f** Investment vehicles: the private sector in Mexico has been increasingly relying on its mature capital market to diversify its debt options and equity portfolio. Market and financial instruments, such as stock exchange certificates, real estate trusts, equity funds and, most recently, energy and infrastructure investment vehicles, have been a viable option for private entities in need of project finance.

ii **Documentation**

The documentation needed for infrastructure projects is not substantially different from that used worldwide for this type of project, which generally takes the following two forms:

- **a** Project-related documentation: typically consists of a contract between an SPV and a public entity as sponsor; ancillary permits and authorisations; and construction, supply, operation and maintenance services or engineering, procurement and construction agreements entered into by and between the SPV and third parties. The project-related documentation is typically audited by a lender or syndicate of lenders financing the project. Under the public contract, the SPV is usually allowed, subject to certain restrictions, to subcontract services with third parties to fulfil its obligations.

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\(^7\) More information about the National Infrastructure Fund can be found at [http://www.fonadin.gob.mx](http://www.fonadin.gob.mx).

\(^8\) More information about investment vehicles can be found at [https://www.bmv.com.mx](https://www.bmv.com.mx) and [https://www.gob.mx/cnbv](https://www.gob.mx/cnbv).
Finance-related documentation: include all documents drawn up by and between an SPV and a lender, such as credit agreements, subordinated or mezzanine loans, escrow agreements, security documents (in many cases consisting of collection rights and cash flows), among others. These documents may be governed by Mexican law or foreign law, while the security package will generally be subject to Mexican law.

Regarding the content of a contract (e.g., a PPP contract), the PPP Law establishes minimum clauses that shall be contemplated, including parties’ rights and obligations, characteristics and standards that the construction or services are required to meet, terms and conditions under which the SPV shall guarantee its obligations against its creditors, risk allocation, and the legal regime relating to the assets transferred to the SPV for the development of the project.

### iii Delivery methods and standard forms

The most common delivery method for an infrastructure project is the contract itself. Although most government contracts are not standardised, it is common that for similar types of projects, the contracts have similar terms and conditions. Although not standardised, many agencies will usually use the same form of contract for similar projects.

Notwithstanding the foregoing, in many cases, the project is required to go through the following process (summary):

- **Registration and prioritisation:** projects using federal funds must be registered with the Investment Unit (the administrative office of the Ministry of Finance). The Investment Unit is in charge of verifying the feasibility of a PPP project, considering a value-for-money determination through a public-private comparator.9

- **Bidding process:** there are different types of tenders, depending on the type of project: domestic and international public tenders (national tenders and international tenders under commercial agreements and open international tenders), close tenders and negotiated tenders. The bidding process consists mainly of the following phases: tender guidelines, briefing meetings, proposal submission, opening of proposals, technical and economic assessment, and contract award.

### IV RISK ALLOCATION AND MANAGEMENT

### i Management of risks

Risk allocation in Mexican projects is generally regulated under each separate contract or concession. The laws will set basic standards in some instances, such as force majeure. Owing to the complex land ownership regulation in Mexico, in the past, the government assumed the risk regarding the acquisition of the lands or easements necessary to develop a project; however, in recent years, supported by reforms, this risk has been allocated in many instances to the SPV.

In the event of force majeure, the basic principle is that no party is liable. However, project requirements may force the parties into agreeing to share the risk; for instance, making no payment or a reduced payment from the sponsor to the developer, with a right

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9 Projects sponsored by state-owned production companies are not required to be registered with the Investment Unit.
to terminate by the developer after a certain period of time has elapsed without the force majeure event lifting. The circumstances regarded as force majeure shall be defined within the contract and shall refer to unforeseen events, or foreseeable events that could not have been prevented, such as public riots, strikes, war, insurrection and acts of God.

ii  Limitations of liability

Limitations of liability shall be agreed by the sponsor of the project and the SPV. The limitations can vary depending on the entity that may incur liability and the nature of the liability. However, for certain projects (e.g., those relating to healthcare or tourism) it is customary to agree on a maximum liability amount, equal to the annual price of the contract based on the financial model of the project.

iii  Political risks

Unlike many decades ago when some activities were state-controlled, Mexico has since made great strides in taking action to diminish political risks. To make the country attractive to both local and foreign investors, law enforcement and respect for human rights has been a priority to secure the rule of law. In this regard, many laws have been enacted and modified to protect human rights against any unlawful government intrusion, mainly property. For instance, most of the legal background for project finance is acknowledged in the Mexican Constitution, to provide investors and private companies with a solid institutional and legal framework to protect their investment.

V  SECURITY AND COLLATERAL

A contract shall establish the terms and conditions under which the lenders of the SPV may exercise their step-in rights to temporarily take over the project if the SPV fails to comply with its obligations, or is negligent in complying with its obligations. In such an event, the sponsor under the contract must authorise the execution of the step-in rights.

A typical security and collateral package to guarantee financing agreements under a Mexican contract consists of the following:

a  pledges for the SPV’s shares; and
b  formation of a management and payment trust agreement to which the SPV and its shareholders (as applicable) would contribute, among other things, shares of the SPV and any collection rights under the contract. Through this type of trust, agreement funds and collections would flow through a defined waterfall, and different accounts are clearly defined, segregated and identified within the trust in such a way that the lender receives payment first from the project income generated by the project-financed asset.

It is common for a lender to enter into direct agreements with subcontractors under an infrastructure contract to facilitate the execution of the agreed step-in rights of the lender.
VI  BONDS AND INSURANCE

The guarantees normally required for infrastructure projects are typical in other parts of the world, such as Spain. For construction services, a performance guarantee is customary (the amount ranges between 10 per cent and 25 per cent of the total construction and equipment value). Bonds and letters of credit are the most common guarantee instruments.

Before entering into a contract, an SPV usually hires a third party insurance specialist to investigate and assess the risks that may be associated with the project during its development. This assessment will help to determine the insurance needed, which, as a minimum, will cover the final users of the infrastructure, the infrastructure itself, the assets used to provide the service and third-party liabilities.

VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Security interests can generally be enforced when a secured claim is due. Although there might be special procedures available for lenders to enforce security interests, they can be enforced in different ways depending on the security (contractual foreclosure of the title, execution of pledge assets, public auction, etc.).

Bankruptcy under Mexican law is divided into three stages: insolvency, reconciliation and bankruptcy. During the first stage, a judge appoints a visitor who renders an expert opinion on the company's finances. The objective of the second stage is to reach an agreement and avoid declaring bankruptcy. If this is achieved, the parties will sign an agreement; if not, the judge will declare bankruptcy.10

Commercial insolvency, bankruptcy (either voluntary or involuntary), liquidation, dissolution or similar relief under applicable law would typically be considered a breach of contract by the developer and would give the sponsor of the project or the lender under the financing documents grounds for termination of the contract without the need of a legal process.

Notwithstanding the foregoing, some security interests (such as lender's step-in rights) can be enforced outside commercial insolvency or bankruptcy procedures.

VIII  SOCIO-ENVIRONMENTAL ISSUES

i  Licensing and permits

The absence of a correct permit or licence will result in early termination of a project. Depending on the contract, the SPV and the sponsor may share the burden of obtaining the necessary permits and licences.

Among others, the following are required for a project development:

a  concession title for the use and exploitation of a public domain asset;

b  construction permits;

c  land-use permits, which are granted by both federal and state authorities;

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environmental impact authorisation issued by the Ministry of Natural Resources. In this important document, certain environmental conditions are established to develop the work and activities based on the effects that the project may have on the ecosystem;

clearance from the National Institute of Anthropology and History, which conducts studies to determine whether there are archaeological findings on the site designated for the project; and

for electricity projects, an authorisation from the Energy Regulatory Commission or the National Energy Control Centre.

ii Equator Principles

Some financial entities require, as a condition within financing documents, that the parties of a contract, and the proposed project, observe and comply with the provisions of the Equator Principles. The Equator Principles are mandatory enforcement provisions for financial institutions that have voluntarily adopted them.11

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPP contracts have become important for project finance in Mexico and will most likely continue to be important in the coming years. Most of the PPP projects thus far have been developed by the federal government under the PPP Law.

PPP projects can be carried out in Mexico by the following: entities of the Federal Public Administration; federal public trusts not considered as state-owned entities; federal entities with constitutional autonomy; and federal entities, municipalities and other public entities with federal resources.

PPP projects are not subject to procurement laws but have their own procurement process and laws. Observance of the PPP Law is optional and other federal laws may apply. The PPP Law contemplates a relatively new contractual scheme known as ‘unsolicited proposals’, through which the private sector may reach out to the government to propose the development of a new infrastructure project through a PPP scheme.

Currently there are over 36 PPP projects under development, involving a variety of sectors, including water and environment, transport, telecommunications and social infrastructure. Some of the most significant are in the following table:

<table>
<thead>
<tr>
<th>Project</th>
<th>Sector</th>
<th>Estimated investment</th>
<th>Type of contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>Las Varas–Puerto Vallarta highway section</td>
<td>Transport</td>
<td>US$360,796,298</td>
<td>Federal PPP</td>
</tr>
<tr>
<td>Waste water treatment plants in the State of Mexico and Mexico City</td>
<td>Water</td>
<td>US$47.5 million</td>
<td>Federal PPP</td>
</tr>
<tr>
<td>General Hospital in Tlahuac, Mexico City</td>
<td>Healthcare</td>
<td>US$149.18 million</td>
<td>Federal PPP</td>
</tr>
<tr>
<td>Desalination plant in Playas de Rosarito, State of Baja California</td>
<td>Water</td>
<td>US$453,644,113</td>
<td>State PPP</td>
</tr>
<tr>
<td>Nichupte Vehicular Bridge</td>
<td>Transport</td>
<td>US$200 million</td>
<td>State PPP</td>
</tr>
</tbody>
</table>

11 See https://equator-principles.com/about/.
ii Public procurement

The Public Works and Related Services Law governs the awarding of public procurement agreements. Article 134 of the Mexican Constitution states the fundamental principles for the administration of public economic resources: efficiency, effectiveness, economy, transparency and honesty. As a general rule, public entities are obliged to select a contractor through a tender process (with the exception of those expressly determined by law). The tender process for public procurement is substantially similar to that described in Section III.iii, point (b).

Although PPP projects have become a vitally important part of the project finance sector, public procurement continues to be a significant tool in the achievement of infrastructure projects for Mexico and, considering the new administration's public policy, will probably grow in number in comparison with other types of infrastructure contracts.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Many restrictions regarding foreign investments have been eliminated over the years, with the aim of attracting investment into the country and increasing economic competition. Currently, according to Article 6 of the Foreign Investment Law, the following activities are exclusive to Mexicans or Mexican entities with a foreigners exclusion clause: national land transport of passengers, tourists and cargo, excluding courier services; development banking institutions, under the terms of the applicable law; and the rendering of professional and technical services expressly indicated by the applicable law.

The following restrictions are applicable to foreigners wishing to participate in certain activities or companies:

a Maximum foreign investment permitted: 10 per cent. Applies to production cooperative societies.

b Maximum foreign investment permitted: 49 per cent. Applies to:
• manufacture and commercialisation of explosives, firearms, cartridges, ammunition and fireworks, not including the acquisition and use of explosives for industrial and extractive activities, or the development of explosive mixtures for the consumption of said activities;
• printing and publication of newspapers for exclusive circulation in the national territory;
• series ‘T’ shares of companies that own agricultural, livestock and forestry land;
• fishing in freshwater, coastal waters and in exclusive economic zones, excluding aquaculture;
• integral port administration;
• port services for piloting ships to carry out inland navigation operations, in accordance with the applicable law;
• shipping companies dedicated to the commercial exploitation of vessels for inland navigation and cabotage, with the exception of tourist cruises and the exploitation of dredges and naval artefacts for the construction, conservation and operation of ports;
• supply of fuel and lubricants for boats, aircraft and rail equipment;
• broadcasting. Within the limits of foreign investment, maximum investments will be tailored to an investor nationality basis considering reciprocity agreements with the corresponding country; and
• certain air transport services.
According to Article 8 of the Foreign Investment Law, special authorisation is needed for a foreigner to have a participation of more than 49 per cent in the following activities and companies:

a. port services for vessels to carry out inland navigation operations, such as towing, and rope lashing;
b. shipping companies dedicated to the exploitation of vessels exclusively in high altitude traffic;
c. companies licensed to operate commercial air strips;
d. private services for preschool, primary, secondary, mid-high, higher and combined education;
e. legal services; and
f. construction and operation of public railways, and public rail transport services.

Regarding the removal of profits and investments, the Foreign Exchange Commission, formed by officials from the Ministry of Finance and the Bank of Mexico, is responsible for foreign exchange policy. At the end of 1994, the Commission determined that the exchange rate would be determined by market forces (floating exchange rate and free float regime).12 Although the federal government implemented a plan for Mexican companies to repatriate foreign earnings in 2017, there is currently no programme that would facilitate this under Mexican law.

XI DISPUTE RESOLUTION

i Special jurisdiction
There are no specialist courts in Mexico to which project finance transaction disputes can be submitted. It is customary for parties to submit any dispute arising from a contract to which Mexican law applies to the federal courts in Mexico City. However, this standard process may be affected by several variables, such as the location of the project and the parties involved. Some PPP contracts contemplate a previous court dispute resolution consisting of an expert committee to which the parties can submit the dispute and even stipulate that the committee’s decision is binding on the parties. In any case, the parties may agree on the dispute resolution process in the corresponding contract.

ii Arbitration and settlement
Under certain contracts, parties may agree to go before the Ministry of Public Function (comptroller) to file a conciliation process regarding dispute resolution under the contract. If no agreement is reached through this conciliation process, parties may agree to submit the dispute to arbitration, which must be governed by Mexican law because in project finance transactions, one of the parties is a public entity.

Dispute resolution with lenders may be submitted to arbitration, governed by arbitration rules (International Chamber of Commerce rules are customary).

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12 More information on currency controls can be found at www.banxico.org.mx/portal-mercado-cambiario/foreign-exchange-markets-exc.html.
XII  OUTLOOK AND CONCLUSIONS

Although there is still a lot to be done to modernise Mexico’s legislation, there is little doubt that progress has been made during the past 18 years in attracting national and foreign investment in major infrastructure projects. The enactment of the PPP Law in 2012 and the energy reform in 2013 represent a milestone for project finance transactions. Private entities have been given greater powers on decisions, while the public sector has been able to receive better and more economically efficient design, construction, operation and maintenance proposals. In addition, PPP projects are a more flexible scheme for the government as they do not necessarily involve public resources. PPPs will continue to be relevant in the country’s projects and infrastructure scenes; however, the current administration’s policy against corruption and in favour of economic efficiency will result in a higher level of scrutiny by the authorities and a conservative and cautious use of PPP structures with an increase in public procurement.

On the energy hydrocarbon front, private projects in the renewable energy and midstream sector continue to be developed. However, the government has recently cancelled auctions for the purchase of energy and has emphasised that it will strengthen the structure and market participation by both Pemex (Mexican Petroleum) and the CFE (the federal electricity commission). It is therefore debatable whether private investment in these fields will continue to grow at the same pace.

The new federal administration is expected to implement public policies based on anticorruption, social responsibility and gender equality; however, there is uncertainty stemming from the investment market and credit rating agencies on the government’s ability to adopt fiscal policies to achieve an equilibrium between revenue and expenditure. For the moment, it is hard to tell whether the number of project finance transactions with public investment will continue to increase as was seen between 2012 and 2018, or if the focus will be on specific identified government projects.
I INTRODUCTION

Throughout recent Philippine history, past administrations have understood the importance of infrastructure development, but the measures taken to reach the ideal level and mixture of infrastructure spending vary greatly. Even with its fast-growing economy, expanding population and rapid urbanisation, the Philippines lags behind its ASEAN counterparts in terms of infrastructure spending. Thus, the current government has made infrastructure development part of its priority development programme because it has identified infrastructure as one of the key drivers of economic growth. In 2017, the government launched the ambitious Build, Build, Build (BBB) programme, which aims to raise infrastructure investments to 7.4 per cent of gross domestic product (GDP) by 2022 from 5.1 per cent in 2016. Between January and November 2018, the government’s infrastructure spending reached an estimated 728 billion Philippine pesos, 50 per cent higher than the 486.5 billion pesos recorded during the same period in the previous year.

As part of the medium-term Philippine Development Plan, the BBB programme is estimated to require US$168 billion in investments for 75 high-impact priority projects nationwide. To finance this, the government plans to use an optimal funding mix composed of government spending, official development assistance (ODA) and private capital.

Arguably, however, private capital to fund infrastructure projects is underused. Thus, the current administration identified public-private partnerships (PPPs) in its 10-point socio-economic agenda as one of the key strategies to accelerate annual infrastructure spending.

Since its official launch in 2010, the PPP programme has played a part in 17 national PPP projects worth around 328.67 billion pesos. According to the 2018 Infrascope Report by The Economist Intelligence Unit (The EIU), the Philippines now ranks second of the countries in Asia evaluated by The EIU, joining Thailand and China in the group of mature PPP markets based on both qualitative and quantitative criteria. In the World Bank Group’s

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1 Carlos Alfonso T Ocampo is a senior partner and Angela K Feria is an associate at Ocampo Manalo Valdez & Lim.
'Procuring Infrastructure: Public-Private Partnerships Report 2018 – Assessing Government Capability to Prepare, Procure, and Manage PPPs', the Philippines is ranked first in the East Asia and Pacific Region in terms of preparation of PPPs, contract management and unsolicited proposals, and third in terms of procurement of PPPs.

This chapter focuses on the legal and regulatory framework of infrastructure projects and project financing in the Philippines, issues commonly encountered in infrastructure projects, and both existing and proposed measures to address these issues. Where relevant, we highlight key projects and current events to provide context.

II THE YEAR IN REVIEW

i From independent power producers to the hybrid PPP model

PPPs, in the Philippine context, are a strategic mode of procurement that involves a long-term contractual agreement between the government and a private firm targeted towards financing, designing, implementing and operating infrastructure facilities and services that were traditionally provided by the public sector.5

A major turning point in Philippine history, the importance of private participation in project financing came to light during the energy crisis of the late 1980s to early 1990s. At its worst, the Philippines experienced daily drops of voltage in the electricity supply lasting eight to 12 hours,6 resulting in an estimated 6 per cent decrease of the country’s GDP. To address the crisis, then President Fidel V Ramos expanded the Build-Operate-Transfer Law (the BOT Law) in 1994, which shortened the procurement process and accommodated private sector participation. As a result of the expanded BOT Law, independent power producers (IPPs) were allowed to operate, which contributed to the resolution of the energy crisis.7 Traditional PPPs, such as those entered into by IPPs, have thus been a proven solution when government could not meet energy demands.

Recently, however, the government has shifted its preference to hybrid models, for which funding for the initial phase is secured through public procurement or ODA, while the operation and maintenance (O&M) of the project is allocated to the private sector through PPPs, a reversal of the procedure observed by previous administrations. As claimed by the government, hybrid models fast-track infrastructure projects and enable project costs to be cheaper in the long run. To illustrate, the Clark International Airport in Pampanga (the Clark Airport) features hybrid PPPs as the government seeks to decongest the Ninoy Aquino International Airport (NAIA) in Metro Manila by expanding the capacity of airports outside Metro Manila. The Clark Airport, in particular, was thrust into the national spotlight in August 2018, when NAIA’s operations were paralysed for two days owing to an unplanned runway closure, costing the country’s main airport millions in lost revenue. The Clark Airport Expansion Project is considered to be the first airport project using the hybrid PPP model.

However, some PPP proponents argue that there is no longer any incentive for private participants to raise revenues and provide O&M services efficiently in the absence of any

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5 See https://ppp.gov.ph/ppp-program/what-is-ppp/.
7 ibid.
capital risk. While shifting policies create some uncertainty in government support towards PPP projects, further comparative analysis is necessary to determine whether the traditional PPPs or their hybrid models will be best suited to finance a particular project.

ii  Private participation opportunities in the health sector
Whereas the BBB programme focuses heavily on transport infrastructure, PPPs in the healthcare industry have been making headway to achieve the government’s objectives of addressing the health service needs of the poor. Through the Public-Private Partnerships Center (the PPP Center), the government has encouraged private participation through PPPs with a focus on projects that would help in the delivery of universal healthcare for Filipinos. One of the pioneering PPP projects in this sector is the development of the planned Philippine General Hospital in University of the Philippines, Diliman (the PGH Project). The PGH Project is also designed to be implemented as a hybrid project, wherein the O&M component will be bid out to the private sector via PPP.

With the enactment of the Universal Health Care Act in 2019 (UHCA), healthcare PPPs may bridge a funding gap of 164 billion pesos needed to implement healthcare reforms during UHCA’s first year of implementation.

III  DOCUMENTS AND TRANSACTIONAL STRUCTURES
i  Common transactional structures
The establishment of project companies, commonly known as special purpose vehicles (SPVs), has become common in financing infrastructure projects. To encourage private sector investments in non-performing assets, the Philippines enacted the Special Purpose Vehicle Act of 2002 (SPVA) to provide tax and other incentives for financial institutions to sell and dispose of their non-performing assets (NPAs) to SPVs and, subject to certain conditions, from SPVs to third parties. However, benefits under the SPVA have since expired, thus prompting financial institutions to call on the Philippine Congress to revisit the SPVA.

ii  Documentation and standard form contracts
The drafting of contracts and relevant bidding documents for infrastructure projects vary according to the type of project involved, but implementing agencies may refer to model contracts prepared by the National Economic Development Authority (NEDA) and the PPP Center (an agency attached to NEDA). PPP contracts, for instance, typically involve the following sections: parties, project, modality, term, contributions, risks, governance, approvals, roles and amendments. Post-award requirements, on the other hand, often include financial closure, regulatory approvals, permits and clearances, right-of-way clauses and insurance.

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9 An Act Granting Tax Exemptions and Fee Privileges to Special Purpose Vehicles which Acquire or Invest in Non-Performing Assets, Setting the Regulatory Framework Therefor, and for Other Purposes (Special Purpose Vehicle Act), Republic Act No. 9182 (2002) as amended by Republic Act No. 9343.
IV RISK ALLOCATION AND MANAGEMENT

i Management of risks
For project finance transactions or construction projects, implementing agencies are given wide discretion in managing risks and the allocation of these risks varies greatly from project to project. However, the allocation of functions and risks is closely related. Thus, the allocation of functions and risks generally follows the principle that a risk or the performance of a function should be allocated to the party that is best placed to perform the function or manage the risk.

Specifically, for PPPs, the allocation of risks is evaluated through an iterative process, namely to identify and assess the risks and decide how to allocate those risks between the implementing agency and the private entity. For private proponents, the payment method constitutes a major factor since, normally, no government financial guarantees are provided by the implementing agency – although in some instances, the implementing agency may offer subsidies as benefits or a guaranteed supply of certain nationalised resources. During the pre-development stage, the implementing agency would test the market with private firms and adjust transactions based on market feedback. Still, the implementing agency and the private entity often use different criteria for evaluating whether a transaction is viable and whether fairness is a business case to be made for the private proponent. Further, social costs and offtake risks are difficult to measure and quantify, thereby making allocation of risks sub-optimal. Types of risks typically allocated between parties include legal and regulatory risks, financial (demand risk), economic, engineering, completion risks, inflation and foreign exchange risks, risks from uncertainty in assured revenues, competition risks and sovereign risks (i.e., expropriation and police power) and other risks.

ii Limitation of liability
The Philippines recognises the separate and distinct legal entity of a corporation, thus limiting the liability of its shareholders. Hence, infrastructure projects tend to be undertaken predominantly by corporations. However, the protection afforded by limitation of liability may be set aside in the case of fraud, deliberate default or reckless misconduct of the defaulting party. In such cases, the veil of corporate fiction is pierced and the separate juridical personality of the corporation used to perpetuate fraud is disregarded.

iii External risks and the application of force majeure
Philippine law adopts a strict definition of force majeure or fortuitous event, and for the defence of force majeure to prosper, it is necessary that one has committed no negligence or misconduct that may have occasioned the loss. Examples of force majeure permitted include war, invasion, rebellion, terrorism, revolution, natural catastrophes or any other

12 ibid.
13 Interview with Mia Sebastian, Deputy Executive Director of the Public-Private Partnership Center [the PPP Center], on 22 January 2019.

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event that is unforeseeable or, although foreseeable, unavoidable. Nevertheless, parties are free to stipulate that any event constituting force majeure shall not excuse a party from its obligations. For instance, some PPP contracts state that the occurrence of any force majeure event shall not release any party from monetary obligations and the parties shall continue their performance, with all due diligence, of all obligations not affected by force majeure.

iv Political risks

Since parties to a construction agreement are free to stipulate, they may adopt provisions to account for adjustments in any increase or decrease in cost resulting from a change in Philippine laws (including the introduction of new laws and the repeal or modification of existing laws) or in the judicial interpretation of such laws. Moreover, given the massive scale of imports of capital goods required for the country’s infrastructure programme, parties may adopt payment stipulations to include fixed rates of exchange to be used for calculating payments.

V SECURITY AND COLLATERAL

Typically, funders and lenders require a variety of security and collateral to protect them from defaulting borrowers, such as real estate mortgages, chattel mortgages (for personal property), pledges or guarantees.

For certain types of collateral, such as mortgages or pledges, registration with relevant government authorities is required to bind third parties. For instance, real estate mortgages must be registered on the Registry of Deeds where the property is located. In other instances, the law automatically creates a lien in favour of those involved in the construction or repair of the building. Article 2242 of the Civil Code, for example, grants preferential rights to labourers, architects, engineers and contractors regarding specific immovable property and real rights of the debtor, and this preferred lien constitutes an encumbrance on the immovable or real right.

These provisions apply when the same property is subjected to the claims of several creditors and the value of the debtor’s property is insufficient to pay all the creditors in full. Thus, to protect the creditor, contracts likewise regularly provide that debtors must warrant its solvency throughout the existence of the project and any violation of such a warranty will entitle the creditor to damages and other remedies, such as forcing the debtor to deliver additional securities.

VI BONDS AND INSURANCE

For construction projects, standard provisions typically include defects liability period, defects notification period, imposition of retention money and the requirement of performance bonds. Moreover, Philippine law requires contractors to secure workmen’s compensation insurance and public liability insurance. In addition to the legal requirements, principals commonly require contractors to secure an all-risk insurance policy and bank guarantees as

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15 Civil Code, Article 1174.
16 Civil Code, Article 2242.
17 Jan-Dec Construction Corporation v. Court of Appeals, G.R. No. 146818, 6 February 2006.
additional forms of mitigation of risk. If a contractor constitutes a joint venture, consortium or other unincorporated grouping of two or more persons, the principal may require joint and solidary liability for the performance of the project.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Registration of encumbrances on immovable property with the proper government authority is required to enforce the rights of a secured party over the collateral. However, with respect to movable properties, the Personal Property Security Act\(^\text{18}\) (PPSA) was enacted to simplify the creation, perfection, registration and enforcement of movable collateral such as bank accounts, accounts receivable, inventory, equipment, vehicles and intellectual property rights.\(^\text{19}\) Under the PPSA, priority of interests depends on the time of registration with a centralised and nationwide electronic registry.

Outside the context of bankruptcy, project lenders may enforce security rights extrajudicially or judicially, in either case, through a foreclosure of the collateral or public auction (although private sale is allowed for certain types of movable property). In a foreclosure of real estate mortgage, the mortgagor is granted a period to redeem the property before title is consolidated with the mortgagee.

If a debtor becomes insolvent, whether voluntary or involuntary, or requires financial rehabilitation, the applicable law is the Financial Rehabilitation and Insolvency Act\(^\text{20}\) (FRIA). Insolvency proceedings require court intervention but, in limited cases, out-of-court informal restructuring is allowed if approved by the court with the conformity of the required percentage of creditors. Special features of the FRIA include:

\(a\) excluded assets that are exempt from execution;
\(b\) excluded entities (banks, insurance companies and pre-need companies covered by the New Central Bank Act) and government entities; and
\(c\) priority of credits, namely those provided by law such as taxes, claims for services rendered by employees or labourers, secured immovables, secured movables and unsecured obligations.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Permit and licensing requirements vary depending on the type of project involved. By way of example, developers of renewable energy projects considered to critically affect the environment may need to secure the following permits and licences before development of a renewable energy project may proceed.


\(20\) An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises and Individuals (Financial Rehabilitation and Insolvency Act), Republic Act No. 10142 (2010).
Licenses and permits from national government agencies

- Environmental compliance certificate;
- Environmental impact statement;
- Tree cutting permit;
- Acquisition of land or land use agreement such as a forest land use agreement or special land use permit;
- Certificate of non-coverage from the national irrigation administration;
- Water permit; and
- Certificate of non-overlap or certificate of precondition from the National Commission on Indigenous Peoples.

Licenses and permits from local government agencies

- Proof of public consultation;
- Relevant resolution of support;
- Relevant local permits (including for construction); and
- Rights of way agreements (both private and public);

The absence of any of the required permits or licences authorises the relevant government agency, such as the Department of Energy, to suspend the project contract.

ii Applicability of the precautionary principle

To further ensure that an infrastructure project does not cause excessive harm to the environment, the Philippines adopts the precautionary principle as a minimum standard in evaluating the environmental impact of a project. The precautionary principle states: ‘When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the courts will resolve any doubts in favour of protecting the environment.’

iii Measures to address socio-environmental issues

While environmental and social safeguards are normally part of a project’s feasibility study, the sheer number of regulatory agencies involved in any given project creates inefficiencies and redundancies in compliance and reporting, thereby making monitoring compliance challenging. Thus, the PPP Center, acting as a central coordinating agency, has integrated environmental and social safeguards in infrastructure projects by identifying issues, evaluating mitigation measures, operating safeguards through the project contract, and monitoring the implementation of such measures and safeguards.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPPs address the limited funding resources for local infrastructure or development projects within the public sector, thereby releasing public funds for allocation to other local priorities.

21 2010 Rules of Environmental Procedure, Rule 20(1).
22 Department of Foreign Affairs and Trade (DFAT) Safeguard Policy for Aid Program, as cited in Public-Private Partnership Governing Board Resolution 2018-12-02, 14 December 2018.
PPPs, as differentiated from other infrastructure projects, emphasise value for money – focusing on reduced long-term costs, better risk allocation, improved services and possible generation of additional revenue for both the government and private sector.

Apart from the implementing agency and the private proponent, the PPP Center also has a crucial role in facilitating the country’s PPP Program and Projects. This section focuses on national infrastructure projects that can be the subject of a PPP.

Framework

The Philippines’ existing PPP framework encourages open competition and ensures a level playing field for all PPP players through transparent and credible processes. Local or foreign investors and large or small companies that participate in PPPs are properly scrutinised in terms of their legal, financial and technical capacities to ensure that they are able to finance, construct and implement large, complex infrastructure projects. In general, PPPs involve four stages: project development (project preparation, finalisation of project structure), approval (evaluation, review and approval of the project), competition (preparation of bidding documents, prequalification to bid, bid submission and evaluation, awarding of project to private partner and issuance of Notice of Award), and cooperation stage (submission of Notice of Award requirements, contract signing, financial close, construction, turnover of the facility or infrastructure). The table below summarises PPP projects between 2010 and February 2019.

<table>
<thead>
<tr>
<th>Stage</th>
<th>Mode of procurement</th>
<th>Number</th>
<th>Project cost (in PhP billion)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Projects under implementation</td>
<td>Solicited</td>
<td>15</td>
<td>242.77</td>
</tr>
<tr>
<td></td>
<td>Unsolicited</td>
<td>2</td>
<td>85.90</td>
</tr>
<tr>
<td>Subtotal</td>
<td></td>
<td>17</td>
<td>328.67</td>
</tr>
<tr>
<td>Projects in the pipeline</td>
<td>Solicited</td>
<td>14</td>
<td>0.38</td>
</tr>
<tr>
<td></td>
<td>Unsolicited</td>
<td>25</td>
<td>3,309.13</td>
</tr>
<tr>
<td>Subtotal</td>
<td></td>
<td>39</td>
<td>3,309.51</td>
</tr>
</tbody>
</table>

With respect to the laws that govern the framework of a PPP, the Build-Operate-Transfer Law of 1990, as amended, its implementing rules and regulations (IRR) and the NEDA-Investment Coordination Committee (ICC) Guidelines primarily govern national infrastructure projects, whereas special laws and local ordinances govern local projects. Joint ventures involving national projects are primarily governed by the 2013 NEDA Guidelines on Joint Ventures.

23 Reorganizing and Renaming the Build-Operate and Transfer Center to the Public-Private Partnership Center of the Philippines and Transferring its Attachment from the Department of Trade and Industry to the National Economic and Development Authority and for Other Purposes (Executive Order No. 8, Series of 2010), as amended by Executive Order No. 136, Series of 2013.


27 An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for Other Purposes, Republic Act No. 6957, as amended by Republic Act No. 7718.
Types
PPP contract types include, but are not limited to, service contracts, management contracts, lease, build-operate-transfer (BOT) and its modalities, concessions, joint ventures and hybrid arrangements.

Typical procurement or tender process
In a project’s life cycle, the implementing agency typically identifies the infrastructure project, which is then evaluated and approved by an approving body.28 The implementing agency then selects a private partner through competitive bidding. Criteria for awarding PPP projects to private sector include the technical, financial, legal, economic, environmental, and social viability of a project.

In addition, the BOT Law allows unsolicited proposals (USPs) for projects excluded from the current administration’s list of priority projects, provided the following conditions are met:

\( a \) the project involves a new concept or technology or is not part of the List of Priority Projects as defined by law;

\( b \) the project is not a component of an approved project; and

\( c \) no direct government guarantee, subsidy or equity is required.

Although USPs, by law, are subject to Swiss challenge, they are criticised for not undergoing a genuinely competitive and transparent bidding process. Further, many argue that the 60 working days for challengers to provide a better offer than the original proposal is insufficient to effectively conduct a thorough project study and challenge the original proponent. To date, the sole instance of a project being awarded to a challenger (PIATCO) is the controversial NAIA Terminal 3 project, but the contract was subsequently declared null and void by the Supreme Court because of irregularities in the contract.

Thus, USPs may provide the advantage of faster implementation of projects but since the few that have been awarded have been shrouded in controversy, the Philippines needs to re-evaluate the process and vague standards set for USPs to give challengers a fair opportunity to participate.

Significant PPP transactions
Waste-to-energy facilities to supplement the energy needs of the Philippines

Apart from traditional infrastructure projects, the PPP Center has highlighted key areas of growth. In particular, the PPP Center has identified renewable energy infrastructure, such as waste-to-energy facilities, as the ‘Next Wave of PPPs’ thanks to the strong interest from local government and investors.29 These non-traditional PPP projects, such as renewable energy infrastructure and digital infrastructure stand to benefit from PPPs because of the technical expertise and innovative technologies more widely available in the private sector.

This year, Metro Pacific Investments Corporation (MPIC) is expected to be awarded the 22 billion peso Quezon City Waste-to-Energy facility project since no counter-offers

were submitted to challenge MPIC’s unsolicited proposal. The facility will have the capacity to convert up to 3,000 metric tons a day from Quezon City’s municipal solid waste (MSW) to 42 megawatts, which can power between 60,000 and 90,000 homes. As public partner for the project, the Quezon City government committed to deliver 1,700 metric tons of MSW per day, to acquire the right of way for access roads and other utilities and to expropriate the project site of the facility if required. The concession agreement will have a term of 35 years and originated from a USP from MPIC.

Projects such as the Quezon City waste-to-energy facility signify the Philippine government’s commitment to diversifying its energy mix and maintain at least 30 per cent of the country’s total energy mix from renewable energy sources until 2030.31

PPP as a tool for modernising the country’s existing infrastructure

Joining the new wave of PPP projects are those featuring new technology to improve and enhance public services. In 2016, the Philippines Statistics Authority (PSA) awarded a 1.59 billion peso project to computerise the civil registry operations of the PSA using imaging technology. Further, in January 2014, the Department of Transportation awarded the Automatic Fare Collection System (AFCS) project to a private consortium (from 33 initial prospective bidders). The consortium contributed the contactless-based smart card technology called the Beep Card™ on Light Rail Transit (LRT) Line 1 and 2 and Metro Rail Transit (MRT) Line 3. The project became fully operational in December 2015 and government officials reported improved collections and higher user satisfaction as a result of the AFCS.32

The current administration lists more than 70 national priority infrastructure projects, of which only seven have a PPP component. While PPPs undoubtedly have a role in addressing the country’s infrastructure requirements, lack of institutional capacity among implementing agencies,33 apparent conflicting objectives between public and private stakeholders, and the highly politicised nature of awarding PPP projects make traditional PPPs the less preferred mode of procurement for big-ticket projects. Nevertheless, the private sector may have opportunities with the influx of the next wave of PPP projects, in which private sector participation is integral in the project’s success.

30 ‘MPIC expects go signal for QC project within Q1’, Business World Online, 26 February 2019 (https://www.bworldonline.com/mpic-expects-go-signal-for-qc-project-within-q1/).
32 Automatic Fare Collection System: Project Brief, PPP Center (see https://ppp.gov.ph/ppp_projects/automatic-fare-collection-system/?wppa-occur=1&wppa-cover=0&wppa-album=85&wppa-photo=1171); United Nations Economic and Social Commission on Asia and the Pacific, Public-Private Partnerships Case Study #6: Automatic Fare Collection System (retrieved from https://www.unescap.org/sites/default/files/Case%206-%20Automated%20Fare%20Collection.pdf).
33 Interview with Jonathan Uy, Assistant Secretary, NEDA Investment Programming Office, on 24 January 2019.
Other procurement methods

Funding of national infrastructure projects is secured primarily from the national budget, whereby bids for projects go through a public procurement process, and governed by the Government Procurement Reform Act.\(^{34}\)

As a developing country, the Philippines also receives funding from loans, grants and ODA from other states and multilateral organisations. In the past three years, Japan has continued to be the largest contributor of ODA, funding five of the administration’s flagship infrastructure projects (or 36.5 per cent of the Philippines’ ODA portfolio), followed by South Korea and China, which funded two projects each. A key infrastructure project funded from ODA is the Metro Manila Subway, which is expected to begin operations by May 2022. The planned subway is regarded as the most expensive project under the government’s Build, Build, Build programme, with total cost of 356.96 billion pesos.\(^{35}\)

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Major foreign investors and investment areas

The Philippines is primarily a capital importing country with respect to many areas of industry. Total foreign investment net inflows in 2018 amounted to US$9.8 billion, down 4.4 per cent from 2017. Japan, Taiwan, Singapore, the United States, the United Kingdom, Australia and South Korea are the countries with the largest foreign investment, although China has recently been catching up, with investment during the fourth quarter of 2018 accounting for 52.6 per cent of total approved investments compared with virtually nothing in the third quarter.\(^{36}\) The sectors that receive the highest level of foreign investment include manufacturing, real estate, administrative and support service activities, and electricity, gas, steam and air-conditioning.\(^{37}\)

Limitations

One hundred per cent foreign participation is allowed in all areas of investment except for those industries that are subject to nationalisation requirements. In particular, the Constitution and the Negative List of the Foreign Investment Act\(^{38}\) specify the industries that are subject to limitations. For instance, the following are some of the areas in which up to 40 per cent equity participation is allowed:

\(\begin{align*}
a & \text{ exploration, development and utilisation of natural resources;} \\
b & \text{ ownership of land;}\end{align*}\)\(^{39}\)

\(^{34}\) An Act Providing for the Modernization, Standarization and Regulation of the Procurement Activities of the Government and for Other Purposes (Government Procurement Reform Act), Republic Act No. 9184 (2003).


\(^{39}\) Except in cases of hereditary succession, where foreign individuals may own lands.
ownership and operation of public utilities except power generation and supply of electricity (note that all the executive and managing officers of any such corporation or association must be citizens of the Philippines);\textsuperscript{40}

d) construction and repair of locally funded public works (up from 25 per cent in the previous list) except:

- infrastructure or development projects covered by the Republic Act No. 7718; and
- projects that are foreign-funded or assisted and required to undergo international competitive bidding.

Conversely, 100 per cent foreign participation is allowed in insurance adjustment companies, lending companies, financing companies and investment houses.\textsuperscript{41} Even if a particular investment satisfies the equity restrictions, the type of investment is still subject to approval by the relevant government authority and, in some cases, the President of the Philippines.

iii Benefits and other incentives

The Philippines has the highest number of investment promotion agencies (IPAs) as compared with its Asian counterparts, with seven overall. These IPAs are authorised to award incentives to foreign investors. Common incentives include both the fiscal (income tax holidays ranging from four to eight years, exemption from or a reduced rate for imports of capital equipment ranging from four to 10 years, and additional tax deductions) and non-fiscal (simplified customs procedures, employment of foreigners). The Philippines likewise recognises property rights of foreigners and registered foreign companies, including the right to non-impairment of contracts, subject only to the constitutionally granted powers of expropriation and police power by the state.\textsuperscript{42}

iv Shifting policies to ease foreign restrictions

During the past decade, the Philippines has recognised the critical role of foreign investors in boosting its economy, and in particular those projects that require significant capital investment and technical expertise. To spur investment in infrastructure projects, the country adopted the Investors' Lease Act\textsuperscript{43} to allow foreign investors to lease private land for up to 75 years (50 years, renewable once for another 25 years). For tourism projects, leases are limited to projects with an investment of not less than US$5 million, 70 per cent of which shall be infused in the project within three years of the lease contract being signed.

A foreign corporation seeking to do business in the Philippines may form a branch or representative office in the Philippines but must first secure a licence to transact with the Securities and Exchange Commission of the Philippines. The recently adopted Revised Corporation Code further increased the capitalisation requirements for foreign branch offices.

\textsuperscript{40} 1987 Phil. Const., Article XII (11).
\textsuperscript{41} An Act Amending Investment Restrictions in Specific Laws Governing Adjustment Companies, Lending Companies, Financing Companies and Investment Houses Cited in the Foreign Investment Negative List and for Other Purposes, Republic Act No. 10881 (2016).
\textsuperscript{42} 1987 Phil. Const. Article III (9).
\textsuperscript{43} An Act Allowing the Long-Term Lease of Private Lands by Foreign Investors (Investors' Lease Act), Republic Act No. 7652 (1993).
from 100,000 pesos to 500,000 pesos. A licence to transact authorises a foreign corporation to sue in the Philippines but there are recognised exceptions to the general rule that only foreign corporations licensed to do business in the Philippines may institute an action before the courts. These exceptions include: (1) if a party is estopped from questioning the capacity of a foreign corporation to sue; (2) if a foreign corporation entered into an isolated transaction; and (3) if an action involves the confirmation, recognition and enforcement of a foreign arbitral award. A foreign corporation will nevertheless have the right to sue if these exceptions can be proven.

v Concerns and other matters

In 2018, the government passed the Tax Reform for Acceleration for Inclusion (TRAIN) Law, which resulted in mixed reactions and uncertainty among investors. According to the American Chamber of Commerce, the proposed second package of the TRAIN Law, which involves the rationalisation of incentives given to foreign investors, creates uncertainty for both existing and new investors as the measure is likely to lead to large-scale revenue reduction and job losses, which may be brought about by damaged investor confidence.

Moreover, even with the adoption of policies that ease restrictions on foreign investments, the Philippines ranks among the lowest in the ASEAN region in terms of total foreign direct investment, which suggests that restrictions still constrict the ideal inflow of foreign investment. Thus, assuming that foreign investments have a considerable role in supporting PPPs, the Philippines needs to find ways to attract foreign investment for such projects. Currently, many of the PPPs in the pipeline are considered public utilities and are thus limited to 40 per cent foreign ownership. Thus, some government officials have called for the amendment of the 83-year-old Public Service Act to ease foreign restrictions by narrowing the definition of public utilities. Further, in 2018, the President called on Congress to propose amendments to the economic provisions of the Constitution, which may address concerns about making the Philippines more competitive and attractive to foreign investors.

XI DISPUTE RESOLUTION

i Special jurisdiction – Construction Industry Arbitration Commission

While disputes are still predominantly resolved by the regular courts, long delays, allegations of corruption and inefficiencies make recourse to the courts less than ideal. Thus, when significant financial losses are at stake, the parties involved in a construction dispute may enter into arbitration before the Construction Industry Arbitration Commission (CIAC), the Philippines’ arbitration vehicle for the construction industry.

However, a common issue between parties is the manner in which CIAC’s exercises its jurisdiction. To illustrate, in the case of China Chang Jiang Energy Corporation v. Rosal Infrastructure Builders (China Chang), decided by the Supreme Court, the high court held that as long as the parties to a construction dispute agree to submit to voluntary arbitration,
regardless of what forum they may choose, their agreement will fall within CIAC’s jurisdiction. In *China Chang*, the agreement specified that any dispute between the parties would be resolved by arbitration before the International Chamber of Commerce but the Supreme Court upheld CIAC’s jurisdiction over the dispute.

Despite some apparent gaps in CIAC’s rules, including the rules on joinder of third parties and the enforcement of arbitral awards, parties to a construction dispute may favour CIAC’s jurisdiction because of the flexible quantum of evidence required to prove facts, the relative leniency in the rules on admissibility of evidence, and the high respect given by the appellate courts in relation to factual findings by CIAC, thereby making setting aside an arbitral award on appeal unlikely.

**ii Arbitration and ADR**

Other than CIAC, the main alternative dispute resolution (ADR) body is the Philippine Dispute Resolution Center (PDRC), which is tasked with administering arbitration and mediation in specialist fields such as maritime, banking, finance, insurance, securities and intellectual property. Relevant laws that govern the substantive matters of ADR include the Arbitration Law47 and the Alternative Dispute Resolution Act of 200448 (the 2004 ADR Act), whereas the Supreme Court’s Special Rules of Court on Alternative Dispute Resolution govern the procedure in arbitration and other ADR mechanisms in the Philippines.49 For disputes that have an international component, the Philippines recognises the UNCITRAL Model Law on International Commercial Arbitration50 and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.51

In 2012, through Executive Order No. 78, the Philippines mandated the inclusion of provisions on the use of ADR mechanisms in all contracts involving PPP projects, BOT projects, joint venture agreements between the government and private entities and those entered into by local government units.

In 2018, in *Strickland v. Ernst & Young LLP*,52 the Supreme Court reiterated the government’s policy of pushing arbitration and ADR as a means to settle disputes. The Court allowed tortious claims to be resolved by arbitration despite Punongbayan & Araullo (the defendant) not being a party to the arbitration agreement. The Court ruled that Strickland’s allegations against the defendant were ‘undoubtedly hinged’ and ‘unavoidably linked’ to the claimant’s previous contractual relationship with Ernst & Young LLP, as agent of the defendant.

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47 An Act to Authorize the Making of Arbitration and Submission Agreements, to Provide for the Appointment of Arbitrators and the Procedure for Arbitration in Civil Controversies, and for Other Purposes (The Arbitration Law), Republic Act No. 876 (1953).
48 An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes, Republic Act No. 9285 (2004).
49 A.M. No. 07-11-08-SC dated 1 September 2009, entitled ‘Special Rules of Court on Alternative Dispute Resolution’.
52 *Strickland v. Ernst & Young*, G.R. Nos. 193782 and 210695, 18 August 2018.
Clearly therefore, the Philippines adopts a favourable view with respect to arbitration as a means of resolving disputes. Nevertheless, arbitration costs remain high. A case in point was the NAIA 3 Terminal project, in which the Supreme Court ordered PIATCO (the challenger to the USP that eventually won the bid) to pay 300 million pesos as arbitration costs.

Despite the push for arbitration, courts still have a crucial role in providing injunctive relief against erring government authorities. For instance, in 2009, the Light Rail Transit Authority initially awarded the Common Station Project to SM Prime Holdings, Inc (SMPHI). Five years later, however, the Department of Transportation (a government partner) awarded the project to the Light Rail Manila Corporation (LRMC). As a result, SMPHI filed a temporary restraining order, which was granted by the Supreme Court in 2014. The controversial project was only resolved in 2016 when SMPHI and the LRMC agreed on a location mutually acceptable to both parties.

Prospective proponents must therefore be cautious in dealing with government partners. Fortunately, stricter sanctions, and criminal prosecution against erring government individuals, have made material breaches in contractual obligations less likely. Nevertheless, understanding the potential risks and cultural and political context when participating in infrastructure projects may be necessary to avoid a full-blown dispute.

XII OUTLOOK AND CONCLUSIONS

Private participation through PPPs has a critical role in reducing the infrastructure gap in the Philippines, especially in sectors that require technical expertise and innovative technologies. Traditional infrastructure still remains a priority for the government and the available capital augmented from ODA and domestic and foreign investors make traditional infrastructure projects highly competitive. The expansion of private participation in non-traditional areas of infrastructure, such as renewable energy projects and other social infrastructure, is a welcome step in the right direction towards achieving the government’s ambitious infrastructure goal of 7.4 per cent of its GDP by 2022.

With favourable economic conditions and a more relaxed fiscal policy, the Philippines should take advantage of these bullish conditions, but must likewise take more proactive steps towards fulfilling the Philippines’ infrastructure needs that first and foremost benefit the public. Specifically, the government must adopt better monitoring and evaluation mechanisms to ensure the proper implementation of a project, instil a robust regulatory regime and intensify its project assistance to implementing agencies and impose flexible yet consistent policies and standards for contract preparation to tailor-fit a project’s needs.53

At the moment, the private sector’s risk appetite and willingness to participate in infrastructure development is far from satiated. Consequently, the government must leverage the private sector’s efficient use of capital and resources by finding the means to allow faster or larger-scale project participation from the private sector. With the proper incentives and allocation of risks, private participation in infrastructure development will undoubtedly be integral to the Philippines surpassing its infrastructure goals.

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53 Interview with Mia Sebastian, Deputy Executive Director of the PPP Center, on 22 January 2019.
Chapter 14

QATAR

Andrew Jones, Zaher Nammour, Niall Clancy and Peter Motti

I  INTRODUCTION

Qatar is a small peninsular country on the west side of the Gulf, with a population of around 2.76 million. The country is primarily comprised of economic migrants – Qatari citizens make up only 11.6 per cent of the total population. Although it has lost its mantle as the country with the highest net migration in the world to the third highest this year, its average population growth of 1.95 per cent is still expected to continue as a result of these high migration levels. Qatar’s economy has also continued to grow despite the new geopolitical context in the Gulf Cooperation Council (GCC) and it is likely that Qatar’s economy will only continue to do so for the foreseeable future.

As a result of its economic success, and its commitment to hosting the 2022 FIFA World Cup, Qatar is undertaking an impressive array of infrastructure and industrial projects. The current Emir (in power since July 2013) is continuing to focus on the country’s domestic welfare through implementing the Second National Development Strategy. Launched in March 2018, it sets national priorities aimed at transforming Qatar into a knowledge-based economy through infrastructure investments, economic diversification, private sector development, natural resources management, human development, sustainable social development and sustainable environmental development. This strategy is being driven by expectations of growth for the real economy through activities within the non-oil and gas sector, especially in the areas of merchandise and traded services. There will be rationalisation of government spending to balance the public financial status of Qatar and it is hoped this will facilitate the creation of a wider space for private sector activities. These projects will be funded to some extent by government surpluses generated through Qatar’s extensive liquefied natural gas (LNG), oil, gas and petrochemical exports. While Qatar has managed to achieve

1 Andrew Jones and Zaher Nammour are partners and Niall Clancy and Peter Motti are senior associates at Dentons in Doha.
4 ibid.
5 ibid.
7 ibid.
its impressive growth (including having the second-highest gross domestic product (GDP) per capita in the world)\(^8\) primarily because of having the third-largest natural gas reserves in the world, it is now planning on diversifying its economy to ensure its growth is sustained.

II   THE YEAR IN REVIEW

It would be remiss to review Qatar’s economic strength without considering its levels of hydrocarbon production, which remain strong and the significant definer of the country’s economy. Although there was a slight contraction in the hydrocarbon sector of 0.7 per cent in 2017\(^9\) as a result of output cuts by the Organization of the Petroleum Exporting Countries (OPEC) and maintenance on LNG trains, this has been offset by growth in the non-hydrocarbon sectors, which grew by 3.8 per cent.\(^10\) This is primarily because of Qatar’s continued expansion of its construction, transport, communication and finance industries.

While reduction in hydrocarbon growth is mostly attributable to OPEC’s output cuts, after the discovery of a new field of 2.5 trillion cubic feet of natural gas in 2013, there was a general moratorium on further exploration and development in the much larger North Field (which holds approximately 900 trillion cubic feet of natural gas), further deterring hydrocarbon exploitation there. However, this moratorium was lifted in April 2017 and hydrocarbon production is predicted to increase dramatically in the coming years, with Qatar Petroleum announcing an increase of LNG production of 30 per cent by 2024.

Qatar has withdrawn from OPEC with effect from 1 January 2019 and is the first Gulf country to leave the bloc of 15 oil-producing countries. Qatar’s energy minister, Saad Sherida al-Kaabi, said in December 2018: ‘The withdrawal decision reflects Qatar’s desire to focus its efforts on plans to develop and increase its natural gas production from 77 million tonnes per year to 100 million tonnes in the coming years.’\(^11\) Since 2013, the amount of oil Qatar produces has declined steadily from about 728,000 barrels per day in 2013 to about 607,000 barrels per day in 2017, or just under 2 per cent of OPEC’s total output.\(^12\)

Previously Qatar successfully accumulated a substantial buffer to prevent its economy from suffering and it has expressed a desire to develop its economy sustainably by increasing its production in sectors other than hydrocarbons. However, in addition to this, it is aiming to increase production of oil to maximise profit, with forecasts estimating that Qatar will achieve production of around 608,000 barrels per day this year and trending to around 600,000 barrels per day by 2020.\(^13\)

The slowdown of hydrocarbon growth is attributable to the large expansion of extraction and the processing of these resources coming to an end. This is part of the evolution of Qatar’s hydrocarbon sector, as it moves from a phase of expansion into one of mature stability and lower growth. This is something that has been articulated in the Second National Development Strategy as Qatar aims to move to a less volatile and more

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\(^8\) ibid.
\(^10\) ibid.
\(^11\) ‘Qatar to withdraw from OPEC in January 2019’, Al Jazeera, 3 December 2018
\(^13\) See https://tradingeconomics.com.
sustainable economy. Although this is the long-term ambition and Qatar has reduced the rate of growth of its LNG exports in previous years, it also wants to ensure that revenue from these industries remains as high as possible so as to continue developing infrastructure for the World Cup in 2022 and to meet Qatar’s National Vision by 2030.14

Growth in manufacturing, construction and financial services has pushed up the non-hydrocarbon sectors, which now account for just over half of Qatar’s nominal GDP.15 Hydrocarbons account for 80 per cent of export earnings and 90 per cent of government revenues are derived from oil and gas.16 Although much of the impetus and investment in infrastructure has been led by central government, Qatar is seeking to attract more private investment in forthcoming years, as shown in the Second Qatar National Strategy.

With regard to national debt, Qatar’s government debt to GDP has decreased from 56.5 per cent in 2016 to 48.4 per cent in 2018. Further, the fiscal deficit narrowed to 1.6 per cent of GDP in 2017 from 4.7 per cent in 2016.17 The fall reflects government expenditure restraints in the face of slowing revenue growth.18

In a statement regarding Qatar’s 2018 budget, the Minister of Finance confirmed that the budget allocated to major projects in Qatar increased by 2.4 per cent from the budget plan for 2017, to US$55.8 billion.19 This is to ensure the implementation of development projects, which mainly revolve around health, education and transport.20 Allocations for the health sector were 22.7 billion Qatari riyals, representing 11.2 per cent of the total expenditure in 2018,21 whereas the education sector had an allocation of 19 billion Qatari riyals in the 2018 budget, up by 19 per cent compared with 2017. However, transport continues to be the most significant sector in public projects, with allocations of 42 billion Qatari riyals (21 per cent of total expenditure). In the 2019 budget, revenues are expected to surge by 21 per cent and 48 billion Qatari riyals are earmarked for the award of new projects unrelated to the non-oil sector.

The main public projects that the government is currently undertaking include:

\[ a \] Sports sector and 2022 FIFA World Cup stadiums: construction costs to amount to between US$8 billion and US$10 billion. In addition, up to US$200 billion is being spent on wider infrastructure required to host the 2022 World Cup. This is primarily focused on the completion of stadiums in Lusail, Qatar Foundation, Al Rayyan, Al Wakrah and Al Khor in addition to other sport projects. Qatar completed the Khalifa International Stadium, its first stadium, in May 2017;

\[ b \] Qatar Integrated Rail: a new US$40 billion railway and metro system, including urban metro, high-speed passenger railway and freight line;
Ashghal Expressway Programme: the public works authority's US$20 billion project to develop a number of major motorways to relieve traffic congestion. These include the Al Bustan Highway, Orbital Expressway, Al Rayyan–Dukhan road and the Al Khor Coastal Road;

Ashghal Local Roads and Drainage Programme: the US$14.6 billion project under which Ashghal will complete a network of roads, drainage, utilities and related infrastructure;

Hamad International Airport Expansion: the project budget is US$15.5 billion for an additional 400,000 square metre extension of the existing airport terminal;

Lusail City Development: a residential and commercial waterfront development valued at US$45 billion;

Msheireb Downtown Doha Regeneration: a project valued at US$4.5 billion. Msheireb will be the first fully sustainable downtown regeneration project, conserving yet modernising the historical downtown of Doha in a mixed-use development;

New Port: design and construction of food security facilities and warehouses valued at US$439 billion;

Bul Hanine Oilfield Redevelopment: the US$11 billion Qatar Petroleum project to boost crude oil production in Qatar through new facilities expected to double the capacity of the oil field;

Barzan Gas Development: the US$10.3 billion Ras Gas project to increase gas supply to the domestic market; and

Kahramaa Solar Photovoltaic Power Plant independent power producer with a net capacity of 500 megawatts.

Of these projects, Qatar Integrated Rail is perhaps the most significant, in terms of its size both financially and from an engineering perspective. It is understood to be one of the largest civil engineering projects under way in the world, using 21 of the world’s largest tunnel boring machines on its underground metro development. Eleven multibillion-dollar contracts had been awarded by 2014 for the design and construction of the tunnels and stations of the initial phase of the Doha Metro. These contracts will see the construction of the first 103 kilometres of the railway. The metro system will be built in two phases: the first will see the construction of three of the four lines (Red, Gold and Green) and 37 stations. These lines are expected to be open to the public by 2020. The future phases involve the introduction of an additional line (Blue) and the expansion of the existing ones, with more than 60 additional stations. The first expansion is due to be completed by 2026.

The Lusail Light Railway is scheduled for completion in 2020. In conjunction with these major civil engineering contracts, Qatar Rail issued invitations to tender for the delivery of all rolling stock, signalling, track and all associated systems required for the initial phase of the Doha Metro. On 1 February 2016, a contract was awarded to a consortium of Mitsubishi

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23 ibid.
24 ibid.
25 ibid.
26 See www.qdvc.com.
Heavy Industries, Mitsubishi Corporation, Hitachi, Kinki Sharyo and Thales for the turnkey construction of a fully automated driverless metro system and for a 20-year maintenance commitment.

All these projects are being funded directly or indirectly by the government. However, it is possible that project financing may play a greater role in the near future. Discussions about Qatar’s plan to enact a new law to facilitate the use of public-private partnerships (PPPs) are continuing. It is possible that this move has been prompted by the enactment of new PPP legislation in Dubai in November 2015. Qatar has announced tenders for the development of eight new schools (by Ashghal, the Qatari public works authority) following the PPP model. Expressions of interest were submitted by developers or investors (or both) in Q1 2019.

The remainder of this chapter concentrates on forthcoming government-funded projects rather than project financing.

The deadlines for delivery of many of the projects referred to above were set in December 2010, when Qatar succeeded in its bid to host the 2022 FIFA World Cup. Most of this infrastructure is promised and necessary for that event. Meeting the deadlines will be very challenging. However, the projects relating to the health and education sectors are part of the Qatar National Strategy, which aims for a greater standard of living for its citizens while maintaining the importance of sustainability.

The deadline of 2022 is fast approaching, and the pressure is certainly on, given that there is now simply less time in which to complete the projects called for by the FIFA World Cup. The public organisations responsible for delivery of the key projects – notably Qatar Rail and the Supreme Committee for Legacy and Delivery – are now established and took appropriate steps to secure relevant powers and governance. For instance, the former Minister of Municipality and Urban Planning issued a number of decisions and a new law was promulgated, enabling Qatar Rail to acquire land and carry out tunnelling. There has also been a Council of Ministers Decision concerning Ashghal and new safety laws relating to the Civil Defence Department. These bodies and the other key infrastructure participants for new projects (a new port authority, Ashghal and Kahramaa (the state water and electricity company)) have been engaged in construction since the beginning of 2014.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Apart from conventional project finance in the oil, gas, independent water and power production and petrochemical sectors, there has been no private finance of infrastructure in Qatar – for example, in transport, waste-water or social infrastructure. However, as mentioned in Section II, if planned legislation is introduced to regulate PPPs, it is possible that there will be greater use of private financing. Previous failed attempts to introduce private finance into rail, road, port and water projects in Saudi Arabia, Abu Dhabi and Jordan provide salutary reminders of the difficulties posed by the additional complexity of risk allocation and documentation (and other factors). Nevertheless, successful PPP projects in the GCC have demonstrated that this vehicle is a viable option. Following the completion

27 The Ministry of Municipality and Urban Planning became the Ministry of Municipality and Environment on 27 January 2016 as a result of Emiri Decision No. 5 of 2016.
of the Madinah Airport PPP project in Saudi Arabia in 2015 (one of the first of its type in Saudi Arabia) and with new PPP projects in the rest of the GCC being tendered almost every week, there is an abundance of precedent models for PPP structures in the region.28 To this end build-operate-transfer procurement, or longer term design-build-operate contracts, are under serious consideration in Qatar and may be used for limited categories of infrastructure, such as waste-water treatment plants. Although access to private capital is unlikely to be a driving factor, it could provide benefits through more efficient and economical procurement and operation. Up to now, almost all publicly funded procurement has been on the basis of the project owner appointing design consultants and issuing design to construction-only contractors. Design-build is the exception.

Ashghal has announced the development of eight new schools, which will be procured on the PPP model. More PPP projects are expected to be announced by Ashghal as part of its PPP programme.

ii Documentation

Documentation outside project financing is conventional and makes use of standard forms of construction contracts and consultants’ appointments. Qatar Petroleum has historically been the repository for project management expertise in Qatar. It has sometimes managed projects on behalf of other public bodies, such as Qatar Foundation, and has used its own standard documents on those projects. For flagship buildings, for which architectural design and innovation are paramount (rather than functional performance), this has had mixed results. In 2009, Qatar Petroleum joined forces with Qatar Foundation to establish a joint venture separate project management arm called Astad Project Management. Ashghal has its own standard documentation.

International Federation of Consulting Engineers (FIDIC) forms of contract are becoming more widely used. In April 2012, tender invitation documents were issued by the Qatar Rail Company to pre-qualified consortiums for the first four large tunnelling contracts and one railway station contract for the new Doha Metro. Four of these packages have already been awarded. Further invitations to tender have been sent out for the procurement of all relevant systems required to operate the Doha Metro, including rolling stock, signalling, telecommunications, power and track works. All these contracts will be based on a bespoke design-build form of contract that Qatar Rail has developed, based on the 1999 FIDIC Yellow Book.

In the past, the quality of contract documentation has frequently not been as high as might be expected given the size and complexity of the projects undertaken.

The NEC contract is not used, neither are the UK JCT contracts.

iii Delivery methods and standard forms

In both the public and private sectors, attitudes to contracting are generally traditional, and long-term relationships and trust do not have a major role. There is some cynicism among international bidders as to the relative importance of quality and price in the evaluation of contractors’ tenders.

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IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The prevailing approach by owners tends to be to maximise risk transfer to contractors (and consultants). It is common for the risk of unforeseen ground conditions to be placed on contractors, and sometimes for change-in-law risk to be transferred to the contractor. Risk of increases in the price of materials is expected to be borne by contractors as are delays caused by a scarcity of materials or delays in approval procedures and import procedures. An economic boom followed by a contraction of the regional construction market led to key material prices rising and falling dramatically, which caused considerable difficulties. With the anticipated boom in construction activity in Qatar, headline inflation was 2.7 per cent in 2016, compared with 1.7 per cent in 2015. Inflation slowed to 0.4 per cent throughout 2017 and remained subdued in 2018. A blockade from other GCC nations caused food prices to increase by 3.9 per cent from June 2017 to November 2017, resulting in Qatar having to import food from further afield. However, there was deflation in house prices by an average of 2.8 per cent owing to the increasing amount of accommodation becoming available in preparation for the World Cup.

Significantly higher inflation is likely in 2019, with the expected introduction of VAT by Q2, at a rate of 5 per cent, mainly on clothes, other durable goods and non-essential services.29

Generally speaking, Qatar should be considered a high-risk environment for contractors. Those who enter into fixed-price lump-sum contracts are expected to stick to the fixed price, with a reluctance to recognise rights to compensation for delays caused by variations, late or inadequate design or information issues, late site access or late payment (the latter being common).

ii Limitation of liability

Generally under Qatar law, parties enjoy freedom of contract. Express terms that either exclude, cap or estimate damages will in most cases be binding and enforceable between the parties. Some exceptions to this include the following:

a Liability resulting from deceit or gross mistake, which, under Article 259 of Law No. 22 of 2004 (the Civil Law), cannot be limited or excluded (except in the case of deceit or gross mistake on the part of subcontractors).

b It is not permissible to exclude liability arising in respect of future unjust acts (very broadly corresponding to acte illicite or tort).

c Decennial liability under Article 711 of the Civil Law is a joint guarantee imposed on a contractor and architect for 10 years against ‘the total or partial collapse or fault in the buildings . . . or fixed constructions . . . and this guarantee shall cover whatever defects shall appear . . . which threaten its sturdiness and safety’. Liability under Article 711 cannot be excluded or limited.

d Under Article 171(2) of the Civil Law, a court or arbitral tribunal may, after weighing up the interests of the parties, reduce an ‘exhausting’ contractual obligation to ‘a reasonable margin’ if:

• ‘public exceptional incidents’ occur that could not have been expected; and
• the occurrence of them makes fulfilment of the contractual obligation ‘though not impossible, exhausting to the debtor and threatens him with grave loss’. This provision may not be excluded by agreement.

Under Article 266 of the Civil Law, if damages are estimated or liquidated, the agreed amount may not be due if the debtor can show that no loss has been suffered by the creditor; or the level of the agreed damages was ‘exaggerated to a high degree’; or the obligation has been partially performed. In that case, the court or arbitral tribunal may reduce the compensation due. Article 266 may not be excluded by agreement.

Liability for liquidated damages for delay is often capped at between 5 and 10 per cent of the contract price. Overall contractual liability is often capped, depending upon the nature of the work, at between 100 and 200 per cent of the contract price. Examples of liabilities that are commonly excluded from the agreed overall liability cap include indemnities relating to intellectual property rights, liabilities recovered by the party in breach under insurance policies, liability for death and personal injury, and sometimes property damage.

Liquidated damages are commonly applied for delay in completion of work under contracts for both contractors and consultants. It is becoming common for employers to seek to impose liquidated damages upon consultants for failing to mobilise and maintain key personnel.

Force majeure provisions are common in contracts and are generally enforceable. Unclear drafting often makes it difficult to establish with any certainty the effect of the clause in specific cases. Article 171 of the Civil Law is also relevant in relation to force majeure situations. Article 258 of the Civil Law allows the parties to agree that the debtor will be liable for the consequences of force majeure. Accordingly, if a contract term places this risk on a party, it will generally be enforceable, subject to Article 171.

iii Political risks

Despite the current geopolitical context in the GCC, progress on Qatar’s current construction projects has continued. In mid 2017, Saudi Arabia, the United Arab Emirates, Egypt and Bahrain elected to begin a blockade against Qatar. As a result of this, Qatar’s existing alliances with trading partners (e.g., Turkey and Oman) have been strengthened. This boosted import levels to pre-blockade levels by August 2017.30 Despite the blockade, the economy grew by 1.6 per cent in 2017.31

Despite the inevitable challenges of the blockade, with Qatar’s newly established trading partners and routes, Qatar remains in a strong position for the World Cup in 2022. That said, long-term project finance lenders have been more cautious. Qatar’s long-term debt presently has a credit rating of AA3 from Moody’s (a decline from a rating of AA2 in March 2016).32 Standard & Poor’s has also maintained Qatar’s AA-/A-1+ short-term foreign and local currency sovereign credit rating.33

33 See www.standardandpoors.com.
Article 27 of the Qatari Constitution states: ‘Private property is inviolable; and no one shall be deprived of his property save by reason of public benefit and in the cases prescribed by the Law and in the manner stated therein provided that the person concerned is fairly compensated.’

The Qatari riyal is freely convertible and its value is pegged to a fixed rate of exchange with the US dollar. Corporate borrowings from banks licensed by the Qatar Central Bank are required to be guaranteed by the borrowing company’s shareholders, except in the case of public companies or if the Qatar Central Bank specifically waives this requirement. If banks fund private development, lenders will also take traditional mortgage security or, if this is legally not possible, lenders will typically take an assignment of contractual rights. This happens, for example, when a borrower’s legal interest in land that is being developed cannot be registered until the development is completed physically.

V BONDS

Public sector bodies are governed by Law No. 24 of 2015 Regulating Tenders and Bids, as amended by Law No. 18 of 2018. The new law aims to streamline and standardise the public procurement process by introducing clear guidelines to be implemented by each tender committee.34

Under this Law, public sector bodies are required, inter alia, to obtain tender bonds from bidders, payable on demand. Project owners commonly require from contractors (and consequently, contractors commonly require from subcontractors) on-demand performance bonds of no more than 10 per cent of the contract price. Advance payments are common and are made against on-demand bank guarantees. Also commonly required as security for performance of construction contracts are retentions of up to 10 per cent and robust forms of parent company guarantees. Collateral warranties, whether from main contractors and consultants in favour of end users, or from subcontractors and sub-consultants, are not common in the Qatar market and are seen as onerous by contractors and consultants. There are signs, however, of increasing expectations for these.

VI ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Insolvency is mainly dealt with in Law No. 27 of 2006, as amended by Law No. 7 of 2010 (the Commercial Law): the relevant provisions can be found under Title Six entitled ‘Bankruptcy and Preventive Conciliation’. The following is an indicative list of other provisions that govern insolvency and preferential claims:

Qatar's insolvency law provides that any contracts executed by a company prior to declaration of bankruptcy remain valid, unless they are contracts for personal services. This being the case, a contractual provision allowing an employer, in the event of the contractor's bankruptcy, to terminate the contract for contractor's default and complete the work itself will be valid.

VII SOCIO-ENVIRONMENTAL ISSUES

It is not possible to provide an exhaustive list of regulations and legislation that would affect projects. The following is therefore a general and selective commentary on some matters likely to affect publicly funded building projects:

a all entities carrying on business in Qatar must be properly registered with the Ministry of Economy and Commerce. Foreign ownership of companies is regulated;
b planning permission from the municipality;
c preliminary approval by the relevant municipality to open a file;
d fire safety clearance from the Civil Defence Department (CDD);
e clearance for road design and access from the Road Construction Department at the Ministry of Municipality and Urban Planning (MMUP);
f clearance for power and water service delivery from Kahramaa;
g clearance for telecommunications service delivery from Ooredoo (formerly QTel);
h clearance from the Building Permit Department of the MMUP;
i final building permit approval from the municipality;
j submitting a public announcement of the construction project at the municipality;
k fire safety approval from the CDD;
l certificate of completion from the municipality; and
m registration of the building at the municipality.

Engineering-related activities in Qatar are regulated by Law No. 19 of 2005 (the Engineering Law) and the executive regulations made under it. Engineering is widely defined and includes architecture, civil, electro-mechanical, mining, quantity surveying services and project management activities. Each person or firm performing engineering work in Qatar must obtain a licence from the Engineering Committee of the MMUP. The requirements to obtain a licence are extensive and usually take a long time to satisfy. In some circumstances, an exemption from the requirement to hold a licence may be granted to non-Qatari persons or organisations. An update to this law was passed in January 2014 (Law No. 2 of 2014), which amended some provisions of Law No. 19 of 2005 regarding the practice of the engineering profession. These changes do not amend the substantive requirement for engineers to obtain a licence before practising in Qatar or indeed any changes to the registration process, but amend (1) the length of validity of individual engineers' licences and (2) the make-up of the committee that approves the registration of engineers and engineering firms in Qatar.

i Environmental issues

The Supreme Council for Environment and Natural Reserves and the Ministry of the Environment are the competent authorities for environmental protection matters. There are a number of environmental laws, of which the following are the most relevant:
a Law No. 30 of 2002 – Law of Environment Protection and the executive regulations made under it. These provide that all plans for public or private development projects must be submitted to the authorities for approval.
Environmental protection is gaining more importance in Qatar and the role of the environmental authorities is expanding, especially in the approval process of construction projects. Environmental impact assessments may be required for some projects.

Sustainable development is also gaining increasing attention. Several projects are aiming to meet sustainable standards, such as the central Doha regeneration project for Msheireb Properties. The importance of sustainability was further expressed within the National Development Strategy for 2018–2022. This sets out plans for more food to be produced domestically and for optimising hydrocarbon sources to maximise their economic and strategic value to the nation. There is coupled with an intention to be more environmentally friendly with a smaller carbon footprint. The plan also includes increasing renewable energy sources, for example, through the issuing of Decree No. 19 of 2018 for Qatar General Electricity and Water Corporation to allocate land for a solar power plant.

**ii Labour laws**

An employer must obtain permission from the Recruitment Committee at the Labour Department of the Ministry of Labour and Social Affairs to employ foreign employees. Once obtained, the employer must apply for a work visa so that the employee may enter Qatar. Within seven days of the employee’s arrival in Qatar, the residence permit procedure must be commenced so that an employee may work and reside in Qatar. The permit will have to be renewed periodically during the course of the employment in Qatar.

The vast majority of employees in Qatar, particularly those engaged in connection with the construction industry, are subject to the Labour Law. One of the few exceptions is employees of government entities, who are instead subject to Law No. 15 of 2016 (the Human Resources Law).

Although not strictly a labour law, Law No. 21 of 2015 (essentially, the Residency Law) is also relevant in relation to employee residency arrangements. This applies to all non-Qatari nationals working and residing in Qatar, aside from those working under the auspices of the Qatar Financial Centre (see Section X). Law No. 21 of 2015 came into force one year after being published in the Official Gazette on 27 October 2015, replacing the existing sponsorship system in favour of a contract-based one that gives expatriates more freedom to change jobs in Qatar. Previously, if an employee was unable to get a no-objection certificate from their sponsor while attempting a job transfer, he or she would be banned from the country for a period of two years before being able to come back in search of new employment. Articles 20 and 22 of the Residency Law allow employees who have completed their contracts to seek new employment and move to another sponsor without the approval of their previous recruiter. They are also able to change jobs before their contract finishes with the approval of their recruiter, the Ministry of Interior (MOI) and the Ministry of Labour and Social Affairs (MOLSA). However, employees with open-ended contracts are able to seek approval for a change of job after five years of employment. Nonetheless, if a company ceases to exist, the
recruiter dies or the recruiter and the employee are involved in a legal battle with each other, the employee is able to move to another recruiter after receiving permission from the MOI and the MOLSA. The existing exit permit system has been replaced, allowing expatriates to freely leave the country without obtaining their employer’s permission. Additionally, the penalty for withholding employees’ passports will be increased from 10,000 to 25,000 Qatari riyals.

Law No. 13 of 2017 amends certain provisions of the Labour Law and Law No. 13 of 1990 (the Civil and Commercial Procedures). The 2017 Law sets out a specific procedure for an employee to appeal a penalty imposed by an employer before the Committee for the Settlement of Labour Disputes. Disputes between employee and employer are also regulated under the Law.

iii Health and safety
Part 10 of the Labour Law imposes a range of health and safety-related obligations upon employers.

VIII PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP
There has not been any trend towards PPP procurement as generally understood in Europe and the United States. Consideration is currently being given to the possible use of some kind of PPP-type arrangements. The most recent report on the subject was prepared for the Qatar Ministry of Economy and Finance and the Qatar Financial Centre Authority in February 2012.

There is no legislation that applies specifically to PPPs but, as mentioned above, the Ministry of Economy and Finance has announced its intention to introduce new legislation to govern PPP vehicles in Qatar. It remains to be seen whether this will prompt an upswing in the take-up of PPP arrangements, following the school PPP announced by Ashghal. In view of the very pressing deadlines for infrastructure delivery, the additional complexity of PPP arrangements and frequently prolonged negotiations prior to contract award are likely to dampen widespread use of PPP in the near future.

ii Public procurement
The principal law regulating public procurement is the Public Tenders Law (see Section V), which applies to all ministries and other government bodies and to public institutions and corporations, except as otherwise provided in the law establishing them. It does not apply to the armed forces or police in the case of confidential procurements, nor does it apply to Qatar Petroleum.

The legislation establishing publicly funded bodies may apply special procurement procedures to those bodies in place of, or in addition to, the Public Tenders Law. The laws establishing such bodies must be looked at to determine which procurement procedures apply.

Law No. 24 of 2015, as amended by Law No. 18 of 2018 (which took effect on 13 June 2016), regulates public tenders and auctions, and seeks to revamp and modernise the government contracting process by introducing competition as a method of procurement for technical works, including drawing and design. A two-stage tendering process has been instituted to assist bidders by defining the technical requirements and the scope of work. This should help secure appointments of the right contractor, agreed costs and an appropriate transfer of risk. The amended law requires relevant government employees to declare any
potential conflicts of interest, direct or indirect, in any government contract to bring Qatar in line with international best practice. A dispute resolution committee hears all pre-contract disputes. This is headed by a senior judge and provides a specialised forum to resolve disputes, in relation to government contracts. The amended law applies to most government and quasi-government contracts of Qatar. It can also extend to apply to private entities in receipt of state funding. The amended law is subject to specific by-laws, which have not yet been made available by the Ministry of Finance; as a result it is difficult to predict how it will work in practice.

The Central Tenders Committee deals with tenders over 5 million Qatari riyals in value and is attached to the Ministry of Economy and Finance. As of 13 June 2016, the Local Tenders Committee processes all public tenders valued at 5 million Qatari riyals or less. The procedures are prescriptive and detailed.

IX  FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Regulation of foreign ownership of Qatari companies has been mentioned but the detail is beyond the scope of this chapter.

Removal of profits and investment

There are currently no exchange control restrictions in Qatar and, subject to payment of taxes, there are no restrictions on remittances of investment returns. Under Law No. 21 of 2009 (the Income Tax Law) a withholding tax of 7 per cent was payable on interest payments made to non-residents. This has been removed by Law No. 24 of 2018 (the New Tax Law). Under the New Tax Law, a single withholding tax rate of 5 per cent now applies to payments made to non-residents for royalties and services that are performed in Qatar without a permanent establishment.35

X  DISPUTE RESOLUTION

i  Special jurisdiction

There are no specific courts or tribunals in Qatar dealing with project finance transactions or construction contracts. Disputes will be heard in the Qatari courts unless referred to arbitration or unless the Qatar Financial Centre (QFC) laws apply.

In 2005, the QFC was established under Law No. 7 of 2005, as amended (the Qatar Financial Centre Law). The QFC perhaps can best be considered as a separate jurisdiction within the state of Qatar, for businesses established in the QFC (i.e., pursuant to the specific QFC laws and regulations). To date, the QFC has had little impact on the project finance or construction sectors, as its objectives are to promote the establishment and conduct of international banking, financial services, insurance and associated businesses. The QFC has its own court, the Qatar International Court and Dispute Resolution Centre (QIC-DRC), formerly the Civil and Commercial Court of the Qatar Financial Centre. The court is staffed

(on a visiting basis) by a number of very distinguished judges from various civil and common law jurisdictions. The Rt Hon the Lord Thomas, a former Chief Justice of England and Wales, is the current President of the QIC-DRC.

Since its establishment in 2009, few cases have been heard by the QIC-DRC. The boundaries of its jurisdiction are as yet untested. The QIC-DRC is currently promoting the use of its services, particularly for alternative dispute resolution (ADR), in the construction sector through a construction dispute resolution system known as Q-Construct, which is akin to construction adjudication in certain common law countries. So far, the public bodies now embarking on procurements have yet to show an appetite to provide in their contracts for use of services such as Q-Construct or dispute adjudication boards.

The language of the QIC-DRC may be Arabic or English and rights of audience are governed by Article 29 of the QFC Civil and Commercial Court Regulations and Procedural Rules (December 2010). The Court has extremely well-equipped modern facilities and hearings can take place by video link.

ii Arbitration and ADR

Construction contracts, particularly in the private sector, commonly provide for disputes to be resolved by arbitration. In the public sector and the oil and gas sector, some employers are willing to agree arbitration provisions, but others, such as Ashghal, are more traditional and their standard terms refer disputes to the Qatari courts. Traditionally the courts and practising lawyers have been circumspect in their view of arbitration. However, Law No. 2 of 2017 (the Arbitration Law) is a significant update to Qatar’s arbitration law. Historically, lawyers have tended to regard arbitration as merely adding a tier to the bottom of the court process. However, through the introduction of the Arbitration Law, it is hoped that any lingering doubts about Qatar’s approach to enforcement of arbitral awards have been removed, making arbitration a credible alternative to the local courts.

The major developments in the Arbitration Law include the following:

a arbitration agreements may be made electronically;
b authority for a public entity to arbitrate must come from the Prime Minister;
c the Ministry of Justice is to maintain a list of approved people who can act as arbitrators; and
d qualifications must be approved if parties wish to nominate an arbitrator who is not on the Ministry’s list.

Public sector employers who accept arbitration provisions require Qatar to be the seat of the arbitration. This is also the norm (although not universal) in arbitration agreements between private sector bodies (e.g., between a main contractor and a subcontractor).

The International Chamber of Commerce (ICC) is the most commonly accepted international arbitration institution. The London Court of International Arbitration is occasionally an agreed choice. The Qatar International Centre for Conciliation and Arbitration operates under the auspices of the Qatar Chamber of Commerce and Industry and publishes its own rules for mediation and arbitration. The QIC-DRC also has its own procedural regulations for arbitration,36 which apply when the QFC is the seat of arbitration.

36 Regulation No. 8 of 2005.
Apart from arbitration, the use of formal ADR is not widespread. A small number of projects have adopted FIDIC dispute adjudication boards, but others using FIDIC contracts have deleted these provisions. As noted in Section X.i, the QIC-DRC is promoting its services for ADR in the construction sector through its proposed Q-Construct scheme.

When construction disputes are referred to the courts, they are almost invariably referred by the judge to a court-appointed expert, who will investigate the facts and merits of the case and report to the judge. All proceedings in the Qatari courts are in Arabic and all documents referred to must be translated into Arabic. It would be difficult to predict with confidence the outcome of a large and complex construction dispute, heavy on documentation, as to the court’s judgment and the time and costs involved.

Qatar became a signatory to the New York Convention in 2003. There have been few, if any, applications since then to enforce foreign awards. A small number of foreign awards had been enforced on other grounds prior to Qatar’s accession to the Convention. However, a decision in 2014 has indicated a ‘positive step towards a full recognition and enforcement of foreign awards’ in the Qatari courts.37 In this context, at a hearing in early April 2014, the Qatari Supreme Court (the highest jurisdiction of Qatar) overturned a judgment of the court of appeal that set aside an ICC arbitral award as being in violation of Qatari public policy.

XI OUTLOOK AND CONCLUSIONS

As Qatar continues to prepare for the 2022 FIFA World Cup, it is undertaking an extraordinary and ambitious programme of infrastructure development, which is almost entirely publicly funded rather than project financed. In the oil, gas, petrochemical and independent water and power plant sectors, there have been successful project financings and further development in these sectors could be expected to be project financed. When Qatar agreed to host the 2022 World Cup, it signed up to fixed deadlines for delivery of a number of major infrastructure projects. Those time limits were ambitious even in December 2010, when Qatar won the bid; since then there has been limited physical progress on a number of key projects. The coming years will be a period of great change in the built environment of Qatar and its transport systems, and one of great challenge to contractors, developers, designers, planners and logisticians. The anticipation of great opportunities has attracted keen interest from international contractors. Ensuring contracts have a successful financial outcome for those participants will, as ever, need skill and patience in navigating the risks involved.

Chapter 15

SAUDI ARABIA

Abdulrahman M Hammad

I  INTRODUCTION

Saudi Arabia is the largest market economy in the Middle East and North Africa in terms of gross domestic product (GDP) and, with 33 per cent of the world’s proven petroleum reserves, is the largest exporter of oil in world. However, with a population of approximately 33.4 million, 39 per cent of whom are below the age of 25, and an oil price that was lower on average than in previous years, the focus for 2018 was change. This reflects the continuing trend in the country for modernisation and implementing change, both on the social and the economic fronts, as evidenced by an uptick in government spending, the slew of regulatory and government reforms, and the resumption of significant spending on infrastructure. The austerity measures of previous years have eased and the government plans to increase its spending by 7 per cent in 2019 in an effort to spur economic growth, which has been badly affected by low oil prices, according to a 2019 state budget announced by King Salman.

Government spending, which historically accounted for a significant part of construction activities in Saudi Arabia, increased as the government had more confidence in oil prices and increases in non-oil revenues. The government launched its Vision 2030, a road map for the future aiming to diversify revenues away from oil dependence.

In 2016, as the first step towards achieving Vision 2030, the country embarked on its National Transformation Program 2020 (the NTP 2020), led by Crown Prince Mohammad Bin Salman Al Saud, to be fully implemented by 2020. On the basis of the NTP 2020, the government approved the Fiscal Balance Program, a five-year financial plan to eliminate the budget deficit by 2020. In 2017, Saudi Arabia reshaped its NTP 2020 with the revised NTP 2.0, and commenced implementing a series of Vision Realisation Programmes aimed

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1 Abdulrahman M Hammad is a partner at Hammad & Al-Mehdar Law Firm.
5 ibid.
10 ibid.
at achieving its goals. This is to be achieved through the newly established National Centre for Privatisation and Public-Private Partnerships (NCP), which highlights the country’s serious re-evaluation of common approaches to construction, government procurement and housing.¹¹

In addition, the White Land Tax Regulation, enacted in June 2016 to incentivise building in the country by taxing landowners of undeveloped land plots of more than 10,000 square metres in size,¹² has positively influenced development and stimulated building work.¹³

II THE YEAR IN REVIEW

The budget deficit for 2018 is expected to reach 136 billion riyals (about 4.6 per cent of GDP), compared to an estimated deficit of 195 billion riyals in the approved budget (equivalent to 6.9 per cent of this year’s estimated GDP). The deficit has improved significantly from its 2017 level, when it stood at 9.3 per cent of GDP, which confirms the government’s determination to maintain fiscal discipline without compromising development projects. Revenues in 2018 are expected to rise by 29.4 per cent to reach 895 billion riyals, owing to an increase in oil and non-oil revenues. Total expenditure is estimated to grow by 10.8 per cent, amounting to 1.03 billion riyals, compared with actual expenditure in 2017.¹⁴

The government has continued to implement reforms relating to both revenue and expenditure, including the implementation of the second phase of the energy price reform and the introduction of value added tax (VAT) in January 2018. To minimise the side-effects of implementing such initiatives, the Citizen Account Programme was launched to compensate eligible individuals and households who are affected. In the 2019 budget, the government aims to reduce the budget deficit to approximately 4.2 per cent of GDP compared to the expected 4.6 per cent in 2018. The increase in total revenue is projected at 9 per cent compared to expectations in 2018, while the increase in non-oil revenues is estimated at 9 per cent. The government will continue implementing finance business partnering initiatives in 2019, including increasing the effectiveness of VAT management, continuing the energy prices reforms to be aligned with the reference energy prices by 2025, and continuing the application of the expat levy. Other economic initiatives and reforms will also continue to be implemented, in line with Vision 2030. The 2019 budget shows a 7.3 per cent increase in total expenditure compared to 2018, fuelled by a 19.9 per cent increase in government investments (capital expenditures) to finance the initiatives and projects for the Vision 2030 Realisation Programmes, including housing projects, launching megaprojects and developing the infrastructure to stimulate economic growth and to create more jobs for citizens.¹⁵

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¹⁵ ibid., at p. 14.
III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

The launch of the NCP and the privatisation drive that was reflected in the NTP 2020 started to shift the model for spending and project construction in Saudi Arabia. That said, and while change is noticeable through the implementation of privatisation goals, it is difficult to say whether, on the whole, there was a significant shift in the type of project financing or contracting and use models in projects in Saudi Arabia. Contractor balance sheet financing continued to be the prevailing method of project finance, with secured project financing remaining within the realm of only a handful of megaprojects. However, from 2017, there has been a resumption of equity financed constructions, mostly within the residential sector, by raising capital through publicly listed and private investment funds.

This traditional construction model was deployed across the spectrum of local and foreign contractors. In 2015, the Saudi Arabian General Investment Authority (SAGIA) implemented a fast-track system to license foreign investors in the country, including issuing temporary foreign investment licences to firms engaged in public work. The requirements for foreign investment licences were further eased by SAGIA in February 2016 with a significant reduction in the required documentary submissions. In 2017, SAGIA published a revision to various capital requirements for foreign investments in the country, including with respect to engineering, procurement and construction licensing.

While Saudi Arabia has for some years seen some deployment of construction and use models for public-private partnerships (PPPs), the use of these models increased significantly in the wake of the prolonged period of low oil revenues and the increasing government spending deficit. This is in line with the NTP 2020, which calls for an increase in privatisation and private sector participation in the GDP by shouldering 40 per cent of the funding burden, and is further accelerated by the launch of the NCP, one aim of which is to accelerate the deployment of PPP in Saudi projects through effective project management, building the regulatory framework and providing advisory services. PPP models commonly deployed in Saudi Arabia include build-own-operate-transfer, build-operate-transfer and build-own-leaseback.

Project financing in Saudi Arabia remains within the realm of megaprojects, deployed following both conventional and shariah-compliant structures. Conventional project finance follows the form of secured lending with pledges over project land, assets and proceeds. It is commonly used in financing by Saudi government entities such as the Public Investment Fund and the Saudi Industrial Development Fund, and by foreign banks and export credit agencies. Shariah-compliant (or Islamic) financing is deployed more commonly through Gulf-based shariah-compliant banks, local mutual funds and publicly listed debt instruments, and while it can follow a number of structures, the mudarabah structure is emerging as the most common in such transactions.

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17 Saudi Arabian General Investment Authority [SAGIA], SAGIA Guide, Section 01.03 (publication of March 2015), as revised by SAGIA publication dated 15 February 2016.
ii  Documentation
Direct construction contracts continue to be the most widely used in Saudi Arabia. Based on the requirements of Article 29 of the Government Tenders and Procurement Law and Article 32 of its Implementing Regulations, government contracts use specific contract forms prepared by the Ministry of Finance and approved by the Council of Ministers. Government contract forms are available for a range of project-related services, including public works, operation and maintenance, design and project management. Variants of government contract forms may be permitted in exceptional circumstances, such as large complex projects, but require approval from the King.

Private-party construction and projects works commonly employ a direct contracting structure. Construction contracts are typically between the employer (i.e., the owner or developer) and the contractor, and the International Federation of Consulting Engineers (FIDIC) contract forms are commonly deployed for large and medium-sized projects.

Aside from construction, project documents commonly include offtake agreements, supply agreements and intellectual property licensing agreements. If a project calls for the creation of an incorporated joint venture in the country, the parties to the joint venture commonly enter into a shareholders’ agreement to further articulate and regulate the relationship beyond what is commonly listed in a company’s articles of association.

iii  Delivery methods and standard forms
Public project delivery follows the contract forms provided by the Ministry of Finance, which are structured according to the requirements of the Government Tenders and Procurement Law and its Implementing Regulations. Project delivery in private projects reflects international practices, with design-build, construction and turnkey projects being the most common. The engineering, procurement and construction (EPC) method of contracting is also commonly deployed in larger projects, including the use of FIDIC Silver Book EPC/Turnkey conditions of contract.

With the increase in PPP projects, we are also witnessing an increase in design-build-operate, especially in relation to revenue-generating infrastructure, such as airports. The NCP additionally sets the stage for an increase in the use of such contracts in roads, railways and ports.

IV  RISK ALLOCATION AND MANAGEMENT
i  Management of risks
Against the background of an overarching requirement for fairness in contracts, Saudi law, based on shariah and enacted legislation, enforces the terms of contracts agreed by the contracting parties. Contracted project risk allocation and security provisions are therefore commonly viewed as enforceable pursuant to the laws of the country. This includes design
assumption provisions, work guarantees, delay damages, and parent company and bank performance guarantees. This is, of course, to the extent that the provisions are not unfair or unjust in application.

Fairness elements in projects and construction are commonly examined in situations where one of the parties lacks the contractual control over triggers to its financial or performance liability. Examining tribunals applying the laws of the country may therefore invalidate on the grounds of a violation of the shariah principle requiring fairness-in-dealings provisions relating to liability against a party that does not control the triggers to the liability. An example of this is commonly seen in the enforceability of delay damages in a contract in which the causes of the delay were beyond the control of the contract.

ii Limitation of liability
Contractual provisions providing for limitation of liability between the contracting parties are generally enforceable pursuant to the general shariah principle of freedom of contract. In projects and construction, liability is commonly limited by contract to the contract value or 110 per cent of the contract value. The parties also commonly exclude by contract any liability for indirect or consequential losses, including losses of profit or business. This exclusion is additionally provided by law through the shariah principles against uncertainty (gharar), whereby a claim for indirect or consequential losses will be subject to challenge on the grounds that the claim was based on uncertain determinations at the time of drawing up a contract.

iii Political risks
Private property is protected from usurpation or trespass by law. Article 18 of the Basic Governing Law\(^\text{24}\) provides that property shall not be usurped or taken in the absence of a court judgment. This protection is identical for both local and foreign-owned property, and is reflected in Article 11 of the Foreign Investment Law.\(^\text{25}\) The Regulations for the Expropriation of Real Estate for the Public Benefit and the Temporary Acquisition of Real Estate Law\(^\text{26}\) regulate the requirements and applicable compensation for the expropriation of real property for public benefit, and further provide for protection of private property from public expropriation.

These property protections apply similarly in relation to government interference in private contracts, with contracts generally considered enforceable to the extent that they do not violate shariah principles. That said, a force majeure provision suspending or excusing the performance of contracts is implied by law. This provision may be relied on, where applicable, to affect offtake or supply agreements to the extent that government policy requires the cessation of offtake or supply.

Saudi Arabia does not apply any currency exchange or fund transfer restrictions aside from those relating to money laundering.

Finally, as a member of the Multilateral Investment Guarantee Agency (MIGA), investors and project financiers may obtain political risk insurance for investment, including

\(^{24}\) Issued pursuant to Royal Order No. A/91 dated 27/01/1412 H (corresponding to 8 August 1992 G).
\(^{25}\) Issued pursuant to Royal Decree No. M/1 dated 5/1/1421 H (corresponding to 10 April 2000 G).
\(^{26}\) Issued pursuant to Royal Decree No. M/15 dated 11/3/1424 H (corresponding to 13 May 2003 G).
project financing, in the country. MIGA extends insurance for losses relating to currency inconvertibility and transfer restriction, expropriation, war, terrorism and civil disturbance, breach of contract and not honouring financial obligations.

V SECURITY AND COLLATERAL

As noted previously, contractor balance sheet financing has been the main method of funding projects in Saudi Arabia. With the Saudi riyal exchange rate fixed against the US dollar, borrowers in Saudi Arabia have benefited from a prolonged period of low interest rates that has facilitated balance sheet financing. Bank lenders commonly require borrowers in construction to forward security in the form of pledges over real estate or stock. Security interest in real property is acquired through a contractual pledge perfected through the registration of the security interest on the property title deed through the office of a notary public. Security interest in stock or other movable assets, such as shares or physical assets, is perfected through registration at the Unified Centre for Lien Registration maintained at SAGIA and governed by the Commercial Pledge Law.27

In project financing, project sponsors are commonly requested to provide completion guarantees to fund project cost overruns. The creditworthiness of project offtakers is also commonly examined, and financiers are likely to require offtaker payment guarantees from large affiliates of offtaker special purpose vehicles or trading companies. Security commonly includes project assets and floating liens over project receivables. Security pledges in contracts, including loan agreements, are commonly recognisable and enforceable pursuant to the laws of the country.

Floating liens over receivables are commonly achieved through obtaining security interest on designated bank accounts opened and maintained at a pledgee bank as security agent.

Step-in rights with respect to projects are legally enforceable but are not commonly exercised. Lenders generally prefer to enforce security over assets they may transfer quickly and at low cost.

VI BONDS AND INSURANCE

Construction contracts, both public and private, commonly include a requirement on the contractor to post a performance guarantee in the form of a bond callable on a local bank in Saudi Arabia. Contractors also commonly post bonds to secure advance payments made by the employer or owner to the contractor. Bank bonds are generally issued by banks, following standardised language resembling a form published by the bank regulator, the Saudi Arabian Monetary Authority.

Insurance for property, general liability, workers’ compensation and health are readily available through insurers in Saudi Arabia, and are commonly required by employers in significant construction contracts. Project and construction insurance is also commonly obtained in large projects, but mainly through foreign insurers or reinsurers working through insurance brokers.

27 Issued pursuant to Royal Decree No. M/75 dated 21/11/1424 H (corresponding to 14 January 2004 G).
VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Outside bankruptcy proceedings, and with respect to most types of collateral, the secured lender’s enforcement of a pledge over collateral requires the lender to make an application to the general court of applicable jurisdiction to force the sale of collateral and payment of the amount of the loan. The procedures for the enforcement of a security interest given in publicly listed stocks, however, may vary depending on the authority contractually granted to the portfolio custodian.

Prior to the passage of the new Bankruptcy Law, bankruptcy proceedings were simplified and had the aim of administering a guided settlement of a debtor’s obligations. Pursuant to the Bankruptcy Preventive Settlement Law, the process for settlement may be initiated by the debtor and is guided by designated committees at local chambers of commerce. Secured lenders may be exempted from settlement proceedings to the extent of their preference with relation to the collateral. A more detailed bankruptcy law that sets out procedures for liquidation and reorganisation has been finalised and approved by King Salman bin Abdulaziz Al Saud pursuant to Royal Decree No. M/05 dated 28/05.1439 H (corresponding to 13 February 2018 G), which was thereafter published in the Official Gazette (Um Al-Quraa) on 06/06/1439 H (corresponding to 21 February 2018 G). The Bankruptcy Law will enter into force from the date of its implementing regulations being issued, which will not exceed 180 days from the publication date of the Bankruptcy Law. This new Bankruptcy Law will effectively replace the Law of Settlement Against Bankruptcy issued pursuant to Royal Order No. M/16 dated 04/09/1416 H and all other provisions or laws that are inconsistent with it.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

The General Environmental Law requires government bodies overseeing the permitting of projects in Saudi Arabia to require project owners to undertake an environmental impact assessment during the feasibility study phase for all projects that may yield a negative environmental impact. The guidelines for impact assessments are set out in Appendix 2 (Standards and Procedures for Assessing Environmental Impact for Industrial and Development Projects) of the Law’s Implementation Rules. An environmental impact assessment is subject to the approval of the General Authority of Meteorology and Environment Protection. In addition, persons overseeing projects with negative environmental impact are required to put in place contingency plans to prevent or mitigate negative environmental impact and to ensure their ability to execute these plans where needed.

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28 Issued pursuant to Royal Decree No. 16, dated 4/9/1416 H (corresponding to 25 January 1996 G) and its Implementing Regulations issued pursuant to Ministerial Decision No. 12 dated 14/7/1425 H (corresponding to 30 August 2004).
29 Bankruptcy Preventive Settlement Law, Article 1.
30 Bankruptcy Preventive Settlement Law Implementing Regulations, Article 1.
31 Bankruptcy Preventive Settlement Law, Article 9.
32 Issued pursuant to Royal Decree No. M/34 dated 27/8/1422 H (corresponding to 14 November 2001 G).
33 General Environmental Law, Article 5.
34 Implementing Rules of the General Environmental Law, Article 5-4.
35 General Environmental Law, Article 9-3.
ii  Equator Principles
We are not aware of any rules or guidance from a relevant Saudi government body relating to the Equator Principles. Our search of the list of members did not yield any financial institutions in Saudi Arabia that have adopted the Equator Principles.36

iii  Responsibility of financial institutions
Generally, project lenders are not considered as entities that are responsible for a project being in compliance with applicable regulations, including social or environmental regulations. We are not aware of any instances in which financing parties were found responsible for project performance or impact.

IX  PPP AND OTHER PUBLIC PROCUREMENT METHODS
i  PPP
Saudi Arabia does not have a specific law governing PPPs, which are further restricted because of the requirements of the Government Tenders and Procurement Law that mandate the use of Ministry of Finance-approved contract forms in government contracting.37 As stated in Section III.i, however, a number of PPP models have been deployed in the country, and it is expected that the use of these models will accelerate in the future as a result of the reduction in oil revenues. In addition, and with the launch of the NCP, it is highly anticipated that the legal frameworks for PPP models will be defined and shaped.

Existing PPP transactions have used a number of structures to navigate the requirements of the Government Tenders and Procurement Law. An imperative consideration regarding these structures is the government body’s authority to enter into contracts or carry out work beyond the reach of the Government Tenders and Procurement Law. This authority may be pursuant to an express exemption granted based on Article 79 of the Law, or pursuant to alternative contracting arrangements, such as contracting through an independent and exempt government authority or through a government-owned company. In the past few years, we have witnessed a rise in the use of the latter of these approaches in relation to the execution of PPP in the energy, healthcare and housing sectors. However, a case-by-case review of the proposed PPP structure and the legal authority it relies on is commonly undertaken by project stakeholders.

36 Search carried out of the list published at https://equator-principles.com/members-reporting on 1 May 2018.
37 Government Tenders and Procurement Law, Article 29.
Public procurement

The Government Tenders and Procurement Law regulates the government’s procurement of products and services. Two aims of this Law are (1) to curtail corruption and personal influence, and (2) to administer public spending effectively through competition and equal opportunity. Thus, the Law requires government entities to procure goods and services through a public bid process, save for certain express exceptions. It mandates the publication of tenders and the equal treatment of qualified bidders.

The Law gives preference to goods and services produced in Saudi Arabia. The bidding procedures mandated by the Law reflect common corporate practices, including the submission of sealed bids for opening on a specified date, the submission of bid bonds, and review by a specialised review committee. Submitted bids must be valid for 90 days. The tendering government body must consider the review committee’s considerations and award the tendered contract within the bid validity period.

FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Saudi Arabia is a member of the World Trade Organization and has a generally permissive cross-border trade regime. Investors seeking to establish a permanent presence in Saudi Arabia must be licensed by SAGIA. The relevant Saudi investment laws allow 100 per cent foreign ownership of foreign investment in most sectors, including contracting services and EPC. Of relevance is the exclusion from the foreign investment allowance of real estate investment in the holy cities of Mecca and Medina. Foreign investors in Saudi Arabia may conduct business using any one of the following forms of entity:

- a limited liability company;
- a branch;
- a joint stock company (open or closed);
- a temporary commercial registration;
- a professional company; and
- a technical scientific services office.

SAGIA licensing procedures classify foreign contractors according to their size and capabilities, and this classification determines the contractors’ public tender participation. Upon obtaining a foreign investment licence, a foreign investor proceeds to form the

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38 ibid., at Article 1.
39 ibid., at Article 6.
40 ibid., at Article 7.
41 ibid., at Article 3.
42 Foreign Investment Law, Article 6.
43 Government Tenders and Procurement Law, Article 10.
44 ibid., at Article 11.
45 ibid., at Article 16.
46 ibid., at Article 12.
47 ibid., at Article 20.
48 Foreign Investment Law, Article 2.
49 Foreign Investment Law, Article 3, and the Negative List, published by SAGIA.
commercial entity in the same manner as any local investor. The Foreign Investment Law provides that foreign-owned entities shall receive the same benefits, incentives and guarantees that are enjoyed by nationally owned entities pursuant to applicable regulations.  

In 2017, SAGIA amended the procedure for issuing a foreign investment licence to simplify and reduce the documentary submission requirements, and launched an initiative titled ‘the 10-minute licence’ for publicly listed companies considering investing in Saudi Arabia.

**Removal of profits and investment**

The Saudi riyal exchange rate with the US dollar is fixed and maintained by the Saudi government, providing for ease of cross-border transfers, liquidity and exchange rate stability. This also allows for holding and transacting in foreign currencies in the country, and local banks commonly maintain bank accounts in a number of major currencies such as the US dollar, euro and British pound. Foreign investors are free to repatriate all profits, capital gains, distributions and proceeds or use them as they see fit. However, distributions of profits to a foreign party are subject to withholding tax at the rate of 15 per cent.

In addition, Saudi Arabia has signed more than 30 double taxation treaties that may provide for lowering the effective tax rate with respect to distributed profits.

**XI  DISPUTE RESOLUTION**

**i  Special jurisdiction**

Construction and contractual disputes are considered commercial disputes within the general jurisdictions of the commercial courts of Saudi Arabia (currently under the Board of Grievances). The foregoing notwithstanding, the competent body to hear any dispute relating to banking activities by or against banks in the country is the Committee for Banking Disputes, which operates under the Saudi Arabian Monetary Agency. The Committee holds special jurisdiction to hear disputes relating to bank guarantees or bank collateral enforcement in project financing; however, it does not have jurisdiction to review underlying contracts.

Parties to large construction projects in Saudi Arabia often prefer to resort to arbitration as the exclusive method of dispute resolution. Such a choice would be binding pursuant to Article 11 of the Arbitration Law.

**ii  Arbitration and ADR**

Arbitration and alternative dispute resolution procedures are commonly used, especially in large construction and project undertakings for which specialised knowledge and expertise is desired in the adjudicating tribunal. Arbitration clauses in contracts are generally enforceable

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50 Foreign Investment Law, Article 6.  
51 ibid., at Article 7.  
53 Article 35 of The Shariah Litigation Law issued by Royal Decree No. M/1 dated 22/1/1435 H (corresponding to 25 November 2013 G).  
54 Article 1, 3 of Royal Order No. 729/8 dated 10/07/1407 H (corresponding to 10 March 1987 G).  
56 Issued pursuant to Royal Decree No. M/34 dated 24/5/1433 H (corresponding to 16 April 2012 G).
pursuant to the Arbitration Law. However, parties should note that government bodies are restricted from using arbitration as a means to resolve disputes in the absence of approval from the Prime Minister (a position held by the King). This restriction can affect any construction and financing projects to which the government is a party.

Saudi Arabia recognises and enforces arbitral awards issued in a country that is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) or other countries based on reciprocity principles, including through the GCC Convention on the Enforcement of Judgments and Judicial Representation and Notices or the Arab League Convention for the Enforcement of Judgments of 1952. Saudi Arabia is also a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the ICSID Convention). However, the enforcement of arbitration awards, both foreign and domestic, by Saudi courts is limited to the extent that the awards do not violate shariah principles or public policy. In relation to these provisions, parties are commonly advised that an arbitral award of interest, or amounts corresponding to interest, are not likely to be enforceable in Saudi Arabia because the payment of interest violates the shariah principle prohibiting usury.

XII OUTLOOK AND CONCLUSIONS

Saudi Arabia witnessed a construction boom for nearly a decade on the back of high oil prices, but with prices more than halving in 2014, and remaining at around US$65 per barrel throughout 2018, the country’s development and construction agenda was questioned in light of the reduced oil revenues. The resulting increase in risk was evidenced by the severe reduction in infrastructure spending and contract awards witnessed in 2016 and early 2017. Nonetheless, because of a number of socio-economic factors, including demographics and GDP diversification, Saudi Arabia is in the process of reorganising its spending programmes and planning a new model for continued growth and development.

The announced Vision 2030 and the NTP 2020 have produced new plans for government leadership in relation to growth, and have resulted in calls for an increase in alternative project financing and PPP arrangements. This has already led to the establishment of the NCP and is expected to accelerate PPP projects, especially in the transport and logistics and power sectors, which will lead the government’s effort to put in place workable and bankable structures for the deployment of projects outside the traditional government tender procedures. A number of legal initiatives announced at the end of 2017 and early in 2018 are also expected to further accelerate the return to growth, most notably the issued Bankruptcy Law and the revised Commercial Liens (Pledge) Law.

With regard to the private sector, reassessment of contracting procedures is taking place to account for a period of more restricted cash flow, including a move towards documentation

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57 Arbitration Law, Article 11.
58 ibid., at Article 10.
59 Saudi Arabia acceded to the New York Convention by Royal Decree No. M/11 dated 16/7/1414 H (corresponding to 29 December 1993 G).
61 Arbitration Law, Article 55; Enforcement Law, Article 9.
and the use of internationally recognised contract forms, such as those produced by FIDIC and similar institutions. Risk assessment and management is increasingly on the radar of employers, contractors and financing banks, and this is expected to result in a drive towards better documentation, better contract management and, it is hoped, better project results.

Regarding 2019 and the near future, a return to higher levels of public spending is projected to rise to an all-time high of 1.106 trillion riyals, from an actual 1.030 trillion riyals this fiscal year, but similarly led by military and education spending. The construction-heavy infrastructure and transport sectors are expected to be significantly buoyed with 72 billion riyals, representing 6.6 per cent of the budget in planned spending, which is higher than the budget of 54 billion riyals for the sector in the last fiscal year.
Chapter 16

SOUTH AFRICA

Deon Govender and Kgabo Mashalane

I INTRODUCTION

For more than 20 years, project finance has been the long-term financing solution for capital-intensive projects within a number of sectors of the South African economy. Project finance has been used in inter alia the energy, natural resources and mining, telecommunications, transportation and water sectors, and has further funded public-private partnership (PPP) projects delivering social infrastructure, such as hospitals.

Multilateral agencies and development banks have participated in South African project finance transactions alongside local and international commercial banks. The funding sources for these transactions have also included major South African life insurers, export credit agencies and, of late, private equity funds and exchange-listed project bonds.

During 2018, developers and financiers of capital-intensive projects remained challenged by policy uncertainty, a weak economy and the dearth of infrastructure projects coming to market. Contractors continued to experience pressure on their margins and a lack of liquidity. However, several noteworthy developments, including developments in relation to the government-led Renewable Energy Independent Power Producer Procurement Programme (REIPPP), have left many in the infrastructure development market hopeful of a recovering market in the year ahead.

II THE YEAR IN REVIEW

Through REIPPP, South Africa has become one of the top five global destinations for renewable energy procurement, attracting significant capital commitments. However, maintenance of this status proved challenging in the year under review.

Three years have passed since 27 independent power producers (IPPs) were appointed as preferred bidders under Bid Window 4 of REIPPP and these IPPs were no closer to signing their respective power purchase agreements (PPAs) with Eskom Holdings SOC Limited (Eskom), the state-owned electricity utility. Further, the Department of Energy’s failure to update its Integrated Resources Plan (IRP) for an even longer period was threatening to dry up the country’s renewable energy procurement pipeline. The updating of the IRP, which serves as the South African government’s plan for new electricity generation capacity, is a key precondition for energy procurement under Bid Window 5 of REIPPP.

This, coupled with the fact that civil engineering was in the doldrums, did not bode well for contractors, developers and financiers of South African capital-intensive projects.

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Fortunately, however, this position started to change during the course of the year. In April 2018, Eskom signed PPAs with the aforementioned IPPs, committing to purchase 2300 megawatts of renewable energy from them. In July 2018, Saudi Arabia pledged to invest US$10 billion in South Africa’s troubled energy sector. In August 2018, the Department of Energy published a revised draft IRP for public comment and the Minister of Energy promised to finalise the IRP by the end of 2018.

There were also noteworthy developments outside the energy sector. Coega Development Corporation, a state-owned enterprise charged with developing and operating the Coega Special Economic Zone (SEC) in the country’s Eastern Cape province, attracted significant investment in the SEC, including a joint venture, valued at 11 billion rand,² between BAIC International and Industrial Development Corporation of South Africa, a state-owned corporation, for the establishment of an automotive assembly plant. In addition, several local multinational corporations pledged to invest more than 130 billion rand³ in response to President Ramaphosa’s calls for investment. A large proportion of these pledged investments will be directed towards infrastructure development in the natural resources and mining, automotive and telecommunications sectors.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

South African project finance ownership structures largely mirror those used in developed markets. A key tenet of South African project finance is limited recourse to the project sponsors and apportioning project risks among the project company’s counterparties under the various project documents. As in developed markets, the project company is typically structured as a single-purpose insolvency remote special purpose vehicle (SPV). There are some noteworthy differences in relation to the security structures and agreements used in South African project financings; these are discussed in Section V.

ii Documentation

In the main, the documentation used to project finance private infrastructure developments mirror those used in developed markets; as indicated above, there are noteworthy differences in relation to South African security arrangements.

Most publicly procured infrastructure projects are anchored on a concession or a PPP agreement between a government institution responsible for the institutional function being outsourced and the relevant concessionaire (in the case of a concession agreement)⁴ or private party (in the case of a PPP agreement).⁵ REIPPPP does not fit squarely within these public procurement categories. With regard to REIPPPP, public procurement of electricity is undertaken by the Department of Energy; however, the IPPs appointed as preferred bidders enter into PPAs with Eskom for the supply and purchase of the procured electricity. Eskom’s

2 Approximately US$750 million using the exchange rate as at 31 December 2018.
3 Approximately US$9 billion using the exchange rate as at 28 October 2018, the date of the announcement of the pledges.
4 The use of concessions has been limited in recent years.
5 Public-private partnerships, within the South African context, also apply to the use of state property for commercial purposes.
payment obligations under the relevant PPAs are underwritten by the National Treasury in terms of a separate implementation agreement. Put-and-call option agreements generally do not feature in South African public procurement.

Typically, the SPV will enter into construction and operation and maintenance (O&M) contracts for the construction and operation of the facility. Other key project documents include offtake agreements (e.g., the PPA under REIPPPP), key input supply agreements (e.g., coal, limestone and water supply agreements for coal-fired power stations), real estate agreements, intellectual property and licence agreements, shareholder and equity funding agreements, and finance documents.

The finance documents usually comprise either a common terms agreement or a facility agreement (or both), hedging documentation, an intercreditor agreement, security documentation (discussed in Section V) and direct agreements relating to key project documents, including (without limitation) the real estate, key supply and offtake contracts. Credit enhancement agreements, such as limited shareholder corporate guarantees and O&M contractor parent guarantees, are often required by lenders to bolster the project’s security package.

iii Delivery methods and standard forms
South African construction contracts embrace a wide spectrum of delivery methods, from design-build to EPC contracts and many variants in between. With regard to construction services, engineering-procurement-construction-management and alliance contracting are used in South African construction projects, although the former tends to be favoured over the latter.

A construction contract in South Africa could take the form of either a bespoke or a standard-form contract. The Construction Industry Development Board (CIDB), a South African statutory body mandated to promote the delivery capability of the country’s construction industry, compels state-owned entities to use standard forms when procuring construction services. The approved CIDB standard form contracts are the International Federation of Consulting Engineers (FIDIC), the New Engineering Contract (NEC), the Joint Building Contracts Committee (JBCC) and the General Conditions of Contract for Construction Works (GCC). While the first two of these (FIDIC and NEC) are international standard-form contracts, the last two (JBCC and GCC) are forms that have been developed in South Africa. The JBCC is a non-profit company with representatives comprising, among others, building developers, professional consultants, and general and specialist contractors. The JBCC standard forms comprise a building agreement and a minor works agreement, and are recommended for use with owner-designed building projects. The GCC standard form contract has been developed by the South African Institution of Civil Engineering and is recommended for use in civil construction projects.

IV RISK ALLOCATION AND MANAGEMENT
i Management of risk
With some exceptions, the risks inherent in project financing transactions and construction contracts largely mirror the risks commonly encountered in similar transactions and contracts in developing markets. They generally fit into the following broad categories:

a construction risk;
b operational risk;
c. supply risk;
d. offtake risk;
e. repayment or credit risk;
f. political risk;
g. currency risk;
h. licensing and authorisations risk; and
i. dispute resolution risk.

There are South African nuances to the above-referenced risks that require attention, particularly within the context of publicly procured infrastructure projects. For example, in relation to currency risk, South Africa has a detailed and well-documented exchange control policy that regulates the export of currency, and subjects the repatriation of foreign investments and income deriving from such investments (such as dividends and royalties) to approval by the South African Reserve Bank. With regard to the authorisation risk, it is important that the investor assess the risk that the procurement award could be declared invalid and unenforceable, as well as the risk that broad-based black economic empowerment (B-BBEE) obligations upon which the procurement award is made conditional could be breached and the resultant contract cancelled.

A significant proportion of the public procurement process is opaque to bidders, and because of this legal counsel are generally reluctant to issue an opinion to lenders on the validity and enforceability of the procurement award. This risk is increasingly being mitigated by the procuring government institution making available to the successful bidder (and its legal counsel) documentation on the procurement process to facilitate meaningful investigation of the relevant procurement process.

B-BBEE is a socio-economic programme endorsed by the Constitution of the Republic of South Africa. It is designed to redress the inequalities of apartheid through transformative measures that enhance participation by black people (and certain other designated groups of South Africans) in the South African economy. Transformative measures within the context of publicly procured infrastructure projects may include a requirement that bidders commit to, inter alia, black ownership and management targets in the SPV or key contractors to the project during the implementation of the project. While the principles underpinning B-BBEE are similar in some respects to local content and development commitments in other markets, B-BBEE is a more complex and involved programme requiring specialist expertise when structuring procurement bids and the resultant contracts with the procuring government institutions.

ii. Limitation of liability

The SPV in a project finance transaction is generally incorporated as a limited liability company. Accordingly, with a few exceptions, claims against an SPV do not attach to its shareholders. The lenders restrict the SPV’s activities through ring-fenced provisions, which are incorporated into its constitutive documents. The ring-fenced provisions limit the principal business of the SPV to the implementation of the project, and may further prohibit it from incurring additional indebtedness, granting loans and guarantees and imposing encumbrances over any of its assets other than those agreed in the finance documents.

Contractors generally do not accept open-ended liability under their construction contracts. They require that their liability for damages under these contracts be subject to a total liability limit, and that sub-limits apply to different types of damages they may
incur (e.g., delay and performance). Consistent with the FIDIC standard-form contract, liability for third-party indemnities and intellectual property infringement claims do not fall within these limits. Contractors limit their liability further by excluding indirect, special and consequential damages.6

Construction contracts, like PPAs, PPP agreements and concession contracts, generally exempt the affected party from performing its respective obligations under the contract if its performance is adversely affected by force majeure events. Force majeure provisions are generally enforceable under South African law.

iii Political risks

Under REIPPPP’s template implementation agreement, a government default includes expropriation or nationalisation of a material part of a power station or shares of an SPV, while the template PPA defines force majeure as including war, civil war, armed conflicts or terrorism. The occurrence of these political risks results in compensation for the SPV. Similar protections are provided for under the standardised PPP agreement.

Political risk cover can also be obtained from commercial insurers (such as Lloyd’s and AfriExim), export credit agencies from whom goods and services are sourced for the project concerned, and the World Bank’s Multilateral Investment Guarantee Agency (MIGA). MIGA cover has not been widely used in South African project financings.

The right to property is a fundamental right enshrined in the South African Constitution, which provides that no persons (both South African citizens and foreigners) may be deprived of property except in terms of the law of general application, and that no law may permit arbitrary deprivation of property. Laws may only provide for expropriation for a public purpose or in the public interest, and expropriation must be subject to compensation, the amount of which is decided or approved by a court. South Africa’s expropriation laws are currently under review.

V SECURITY AND COLLATERAL

The Deeds Registry Act 1937 prohibits a borrower from granting a mortgage bond over immovable property in support of its obligations to more than one creditor through a single mortgage bond, if such obligations arise from different causes. To allow different categories of lenders to a project to benefit from security over the same immovable property, it is necessary to establish a security company (security SPV) independent of the SPV (borrower) and to register the mortgage bond over the property in the name of the security SPV. Typically in these circumstances, in addition to a mortgage bond over immovable property, all other security over project assets is issued to (and, where applicable, registered in the name of) the security SPV. The project lenders receive benefit to this security through guarantees issued by the security SPV in favour of each lender. The SPV in turn indemnifies the security SPV against losses it incurs under the various guarantees it has issued to the lenders.

6 Special damages are those that result from a breach of contract, which are ordinarily considered in law as being too remote to be recoverable, unless the parties actually contemplated that such damages could result from a breach of the contract.
Typically, an SPV is required to issue to a security SPV the following security, within the context of a project financing:

- mortgage bonds over the immovable property of the SPV registered with the Deed Registry with competent jurisdiction;
- notarial bonds over the SPV’s movable property registered with the Deed Registry with competent jurisdiction. South African law provides for special notarial bonds over specified movable property of a debtor, and general notarial bonds over all other movable property of a debtor;
- a pledge and cession over the shares in the SPV and any rights attaching to those shares (including shareholder claims);
- a cession in security over the SPV’s rights, including its rights under project documents and authorisations and its rights to receive revenue under debtor, insurance and other claims, intellectual property rights, as well as its rights to the proceeds of bank accounts; and
- where applicable, a deed of hypothecation of patents, trademarks and designs registered with the Commission of Intellectual Property and Companies. This type of security is generally not required as an SPV seldom has intellectual property rights to encumber at the beginning of a project.

There are no formalities prescribed for a cession in security. In relation to a pledge and cession in security over shares, while the contract generally provides for the relevant share certificates to be delivered to the lenders’ agent with a transfer form to evidence the security, this is not formally required in relation to certificated shares; the execution of the pledge and security cession agreement suffices for the purposes of creating the relevant security. However, in relation to uncertificated shares (including all shares listed on a securities exchange), in addition to the execution of the pledge and cession in security, the securities account of the SPV must be appropriately notated in terms of the Financial Markets Act 2012. If the security over movable and immovable assets needs to be registered (as noted above), the security only constitutes real security once registered; the title to the asset remains with the SPV, subject to the lenders’ security interest.

Project finance structures in South Africa incorporate step-in rights, which are generally housed in direct agreements and are for the benefit of the lenders. Step-in rights allow the lenders to step into the shoes of the SPV under the relevant project documents where the SPV’s counterparty has the right to terminate the relevant project document, thereby giving the lenders the opportunity to cure the SPV default and avert termination of the relevant project document.

**VI BONDS AND INSURANCE**

Credit support is often required of the project sponsors (primarily in relation to their equity commitments), the offtakers (to mitigate credit risk relating to their purchase commitments) and the parent companies of the EPC and O&M contractors (to mitigate against performance risk under the EPC and O&M contracts, respectively). This credit support generally takes the form of a corporate guarantee or a suretyship but, depending on the lenders’ requirements,

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7 In South Africa, mortgages can also be registered over long-term leases of real estate.
could also take the form of on-demand bank guarantees, insurance policies or letters of credit. Suretyships and guarantees do not give any preference to a creditor on insolvency of the grantor of the instrument.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

A creditor holding security in the form of a mortgage bond or a general notarial bond must apply to court for an order authorising the Sheriff of the High Court to attach the debtor’s assets subject to that bond. The creditor perfects its security interest over those debtor assets upon the sheriff attaching the assets. Thereafter, the secured creditor may sell the assets through a private or public sale and use the proceeds of the sale to discharge the creditor’s claim and settle related costs. If a creditor holds security in the form of a pledge, cession in security or a special notarial bond, a court order is not required to perfect the relevant security; the secured creditor may sell the secured assets and apply the proceeds of the sale to discharge the creditor’s claim without a court order. A court order is also not required if the debtor and the secured creditor agree that the sale of the secured assets need not go through the judicial execution process. Such an agreement is recognised in law only in relation to movable assets pledged and delivered to the secured creditor, and where such assets are in the possession of the secured creditor at the time it enforces its rights.

A creditor is prevented from enforcing its claims against a debtor after business rescue proceedings against that debtor have commenced. Business rescue proceedings are regulated by the Companies Act 2008 and are akin to proceedings under Chapter 11 of the US Bankruptcy Code. These proceedings are designed to rehabilitate the financially distressed debtor through temporary supervision of the debtor. Business rescue proceedings can be initiated by the board of the distressed company filing a board resolution with the High Court, or through the High Court granting an order to this effect against a creditor or shareholder’s application to the High Court. Once a debtor is placed into business rescue, it is obliged to appoint a business rescue practitioner, which is authorised to suspend any of the debtor’s obligations to creditors during the period of the business rescue. The business rescue practitioner is also empowered to apply to the High Court to cancel any terms of a contract that, in the circumstances, are unjust or unreasonable.

A creditor is prohibited from realising any security it holds over movable or immovable property once insolvency proceedings against the debtor have commenced. The creditor is obliged to hand over the property to the liquidator for realisation. A few exceptions to this rule are set out in the Insolvency Act 1936. For instance, if the creditor is a secured creditor, the creditor can sell the secured movable property it holds and pay the proceeds realised to the liquidator; however, the liquidator is only obliged to use the proceeds of the sold movable property to settle the secured creditor’s claim if the claim is proved and admitted against the debtor’s estate. In addition to secured creditors, the Insolvency Act recognises preference and concurrent creditors. The preference creditor, like the concurrent creditor, does not hold security to support its claims; however, the Insolvency Act grants priority to the preference creditor for payment of its claims over those of the concurrent creditor. The concurrent creditor is only paid after both the secured and preference creditors have been paid. Not all creditors holding security are secured creditors. If a creditor has not taken possession of a debtor’s assets or if a creditor has a general notarial bond that is yet to be perfected (as outlined above), the creditor has a preference claim that will only be settled after the claims of
other secured and preference creditors are settled. As noted above, suretyships and guarantees
do not give any preference to a creditor on insolvency of the grantor of the instrument – the
guarantor is a concurrent creditor.

The Insolvency Act provides for the setting aside of certain transactions entered into by
an insolvent debtor prior to, or after, the liquidation, as well as clawback rights in favour of
the debtor’s insolvent estate. If an insolvent debtor disposed of assets without value (e.g., if
it made a donation), the High Court can set aside the transaction if, immediately after the
disposal, the debtor’s liabilities exceeded its assets (the ‘insolvency trigger’). The insolvency
trigger could have occurred either within two years of the liquidation or more than two
years before the liquidation; however, in relation to the former, no insolvency trigger results
if the person claiming under or benefiting from the disposition proves that the assets of the
debtor exceeded its liabilities immediately after the disposition. The High Court can also set
aside a disposition of property made at least six months prior to a debtor’s liquidation if that
disposition had the effect of preferring one of the debtor’s creditors over another and resulting
in an insolvency trigger, unless the person in whose favour the disposition is made proves that
the disposition was made in the ordinary course of business, and that it was not intended to
prefer one creditor above another. The High Court may set aside the improper disposition
transactions described above and authorise the liquidator to recover the assets disposed or
the value thereof at the date of the disposition (whichever is higher). The Insolvency Act also
provides for the setting aside of collusive transactions entered into between the insolvent
debtor and any other person prior to the insolvency, if the debtor in collusion with the
other person disposed of the debtor’s assets in a manner that had the effect of prejudicing
the debtor’s creditors or preferring one of its creditors above another. Any person who is a
party to a collusive disposition is liable to make good any loss caused to the insolvent estate,
and if such a person is also a creditor, he or she will also forfeit his or her claim against the
insolvent estate.

Certain security not registered within a hardening period is invalid. The Insolvency
Act provides that if a debtor is liquidated within six months of a special notarial bond or a
mortgage bond being registered, the security is invalid. There is an exception to this general
rule: if the assets secured by a special notarial bond or a mortgage bond had been secured for
at least two months prior to the registration of the relevant bond, the security is valid.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

If a project involves land development, which is often the case with infrastructure projects,
inevitably the developer must conduct an environmental impact assessment (EIA) and
secure an environmental authorisation to undertake the proposed development in terms of
the National Environment Management Act 1998 (NEMA). In a nutshell, the EIA process
under NEMA requires the following:

a conduct either a basic assessment (for activities less likely to significantly affect the
environment) or a scoping and EIA process (for activities likely to result in environmental
degradation or higher levels of pollution). The latter processes involve a more thorough
assessment of how the proposed development is likely to affect the environment than
the former process;

b determine how the proposed development is likely to affect the environment and how
the developer could reduce or mitigate against these effects;
c give the public an opportunity to comment on the proposed development, inclusive of the mitigation measures proposed to deal with the effects on the environment; and

d provide the government institution charged with making a decision on an application for environmental authorisation with key information to help it make a decision.

Other licences and permits required for infrastructure projects vary depending on the nature of the projects. Some of the other key environmental permits include:

a atmospheric emissions licences under the National Environmental Management: Air Quality Act 2004;

b waste management licences under the National Environmental Management: Waste Act 2008;

c water use licences in respect of certain water use activities under the National Water Act 2008;

d biodiversity permits under the National Environmental Management: Biodiversity Act 2004 in respect of designated activities that may affect protected species and bio-prospecting; and

e permits for the undertaking of certain activities affecting heritage resources under the National Heritage Resources Act 10 1999.

ii Equator Principles

Most of South Africa’s commercial banks have adopted the Equator Principles and will oblige the SPV to adhere to them in the implementation of the relevant project. Through the use of the pass-through principles, the SPV may oblige other project participants, such as the O&M and EPC contractors, to comply with the Equator Principles (or certain aspects thereof) in the implementation of the relevant project.

iii Responsibility of financial institutions

There are divergent views within the market as to whether lenders could be held liable for their indirect contribution towards environmental pollution and degradation caused by the projects they funded. These views remain untested by South African courts with competent jurisdiction.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPPs have been part of the project finance landscape for over a decade, although fewer PPPs have come to market in the past few years.

Depending on the nature of the procuring government institution, a PPP agreement could be subject to either the municipal PPP or the national PPP legislative framework. The latter deals with PPPs entered into with national and provincial state departments and state-owned entities, while the former regulates PPPs entered into by municipalities and municipal-owned entities. The national PPP legislative framework (when compared with its municipal counterpart) is more comprehensive and involves protracted processes. The discussion that follows is based on South Africa’s national PPP legislative framework.

PPPs at national level are primarily regulated by National Treasury Regulation 16 under the Public Finance Management Act 1999 (PFMA) and administered by the PPP Unit within the National Treasury. This Regulation incorporates a PPP Manual and Standardised
Provisions for the PPP agreement. The PPP Manual outlines, inter alia, how PPPs must be initiated, how transaction advisers should be appointed and how the various stages of the procurement process must be implemented. It further details the various National Treasury approvals required at various milestones of the PPP development process. The Standardised Provisions set out the clauses required in each PPP agreement, with annotations as to what each of the clauses seeks to achieve and under what circumstances deviations to these clauses are permissible. All institutions undertaking PPPs require approval from the National Treasury in all four phases of the PPP procurement process (i.e., the feasibility study, procurement, value for money and final PPP agreement phase). During the procurement process, the relevant PPPs are assessed for value for money, affordability and optimal risk transfer.

The PPP procurement process entails the advertising of a request for qualification (RFQ) calling interested bidders to collect and download copies of the RFQ and attend a public briefing. This process is designed to introduce the project to the market and assess interest therein. Responses to the RFQ are evaluated and potential bidders are qualified to respond to the request for proposal (RFP). Bidders are given access to a data room through which they can access pertinent project information and documentation for their respective due diligence investigations. As part of their bid response, bidders must mark up the draft PPP agreement included in the RFP. A preferred bidder is selected from the bidders and is invited to enter into negotiations relating to the PPP agreement; at times, two or more bidders may be required to provide their best and final offer before a preferred bidder is selected.

There are various types of infrastructure development PPP projects based on the contractual arrangements involved, including:

a) design, finance, build, operate and transfer;
b) design, finance and operate; and
c) design, build, operate and transfer.

ii Public procurement

Section 217 of the Constitution provides that whenever the South African government contracts for goods and services, it must do so in a manner that is fair, equitable, transparent, competitive and cost-effective. The PFMA and the Municipal Finance Management Act 2003 (MFMA) establish a framework for state procurement in line with Section 217. The latter deals with procurement by municipalities and municipal-owned entities, while the former deals with procurement by national and provincial government departments, and state-owned entities. Supply chain management regulations have been issued under both the PFMA and the MFMA. These regulations are detailed and provide for tender processes distinct from those applicable to PPPs; these processes vary depending on the procuring institution and the procurement requirements. B-BBEE is an important criterion for pre-qualification and tender awards (see Section IV.i). Tender awards constitute administrative action, which can be challenged on a review application to the competent high court on grounds that the action was unlawful, irrational, unreasonable or procedurally unfair.

iii PPP contingent liabilities

PPP contingent liabilities are liabilities that the South African government incurs in terms of a PPP agreement when that agreement is terminated. Under certain circumstances, a PPP agreement will provide that the procuring government institution is obliged to compensate the private party if the PPP agreement is terminated before its expiry date. There are various
categories of PPP contingent liabilities, depending on whether the termination is the result of private-sector default, government default or force majeure – an event beyond either party’s control.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

South Africa’s Exchange Control Regulations are administered by the South African Reserve Bank (SARB) and control inflows and outflows of capital. These regulations apply more to residents than non-residents; however, to ensure appropriate treatment of a non-resident investment, non-residents must apply for exchange control approval prior to making investments in South Africa. For example, should the foreign direct investment take the form of a shareholder loan to a South African subsidiary, a non-resident’s repatriation of the loan proceeds (principal and interest) will be blocked in the absence of an exchange control approval secured from SARB before the loan was made available.

Save for work permits for expatriate staff and officers and registration of the foreign company as an external branch (should it elect not to incorporate a South African subsidiary through which it implements the project), there are no special licensing or other requirements for foreign contractors. With the exception of the exchange control restrictions outlined above, there are no restrictions that apply to foreign investors or creditors in the event of a foreclosure of an infrastructure project or an SPV.

A range of investment incentives are available to investors in different sectors of the economy via the South African government, through its Department of Trade and Industry.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific rules or requirements, and South Africa does not have a dedicated forum (court or otherwise) for project finance transactions or construction disputes. In the absence of a written agreement to the contrary, the default position is that disputes are dealt with by a court with competent jurisdiction.

The choice of foreign law as the governing law for any of the project documents would generally be recognised by South African courts, unless the entry into and performance of the documents would be contrary to public policy and the South African Constitution.

ii Arbitration and ADR

Arbitration and other forms of alternative dispute resolution (ADR) are used to resolve commercial disputes in South Africa, including disputes relating to project finance transactions. Adjudication is also used as a form of ADR within the context of construction contracts.

South Africa is yet to accede to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the ICSID Convention) and, considering the dispute resolution provisions of the Protection of Investment Act 2015, it is unlikely to do so in the near future. The Protection of Investment Act, which is yet to take effect, does not provide for compulsory international arbitration for the resolution of investor-state disputes involving the South African government; currently, international arbitration is used at the government’s discretion.

XII OUTLOOK AND CONCLUSIONS

While there are signs of the South African economy improving, any improvement is conditional upon greater innovation and significant investment in the economy, particularly in infrastructure development. As South Africa continues its drive to attract more investment, it is probable that potential investors will require that the South African government shift (or soften) its position on a number of regulatory and policy issues that have historically challenged foreign direct investors, including expropriation of land, labour reforms, B-BBEE and investment protections. The need for investment could start altering South Africa’s regulatory landscape.
I INTRODUCTION

Project finance has been one of the most widely used financing methods in Spain in recent years. The main reasons for this are the ‘passion’ during the past decade for renewable energies and the construction of infrastructure megaprojects (mainly highways, railways and airports) under concessional regimes.

II THE YEAR IN REVIEW

There has been a lot of activity in the Spanish infrastructure and energy markets. In terms of public investment, the amount devoted to infrastructure by the government in the 2019 General State Budget increased by 18.7 per cent, as compared with 2018, to €10.030 billion. Of this, €5.041 billion is earmarked for the highway network and €2.328 billion for railways. The remainder will be spent primarily on ports, airports, hydraulics, and the coast and environment.

Additionally, the Ministry of Development is commissioning the Extraordinary Highways Investment Plan (PIC), which will involve the tender for several highway concessions, in the hope of attracting fresh investment into the infrastructure network.

There has also been heightened activity in the renewable energy market. Following restructurings of renewable assets conducted as a result of the regime on feed-in tariffs approved by the government, we are seeing several projects being taken over and prepared to compete in free market conditions. Most of them are medium-sized solar energy initiatives that endeavour to proceed without public assistance or subsidies. In this context, the use of power purchase agreements (PPAs) is becoming more common in the Spanish market.

A good example of this is the Talasol Project, which is a 10-year PPA for a 300-megawatt photovoltaic (PV) plant that will be installed in the municipality of Talaván (Cáceres). Initiatives like this one are generating enthusiasm for creating similar projects nationwide and the market is showing an increasing appetite for PPAs. In this regard, evidence shows that the preferred option by offtakers and sponsors is a synthetic PPA for an approximate term of 10 years. However, this is normally not enough to fully cover the risk of the financiers as the tenor is usually longer than that, so there will still be some merchant risk towards the end of the financing. For this reason, the importance that financiers will put on having a PPA in place is still not certain.

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On 17 May 2017, the Ministry of Energy, Tourism and Digital Agenda awarded three-gigawatt tendered capacity to wind developers. A subsequent auction in July 2017 brought notable improvement to a previously narrow field of investment. The original offer of a 3GW capacity was renegotiated and augmented owing to high levels of interest from potential investors, both local and international. The revised capacity of eight gigawatts, shared throughout a diversified field of renewable energy sources, illustrates the intense interest and breadth of opportunity that remains in this industry. On 31 December 2019, all the projects that were awarded in the aforementioned auction shall be registered with the Ministry of Industry, Trade and Tourism. Taking into consideration the current status of some of the projects awarded in the auction, it is unlikely that all of them will be able to achieve the deadline, which means that they will not be able to benefit from the subsidised minimum electricity price.

According to an estimate by the Spanish Photovoltaic Union, investment in photovoltaic energy will reach between €4 billion and €5 billion before 2020.

Some of the most noteworthy transactions in the renewable energy sector during the past year include the construction of the Mula PV plant in Murcia (Spain) with a total capacity of 500MWP,2 which is the biggest PV plant in the European Union, and the financing of 10 wind farms in Zaragoza (Spain) with a total capacity of 342 megawatts.

Finally, the new Public Sector Contracts Law entered into force on 9 March 2018. This regulation introduces some major changes with respect to the regulation of public concessions to align Spanish domestic law with European Union directives.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures
Financing a project in Spain under a project finance structure is generally made through a newly incorporated special purpose vehicle with private or public-to-private share capital.

In the case of projects under concession regimes (mainly for highway construction and exploitation), Spanish authorities have opted for the build-operate-transfer or build-own-operate methodologies. Highways have often been financed either through tolls paid directly by the users or by ‘shadow tolls’, in which the remuneration is set depending on the amount of traffic and is paid directly by the Spanish authorities to the concessionaire.

Occasionally, more innovative formulas such as build-lease-transfer have been implemented, particularly for financing of prisons and healthcare construction projects. Under this formula, the private sponsor leases the facility to the authority in exchange for a fee or a periodic rent to be paid throughout the asset’s exploitation period.

ii Documentation
The suite of documents under a project finance structure in Spain comprises project agreements and financial agreements.

Project agreements include all the non-financial agreements signed by the sponsor and the project company with third parties for the construction, supply of materials, commissioning, operation and maintenance of the project. Lenders are not often party to such agreements.

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2 MWP (megawatt-peak) is the maximum output under controlled conditions.
They are generally drafted by the sponsor (and its legal advisers, if applicable) and audited by the lenders’ independent (legal, technical-environmental and insurance) advisers, who may propose certain amendments thereto.

Construction agreements are always negotiated between the parties on a ‘turnkey’ basis (engineering-procurement-construction (EPC) agreements). Operation and maintenance agreements are often signed at the beginning of the construction period, but they come into force only once the project has been commissioned. The underlying agreement might be a supply or a sales agreement entered into by the project company with a private party (e.g., sale of electricity) or even with a public administration (administrative concessions, leasing, etc.). Insurance agreements also need to be signed by the project company with a reputable and creditworthy insurer subject to the insurance independent adviser’s approval.

Financial agreements include all those entered into by the project company and the sponsor with the lenders. The lender’s legal counsel, in contrast, takes the lead on the drafting of such agreements. There is an increasing trend in Spain to conform financing agreements to international deal-financing standards governed by the legal system of the United Kingdom or the United States. As a result, legal counsel often suggest that direct agreements with project counterparties or accounts agreements be considered part of the suite of finance documents.

The intercreditor agreement is particularly important if the European Investment Bank acts as a lender, with a commercial bank syndicate in the same transaction. In addition, the intercreditor agreement is a core agreement for transactions being financed under a project bonds scheme or by a variety of creditors (subordinated creditors, mezzanine creditors, etc.).

Insurance agreements signed with export credit agencies are also customary for transactions with an international component. In the event that an export credit agency is involved, a thorough review of the financial documents should be carried out by legal counsel alongside the mandated lead arranger regarding the compliance of the financing with the OECD Arrangement on Officially Supported Export Credits and the insurance agreements.

What sets Spain apart from common international practice is that financial agreements have to be executed before a Spanish public notary by means of a public deed. This means that every financial agreement must be signed simultaneously in Spain by all the parties and that each party, or its representative, must be present at the signing. Therefore, foreign counterparties will very likely have to grant powers of attorney, notarised and apostilled (if the country of residence of the foreign counterparty is a member of the 1961 Hague Convention) or legalised, as applicable, prior to the financial closing. They will have to apply for a tax identification number for foreign entities as a requirement for notarisation of any document. There are also certain new requirements on anti-money laundering and terrorism financing that will have to be fulfilled. Compliance with such formalities may be time-consuming so it is advisable to work on them from the very beginning of the transaction. Notarial fees will also be considered a transaction cost that has to be borne by the sponsors or the project company.

iii Delivery methods and standard forms

The standard delivery method is very often based on a turnkey structure. It is very unlikely that lenders will accept delivery methods based on a design-bid-build structure. The most important characteristics of construction agreements in Spain are fixed price and term, application of penalties as a result of delays, shortfalls in profits for the project company and termination events that would eventually require the contractor to reimburse the full amount
of the price paid by the project company. The last of these might not be a standard in other jurisdictions, but Spanish lenders will be reluctant to accept an alternative in the event of termination caused by a fault of the contractor.

Standard construction agreements (e.g., those sponsored by the International Federation of Engineers) are not currently in use unless there is a Spanish version available, but rather the sponsor or the contractor proposes the contract form that has to be audited by the lenders’ independent (legal, technical-environmental and insurance) advisers, who may in turn suggest amendments.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The main risks associated with project financing are those common in other jurisdictions.

Credit risk

Credit risk attached to sponsors relates to contingent funding obligations in addition to base equity contributions to the project company to comply with the required gearing ratio.

Contractors, operators, insurance companies and suppliers are generally assessed in terms of their creditworthiness to make required payments under the relevant project agreement. In addition, an assessment should also be made with respect to offtakers and their creditworthiness to comply with their payment obligations during the life of the project.

Credit risk relating to public bodies had been mitigated during the early years of the rise of project finance in Spain by means of insurance provided by monoline international insurance companies. However, these companies are some of those that have been affected most by the international financial and economic crisis. As a result, most projects originally backed by such guarantees have been restructured to set those insurances aside. No guarantee mechanisms have been implemented as a replacement, other than those provided by corporations themselves or a third financial party (i.e., bank guarantees).

Construction and start-up risk

This type of risk relates to delays in the commissioning and start-up of the project. It can result in an increase in the financial cost and, eventually, the project company’s lack of funds to fulfil its payment obligations under the financing.

As a general rule, lenders do not assume any risk pertaining to the project’s construction period. Mitigating measures are often implemented by lenders to avoid such risk as far as possible. In addition, corrective measures are usually demanded under the turnkey agreement (i.e., by means of the regulation of ‘completion tests’ audited by the independent technical adviser), under the financial agreements (i.e., by means of completion guarantees granted by the sponsors, which might eventually be required to reimburse all outstanding debt under the project financing) and, finally, under the insurance agreements (i.e., in the case of a force majeure event). Lenders may also require the funding of special reserve accounts by the project company for different purposes. These accounts might be funded against project cash flows, contributions made by the sponsors or utilisations under the project financing.
Market and operating risk (project risk)

This risk relies on the project’s ability to honour commitments forecasted under the financial model. This risk will generally be borne by the lenders from the expiry date of the guarantee periods under the EPC agreement (i.e., those guarantees will normally lapse around 24 months after the commissioning of the project). As explained in Section II, the market in Spain is showing an increasing enthusiasm for PPAs as they are a tool to partially mitigate the merchant risk in subsidy-free schemes. This is allowing lenders who were initially reluctant to enter the renewable energy market, because they did not want to bear merchant risk, to now be willing to finance renewable projects when a PPA is in place. Nevertheless, a synthetic 10-year PPA – which is currently the market standard in Spain for this kind of agreements – is not enough to fully and effectively cover the merchant risk for the financiers under a long-term non-recourse project finance situation, as the tenor of the financing is usually longer than that. This is why the financiers who are unwilling to bear merchant risk are also requesting, in addition to a PPA, certain tools such as cash sweeps to reduce the tenor of the financing, and therefore minimising the exposure to the merchant risk post-PPA.

Financial risk

This risk relates to fluctuations in interest rates (and exchange rates, if applicable) inherent to the project financing. It is normally covered by lenders by means of financial derivatives (e.g., swaps, caps, collars, floors) to be entered into by the project company.

Political, administrative and regulatory risk

Lenders used to feel comfortable with this risk and, as a result, they did not request sponsors to contribute funds or to provide bank guarantees as cover. However, recurrent political interference in recent years to change the feed-in regime applicable to renewable energies has very much undermined lenders’ trust. As a result, most lenders have been demanding that sponsors put enhancements in place until project completion.

Lenders normally make use of (and sometimes even abuse) the sponsor’s and the contractor’s financial condition to cover project-associated risks, and it is often categorised as an enhancement in project finance deals in Spain. This (more efficient) reallocation of risks among the parties involved in the project may be a consequence of the lack of development of contractual structures, which, in contrast to Spain, are common in other jurisdictions.

ii Limitation of liability

No compulsory provision constrains the liabilities borne by the parties under a project financing. It is customary, however, to agree on a maximum liability to be borne by the contractor, supplier or operator limited to the full price (annual price for the operator) under the relevant project agreement. Penalties and liquidated damages are normally based on the financial model.

Indirect or consequential loss is a category not recognised by the Spanish legal system. Therefore, it is not advisable to make a reference to them in project agreements.

Force majeure in project agreements generally exempts the parties from fulfilling their obligations thereunder. Parties usually agree that, after an initial suspension period, either party is allowed to terminate the agreement after a period of roughly 180 days. In addition to that, adverse consequences arising from force majeure events should be covered
by the insurance policies. Other adverse consequences not covered by insurance policies are often borne proportionally by the contractor or the operator (as the case may be) and the project company.

### iii Political risks

As mentioned in Section IV.i, political risk has not been a concern for lenders in Spain until recent years. Nevertheless, ongoing regulatory changes in the past few years (in the electricity sector, mainly) have probably undermined the Spanish state's credibility in this regard. We hope the enactment of the new – and hopefully definitive – regulation on the renewable energy sector will help to improve the view that market players have of Spanish authorities.

### V SECURITY AND COLLATERAL

The security package normally required by lenders for project financing in Spain includes the following:

- **a** pledges over the project company’s shares;
- **b** pledges over all the bank accounts relating to the project (including the operating and the special purpose reserve accounts);
- **c** pledges over project agreements (construction agreements, operation and maintenance agreements, insurance, supply, energy sales agreements, agreements regarding real estate, etc.); and
- **d** mortgages over real estate or concessions only in exceptional circumstances (this security is often required by lenders when the asset to be mortgaged is essential in terms of cash generation (e.g., mining or motorway concessions)); however, it is customary for a project company to undertake to grant security over project assets.

Pledges are typically taken with the transfer of possession, thus (1) they do not incur stamp duty in Spain, (2) they do not need to be registered with any public registry, and (3) they become perfected by means of the transfer of possession of the asset under the security and the execution of a public deed before a Spanish notary public.

Mortgages must be registered with the Land Registry and will incur stamp duty. The applicable rates of stamp duty vary depending on the region in which the security is registered, ranging from 0.5 per cent to 1.5 per cent of the maximum amount secured by the mortgage. As a result, it is customary that lenders agree to defer the creation of a mortgage until certain events have taken place (e.g., a default or breach of a financial covenant).

Sponsors’ contributions to the project company are often made by means of share capital and debt subordinated to the project finance (senior) debt, subject to compliance of a subordinated debt-to-equity ratio.

Step-in rights are generally allowed in project finance under Spanish law, but are not advisable. Under Spanish insolvency law, there is a risk that enforcement by the lenders of those rights might eventually lead to them being considered shadow directors, resulting in the subordination of their credits against the project company.
VI  BONDS AND INSURANCE

The guarantees normally required under construction agreements are the advance payment and performance guarantees, both for an amount in the range of 10 to 15 per cent above the agreement’s price. Both guarantees may be formalised by means of bank guarantees or surety bonds, with certain minimum ratings often required by the lenders. The advance payment guarantee will be returned to the contractor on the project’s provisional acceptance date, upon delivery at the same time of the performance guarantee, and the performance guarantee is returned to the contractor on the project’s final acceptance date.

Bonds and insurance are not contemplated by lenders as actual enhancements to guarantee project completion. On the contrary, lenders rely on the creditworthiness of the sponsors and contractor alike; we note that this is not standard in other jurisdictions.

VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Apart from insolvency implications that may arise, lenders may enforce their rights as secured parties by filing the corresponding claim before the competent court in Spain. It is essential for that purpose that (1) all financing agreements (including any assignment agreements in connection therewith) are executed as public documents before a Spanish notary public, and (2) all parties (in particular, any debtor) appoint the agent bank as the calculation agent for all applicable purposes (such calculations to be prima facie accurate). If these requirements (and others specified in the Spanish Civil Procedure Law) are fulfilled, lenders will benefit from an accelerated enforcement procedure against Spanish debtors.

There are also special procedures available for lenders to enforce security created in Spain, provided that certain specifications are complied with. Lenders may also benefit from an auction procedure organised by a notary public to sell pledged assets to third parties. There is also an enforcement procedure pursuant to Royal Decree-Law 5/2005 with respect to certain assets.

In insolvency proceedings, the general applicable rule is that a secured lender has privilege over the security. However, if the asset that is subject to the security is considered necessary for the debtor’s professional or business activity (excluding shares of companies owning a specific asset and related liabilities, provided that the enforcement of security does not result in the termination of agreements relating to exploitation of the asset), the security may not normally be enforced until one year has elapsed since the bankruptcy declaration.

Spanish insolvency law contemplates a two-year clawback period prior to the bankruptcy declaration. All transactions carried out within this period that are detrimental to the debtor’s assets can be rescinded, irrespective of the fact that there is no fraudulent intention. The law provides a list of transactions that are presumed to cause damage and that may not be rebutted by evidence to the contrary (e.g., transactions that extinguish non-secured obligations maturing after the bankruptcy declaration) and other transactions in which damage is presumed, unless evidence is provided to the contrary (e.g., creation of security over pre-existing obligations, as well as transactions that extinguish obligations secured by security that matures after the bankruptcy declaration). Spanish insolvency legislation also provides the refinancing arrangement and the court scheme of arrangement as instruments to drag along minority (blocking) lenders in the context of a refinancing.
Spanish insolvency law also provides a category of credits that benefits from a general qualification in terms of reimbursement (credits relating to employees’ salaries, tax credits and social security credits), provided, however, that none of the credits will affect the special privileged nature of secured ones.

Loans provided by persons with any special relationship with the debtor will be subordinated (e.g., loans granted by shareholders who, at the time the credit arises, held at least 10 per cent of the share capital in the project company or companies within its group of companies).

Other credits not categorised under Spanish insolvency law as qualified or subordinated will be considered ordinary.

Entities pertaining to the state’s territorial organisation, public bodies and other public corporations cannot be declared insolvent pursuant to Spanish insolvency law.

Spanish insolvency law contemplates certain pre-insolvency arrangements that are very likely to be relevant in the context of current refinancing processes resulting from the renewable energy sector reform. As a result of the implementation of those arrangements, a minority of creditors might eventually be compelled to accept terms imposed by certain majorities, provided that certain thresholds are reached and that the refinancing agreement is approved by the courts.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Construction of assets

The permits, licences and authorisations most commonly applied for in Spain for the construction of assets under a project financing are the following.

Administrative authorisation and approval of construction plans

Construction of installations that fall under the regulations of regulated sectors (e.g., energy) is normally subject to first obtaining an administrative authorisation, which is granted by the relevant authority of the autonomous community in Spain where the building or installations are to be located. The construction plans for the building or installations must also be approved by the same authority.

Declaration of public utility

This may be applied for at the same time as the administrative authorisation or the approval of the construction plans. Although it is not compulsory, the declaration of public utility implies the ‘need of occupation’ of the properties affected by the project and the ‘need to acquire’ the affected rights, which would enable the sponsor to implement expropriation procedures, if necessary.

Local licences

Local licences to be issued by the relevant city council include works licences, first occupancy licences, activities licences and operating licences. The construction of a building or installation generally requires a works licence and an activities licence to be obtained in advance. A first occupancy licence may also be necessary when all the work is finished, to verify that the conditions established in the works licence have been complied with.
Declaration of environmental impact

Buildings and installations may be subject to first obtaining an environmental decision authorising their construction. This authorisation is governed in the relevant environmental rules and regulations for each autonomous community, and usually consists of a declaration of environmental impact. However, in the case of relatively new installations, a unified or comprehensive environmental authorisation may be issued instead. Whatever the situation, a declaration of environmental impact or unified or comprehensive environmental authorisation, as the case may be, must be granted prior to the relevant municipal licence.

Operation of assets

The permits, licences, authorisations and registrations usually required for the operation of assets under a project financing in Spain are the following.

Start-up certificate

This certificate may be obtained once the construction has been completed in accordance with the approval of the construction plans.

First occupancy and operating licences

These licences may also be necessary for the operation of installations. However, depending on the type of premises or installation and the planned operation, other permits, authorisations and licences may be required. For example, renewable energy installations have to be recorded at an administrative registry to take advantage of the special remuneration applicable to such installations.

ii Equator Principles

A few financial entities in the Spanish market require, as a condition precedent to financial close, the delivery of a report rating the project under the Equator Principles.³

iii Responsibility of financial institutions

One of the main risks borne by lenders in Spain is that of being characterised ultimately as shadow directors of the project company. If characterised as such, they would bear the same liabilities, as legal entities as ordinary managers and their claims with regard to the company would be subordinated by virtue of law.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

The most common public-private partnership structures for the construction of infrastructure in Spain are the following:

a Payments made by the public administration to the private company: these may be made directly during construction or the exploitation period (e.g., shadow tolls).

b Construction carried out by the private company supported by private financing and subsequent transfer of the installations to the public administration: the public

³ See https://equator-principles.com/about/.
administration authorises the project company to develop the project in a public area, so that the project company can carry out the construction of the infrastructure. As from the date on which the infrastructure is erected, the public administration pays the project company a rent in consideration for its use of the installations.

c. Creation of public-private capital companies for the development of projects.

d. Financing granted by public administrations (e.g., by means of subordinated loans to the project company), which will be reimbursed to the public administration as debt subordinated to the full reimbursement of amounts owed to the lenders.

Law 9/2017 (the Law on Public Sector Contracts) governs the private financing of the concession of public works agreements in Spain. This law expressly foresees collaboration agreements between the public and private sectors. In such agreements a public administration or a public entity contracts a private entity, for a specific period, to provide a global and comprehensive service that, in addition to including the financing of the intangible investments, works or supplies necessary to fulfil a certain public service, also comprises some of the following services:

a. the construction, installation or transformation of works, equipment, systems and products or complex goods, as well as their maintenance, updating or renewal, exploitation or management;

b. the comprehensive management of the maintenance of complex installations;

c. the manufacture of goods and the rendering of services incorporating specifically developed technology, for the purpose of providing the most advanced and most economically advantageous solutions, compared with those currently existing in the market; and

d. other services associated with the fulfilment by the public administration of the public service or general interest objectives entrusted to them.

The consideration to be received by the contractor will consist of a price to be paid while the agreement remains in force, which may be dependent upon the fulfilment of certain performance objectives.

These collaboration agreements are foreseen in the Plan for Infrastructure, Transportation and Housing for the years 2012–2024, published by the government, with investment as a key instrument in the coming years because of the expected decrease in the budget allocated by the government for investing in infrastructure. Particular mention is made of the intention to apply this methodology to other sectors and to provide a stable and tax-efficient legal framework that promotes agreements of this kind.

In addition, public-private capital companies are authorised by the Law on Public Sector Contracts to raise funds as a result of capital increases procedures and to securitise credit rights with regard to the Spanish authorities under the relevant public sector contract, provided that certain conditions are fulfilled.

ii Public procurement

The Law on Public Sector Contracts governs the awarding of agreements to third-party entities. The main aim of the Law is to regulate the contracting of the public sector, with the purpose of (1) ensuring that public sector agreements uphold the principles of freedom of access to tenders, publicity and transparency of the procedures, and non-discrimination and equality of treatment among the candidates, and (2) regarding the budgetary stability
and spending controls objectives, to ensure the efficient use of the funds allocated to the execution of works, the acquisition of goods and the contracting of services, based on the prior definition of the needs to be met, the safeguarding of competition and the selection of the most economically advantageous offer.

Public sector agreements established in the Law on Public Sector Contracts are works agreements, public works concessions, agreements for the management of public services, supplies, other services and collaboration schemes between the public and the private sector.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There are no general restrictions on foreign investment in Spain in relation to project finance deals. To register securities in Spain, foreign lenders must first obtain a Spanish tax identification number.

Repatriation of profit and investments

There are no specific restrictions regarding the repatriation of profit earned by foreign investors or lenders, except for the usual tax implications deriving from double taxation on income. Thus, a case-by-case basis analysis must be carried out on those countries with which Spain has signed treaties to avoid any double taxation.

The countries considered by the Spanish tax authorities to be tax havens are listed in Royal Decree-Law 1080/1991, as amended. 4

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specialised courts in Spain to which disputes under project finance or construction agreements may be submitted.

It is customary that disputes relating to financial documents will be subject to the jurisdiction of the courts of Madrid or Barcelona. In contrast, disputes under project agreements will be submitted to arbitration.

ii Arbitration and ADR

Submission to arbitration is common practice in project agreements and is also often required by lenders to speed up dispute resolution.

The Madrid Civil and Mercantile Arbitration Court, the International Chamber of Commerce and the arbitration courts dependent on regional chambers of commerce, industry and navigation are the courts usually designated by parties.

There are no restrictions in Spain to submit disputes to arbitration, provided that this submission is expressly stated. Spain is a signatory state to the ICSID Convention and to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Arbitration in Spain is domestically regulated by Law 60/2003 on Arbitration, which aims to accommodate the New York Convention rules to national principles and facilitate international arbitration. As Spain has not enforced the reciprocity reservation in Article 1.3 of the New York Convention, the Convention is applicable to any

arbitral award rendered in a foreign country, even if it is not a party to the Convention itself. In addition, as Spain has not enforced the ‘commercial reservation’ in Article 13 of the New York Convention either, the Convention is also applicable to any kind of award, regardless of the subject it rules on.

According to the Arbitration Law (Law 60/2003), competence for the recognition of foreign awards is attributed to regional high courts and competence for their enforcement is attributed to the first instance courts.

Usual restrictions in other jurisdictions may eventually apply to restrict the recognition in Spain of arbitral rulings such as breaches of public policy (including economic public policy) applicable in Spain.

XII OUTLOOK AND CONCLUSIONS

The number of project finance transactions in Spain is expected to increase in 2019 as a result of factors outlined in this chapter. Additionally, as a result of the regime on feed-in tariffs approved by the government, the number of projects prepared to compete in free market conditions will increase. Traditional banking and long-term financing will presumably be progressively replaced by other innovative structures brought in by new participants in the market, including insurance companies,5 pension funds and foreign investment funds.

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5 As a result of, among other things, relevant amendments to project assets in their portfolios that have been implemented very recently through the Solvency II Directive (2009/138/EC).
I INTRODUCTION

Supported by low interest rates and immigration, construction activity in Switzerland remains at a high level; this applies to both residential and commercial building sectors. In particular the number of major construction projects has increased steadily in recent years. As regards public sector investments, transport-related projects are the growth drivers. It is expected that population growth and rising mobility will maintain the high level of demand for infrastructure and transport-related construction and will pose financing problems for the public sector.

The 2010 Neumatt Burgdorf project (the Burgdorf Project) was Switzerland’s first public-private partnership (PPP) project to be carried out based on international project finance standards. The project encompasses the demolition of old buildings at the site and the planning, financing, construction and operation of administrative premises and a prison (with 110 beds); it successfully started operations in 2012. The Burgdorf Project is a pilot project and it is expected that other public bodies will initiate projects of their own in future.

As at 2015, the Swiss Innovation Park – a PPP launched by the federal and the cantonal governments – is beginning to take shape: the idea is to create a nationwide network for research and development, linking various different locations together. This network-based approach is a reflection of the federal and cantonal governments’ strategy for positioning Switzerland as an appealing location in the global competition to attract innovative research and development.

II DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Transactional structures of project financing commonly follow international standards. Typically, the infrastructure is built and operated by a project company. The project company is established in the form of a special purpose vehicle (SPV). In relation to the legal form of the SPV, a Swiss company (Aktiengesellschaft) is the preferred option; however, a Swiss company with limited liability (GmbH) is also viable. If a foreign SPV is used, the SPV is usually domiciled in a country that has entered into a double taxation treaty with Switzerland to avoid withholding tax and to facilitate an exit by means of a share deal.
To a large extent, the construction of the project is financed by lenders. For this purpose the project company enters into a credit agreement with a syndicate of banks. The shares of the project company are owned by the project sponsor. Several sponsors enter into a shareholders’ agreement that governs their rights and duties as shareholders. The project sponsors provide the equity needed for the balance of the finance in the form of share capital, a contribution to the general reserves of the project company and subordinated debt.

The project company has no employees of its own and will generally outsource its constructional and operational duties to subcontractors, ideally to a general contractor to avoid interface issues.

ii Documentation

Documentation in Swiss project finance transactions is consistent with international standards. In major projects, in particular if syndication of the loan is intended, the credit agreement is based on the standard form issued by the Loan Market Association. For smaller projects, Swiss banks usually provide shorter standard forms of their own.

Project finance requires mitigation of the completion risk. As a result, the project company usually mandates a total or a general contractor, which takes sole responsibility for the proper delivery of all construction work on a turnkey basis for a fixed price on the basis of a construction contract. The design and planning work is either included in the contract (total contractor) or is performed by a general planner.

A facility manager enters into an operation and maintenance agreement with the project company. To mitigate all operational risks, this is usually concluded as a general contractor agreement. In addition to the operation and maintenance agreement, the parties may enter into service-level agreements.

In PPP projects, in many cases a government concession is required. The concession is granted in the form of either a unilateral decree or a contract governed by public law. Further, as the case may be, the project company enters into agreements with (equipment) suppliers and purchasers. Other typical ancillary contracts include interest hedge agreements, insurance contracts, direct agreements (between the project contractors and the lenders) and appointment of independent experts.

iii Delivery methods and standard forms

In a Swiss domestic set-up, parties often use the standard form for general contractor issued by the Swiss Engineers and Architects Association (SIA), which has also prepared various general conditions of which SIA Rule 118 (General Conditions for Construction Works, amended edition published in 2013) is widely used. These general conditions only apply if specifically agreed by the parties. As an exception, the Swiss Supreme Court has ruled that two Swiss construction companies were deemed to have tacitly accepted the SIA standards.2

As regards public procurement, the Coordination Conference of Building and Property Bodies of Public Sector Developers (KBOB) provides a standard form for general and total contractor agreement. KBOB contracts are now also used more often for private projects.

In the international context, the most frequently used standard forms are the various sets of conditions issued by the Geneva-based International Federation of Consulting Engineers (FIDIC).

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III RISK ALLOCATION AND MANAGEMENT

i Management of risk

The management of risks is essential in the context of project finance and requires a tailor-made analysis of each project to identify and assess these risks and determine who should bear them. In general, the parties will have to deal with different types of risks.

Completion risk is the risk that the project will not be completed in time or at all. In the case of cash flow-related lending (as is the case in project finance), completion in due time is crucial, as interest continues to accrue and may not be covered by the projected cash flow. Usually, the completion risk is mitigated from the project company to the total contractor, who must accept contractual penalties and provide a completion guarantee. In addition, the lenders may insist on additional guarantees by the sponsors.

There can be a risk that government permits for a project will not be granted or will be granted only subject to costly conditions; usually, obtaining all substantial permits is a condition precedent to drawdown under the credit agreement.

Lenders are generally not prepared to take any environmental risks. With respect to existing contamination of a site, environmental risks may be passed to the total or general contractor (who will price in the risk) if it has been assessed in environmental due diligence. Future environmental risks are usually transferred to the operator and must be insured.

The risks relating to the operation and the maintenance of the project are usually transferred to the facility manager, who must secure the proper fulfilment of his or her duties by providing performance guarantees.

ii Limitation of liability

Pursuant to the general provisions of the Swiss Code of Obligations, a party is liable for any damages resulting from non-performance, unless it demonstrates that it has no responsibility for the non-performance. Negligence is sufficient to trigger liability; a concurrent fault of the injured party does not limit the non-performing party’s liability, but may result in reduced damages.

Under Swiss law, the parties may agree upon a limitation of the contractor’s liability (e.g., stipulation of a cap). However, liability for gross negligence and wilful intent cannot be contractually excluded or capped.

As a general principle, liability of the contractor is limited in the event of force majeure. However, the parties usually include some language to specify the scope of force majeure and the consequences related to it (extension of timescales, compensation of the contractor for additional costs).

In its relationship with the owner, the contractor is solely liable for the performance of the contract and thus for the work of the subcontractors. If instructions given by the owner risk causing delay or defects, or increase the costs of the work, it is incumbent upon the contractor to immediately and specifically point out this risk to the owner; the contractor may be liable for any consequences by failing to do so.

No third-party contractual claims are possible against the contractor; if indirect damages are not contractually excluded, the contractor may face a claim from the owner trying to recover any damages it was obliged to pay because of third-party damages.
iii Political risks

Switzerland is known for its political stability. Hence, mitigation of political risk is not a main issue in construction or financing contracts. Certain political risks, such as war and strikes, are usually included in the force majeure provisions. However, because of the numerous participation rights provided for by the Swiss political system, a project might be substantially delayed or even halted. This risk can arise even at a late stage of the project. As a result, early binding decisions regarding politically relevant issues are crucial.

Once the required permits or concessions are granted (in particular the building permit), the owner may profit from a broad protection of its property rights on a constitutional level; Article 26 of the Swiss Constitution grants full compensation in the event of expropriation. Moreover, having realised a building project based on a building permit, an owner is protected by means of the principle of confidence: such a building permit must not be revoked.

The protection of the property rights is granted irrespective of the nationality of the principal.

IV SECURITY AND COLLATERAL

In project finance structures, the Swiss standard security package is comprised of a number of elements. Mortgages are the classic security interest in real estate financing. However, properties in administrative use are subject to a specific legal regime. In Switzerland, such mortgages may be granted in the form of an actual mortgage or a mortgage note. The mortgage note is issued in bearer form or registered form. Generally, the mortgage note is the preferred security interest because of its nature as a tradable security that can itself be sold and pledged. As from 1 January 2012, mortgages may also be established by means of a registered mortgage certificate. Registered mortgage certificates are instruments that are easily transferable and may also be pledged. Mortgages are established by a notarised deed and registration on the land register.

Lenders must be aware that certain legal liens may arise that would rank ahead of any contractual security right over the real property. These legal liens may exist to secure any unpaid real estate capital gains tax, transfer tax or mechanics liens. As a result, contractual provisions must be included in the documentation to avoid the creation of any such security interest.

Receivables are normally assigned by way of global assignment. The assignment is non-accessory to the secured obligation. During the term of the agreement, the assignor must regularly deliver to the assignee its lists of receivables, showing the assigned receivables, as continuing evidence of the claims assignment. Third-party debtors are often not notified of the assignment until the borrower’s default. As long as third-party debtors are not aware of the assignment, they can validly fulfil their obligations by payment to the assignor. Global assignments are used very often.

Under Swiss law, future receivables can be assigned, but they would fall within the bankruptcy estate of the assignor if they come into existence after the opening of bankruptcy proceedings over the assignor. The assignment requires a written agreement between the assignor and the assignee, clearly determining the claims that are allowed to be assigned, especially with regard to any global assignment of future claims.

If an SPV is involved, the standard security package also includes a pledge over the shares in favour of the lenders. There are no special registration requirements with respect to a share pledge; however, as a perfection formality, the share pledge requires a valid agreement
and the physical transfer of the relevant shares to the pledgee. In addition, in the case of registered shares, the share certificate must be duly endorsed (normally an endorsement in blank is provided in blank to facilitate the enforcement). In the case of registered shares, the pledge can be registered in the company’s share ledger.

Generally, there are no limitations on granting this type of security to a foreign lender, provided that, pursuant to the articles of association of the company, the company does not require a majority of Swiss shareholders. Further, the share pledge might trigger the need for a Lex Koller permit (see Section IX.ii).

Swiss law provides that the shareholder’s voting and participation rights remain with the pledgor. Consequently, the features of a pledge agreement need to be examined to ensure that voting and participation rights can be exercised.

A bank account can be pledged pursuant to a pledge agreement or assigned pursuant to a security assignment agreement to a domestic or foreign secured party.

Lenders must be aware that any rights the account bank might have over a bank account pursuant to its general terms and conditions (e.g., set-off rights or pledge rights) rank ahead of the security interest of the pledgee, unless waived by the account bank. Such a waiver might be difficult to obtain in practice.

Bank accounts can be pledged by means of a written accounts pledge agreement. The account bank must be given notice to create and perfect the second-ranking security interest. The right to withdraw funds is not usually restricted as long as no default has occurred.

Swiss law does not specifically provide an instrument equivalent to the floating charge used in England. Movable assets need to be physically transferred to the pledgor or a third-party pledge-holder to perfect the pledge. Therefore, the concept of a floating charge over movable assets that need to be available for the operations of the pledgor is not feasible.

Under Swiss law, subordination of debt is achieved contractually through an agreement between the debtor and the subordinated creditor in which the creditor’s claims are subordinated to certain other claims.

Further, multiparty agreements with a more complex ranking system of subordinated debt are possible. The debtor and the creditor may agree that the creditor will rank as senior to any other creditor of the debtor, provided that the creditors agree to be ranked junior.

If a company is overindebted, the board of directors must notify the relevant bankruptcy court, which, on notification, will start bankruptcy proceedings. The notification duty can be avoided if creditors subordinate their claims through a contractual agreement.

Principally, the lenders can reserve the right to step in and take over the project company's position if the project company is not performing. This step-in right requires an agreement with the shareholders of the project company (purchase option) if the project company is to continue its business, or with the contractors (usually by means of a direct agreement) if a new company is to take over the project. Frequently, both forms of step-in right are combined.

In the context of a PPP, it is a matter of dispute as to whether the public procurement regulations restrict the ability to stipulate step-in rights.
V BONDS AND INSURANCE

i Performance guarantee and defects warranty

In construction contracts, the contractor (in the context of project finance, typically the general contractor) must provide a performance guarantee. Upon completion, the contractor must provide a warranty as regards the defects of the construction. The performance guarantee and the defects warranty are secured, generally either by a bank guarantee or by a surety.

By means of a bank guarantee, the guarantor bank undertakes to pay to the beneficiary, upon its first demand, any amount up to a defined maximum. This guarantee is irrevocable and unconditional and may be exercised if certain obligations are not fulfilled properly.

Swiss law also recognises the concept of surety. In a surety contract, the grantor fulfils the obligations of the principal obligor (borrower) if the latter is unable to do so. The main difference between this and the guarantee is that the grantor has available to it all legal defences available to the principal obligor, because the surety does not create an independent contractual claim (unlike the guarantee). The surety must be limited to a maximum amount and must be in writing to be valid. The grantor is only obliged to pay once the main obligor is in arrears in relation to its performance and either has been issued with payment reminders to no avail or is manifestly insolvent.

ii Insurance

Usually, an insurance adviser is appointed who will carry out the insurance due diligence and define the minimum standard of insurance coverage.

Typically, the contractor must take out insurance for civil liability relating to damages arising from the construction. Tender conditions may require that the bidders furnish proof of this insurance and maintain cover throughout the project.

In addition, the project company, as the owner of the site, must ensure there is sufficient insurance for civil liability relating to damages resulting from the property.

VI ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Enforcement of security and bankruptcy proceedings adhere to the rules set out in the Debt Enforcement and Bankruptcy Act (DEBA). To a certain extent, the parties can agree on specific enforcement mechanisms. However, pursuant to mandatory law, the collateral must not immediately fall into the property of the pledgee if its claims are not satisfied.

Under a Swiss standard security agreement, the lender may enforce the security (at its option) by private sale (including self-acquisition), by a (privately organised) public auction or by way of an official enforcement proceeding before any competent court or authority pursuant to the DEBA.

Although most security agreements allow lenders to enforce them by way of private sale on the occurrence of an event of default, it is recommended that enforcement is only commenced when the secured obligations are due and payable. Lenders are under an obligation to account for proceeds realised in enforcement and must repay any surplus to the borrower (after deduction of all costs and so on).

With regard to mortgage notes, only a private sale would be possible, but not with regard to the underlying real property (which may only be subject to enforcement proceedings within the framework of the DEBA).
In the case of assets transferred by way of security, enforcement, in the strict sense, is not necessary, as ownership has already been transferred to the secured party. Enforcement in this context means that the obligation to return the transferred assets under the security agreement expires. This follows similar rules that apply to private enforcement (in particular, any surplus remaining after the application of the proceeds of the secured debts must be returned to the party that granted the security).

Under Swiss substantive law, future receivables, which have been assigned to the lenders but have come into existence only after the opening of bankruptcy proceedings against the borrower, fall into the borrower’s estate and do not pass to the lenders. However, the security provided by mortgage notes includes all lease receivables that will come into existence from the commencement of enforcement proceedings or from the opening of bankruptcy proceedings against the borrower to the realisation (i.e., sale) of the property.³

The DEBA also includes composition proceedings.⁴ These provisions were substantially revised as of 1 January 2014. The legislature was guided in part by the US Chapter 11 and has specifically provided for a significantly facilitated access to composition proceedings.

VII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits
Swiss authorities at federal, cantonal and communal level have various regulatory responsibilities relating to zoning and public construction law. Generally, zoning and building regulations are enacted by the cantons and implemented by communal building authorities. As a result, Switzerland has 26 different cantonal zoning and construction regimes. Any change to an existing building or construction requires a building permit.

Projects that will potentially affect the environment require an environmental impact assessment demonstrating the specific measures that must be taken to ensure compliance of the project with the environmental regulations.

ii Responsibility of financial institutions
If the control of the project company by the lenders is too tight, the financial institutions may qualify as shadow directors and, as a result, become liable for the activities of the borrower to a certain extent; therefore, structuring of the supervision of the project company in the credit agreement is crucial to avoid the lenders’ liability.

Furthermore, lenders with subsidiaries, branches, offices or appointed representatives in Switzerland must comply with the Federal Law on the Prevention of Money Laundering and the Financing of Terrorism in the Finance Sector.

³ Article 806(1), Civil Code.
⁴ Article 293 et seq.
VIII  PPP AND OTHER PUBLIC PROCUREMENT METHODS

i  PPP

Neither the federal nor the cantonal legislator in Switzerland has provided a specific formal statutory and regulatory framework for PPP transactions. However, in 2009, the Federal Ordinance on the Public Budget of 6 April 2006 (SR 611.01) was amended by inserting Article 52a, which states that PPP projects must be considered for the fulfilment of public tasks.

In general, there are no major regulatory obstacles to realising public infrastructure projects via PPP schemes. However, the PPP concession model for road infrastructure is not feasible in Switzerland as the Swiss Constitution prohibits the levying of any taxes on the use of national roads.

A general ban on negotiations imposed by the cantonal public procurement provisions does impede the procurement process for PPP projects. However, the Burgdorf Project has shown that a PPP process is feasible under total contractual competition, which contains rigid requirements concerning the anonymity of participants. As negotiations are allowed under federal procurement law, more flexibility in the PPP tendering process exists at a federal level.

Lenders may also have difficulties receiving the type of full security package that is commonly received in international project finance structures. In relation to real estate, it appears to be difficult for a private partner to obtain (full) ownership rights over any real estate.

Lenders must also be aware that a specific legal regime applies to assets in administrative use. While such assets may be privately owned, they must not be subject to mortgages.

ii  Public procurement

The Confederation and each of the 26 cantons has its own procurement law. However, international treaties ratified by the Confederation provide the legal framework for both federal and cantonal procurement legislation. In particular, Switzerland is a signatory state to the General Procurement Agreement dated 15 April 1994 (GPA) and that treaty’s provisions are adopted in the relevant legislation (basically for all public tender procedures, even beyond the scope of the GPA).

The relevant legislation explicitly provides for the fundamental principles of public procurement, such as equal treatment, transparency and competition. Furthermore, the Confederation and all cantons have implemented challenge procedures according to Article XX of the GPA and the award is subject to appeal at an independent court (the Federal Administrative Court and cantonal administrative courts, respectively). To a limited extent, these decisions may be appealed at the Supreme Court.

Generally, an application for review has no automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract. However, courts generally grant suspensive effect (typically, solely on the request of the applicant).

IX  FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Basically, Switzerland has not enacted major restrictions on imports of project equipment nor are there relevant licensing or other requirements specifically for foreign investors.

Cross-border lending by a foreign lender to a borrower in Switzerland does not generally require authorisation from the Federal Financial Market Supervisory Authority (FINMA) or any other regulatory authority. However, a lender with a subsidiary, branch, office or
appointed representative in Switzerland is subject to supervision in Switzerland under the Federal Law on Banks and Savings Institutions, and must possess a licence to engage in the business of banking from FINMA.

i  Removal of profits and investment

Swiss law does not provide foreign exchange restrictions or substantial fees, taxes or charges on currency exchange. However, claims in foreign currency will be enforced in Switzerland only in Swiss currency.

There are no controls or laws in force that would prevent either the repatriation of proceeds realised in Switzerland, payments to a foreign lender under security agreements (including guarantees) or a loan agreement. However, interest payments by a Swiss debtor may be subject to the federal withholding tax of 35 per cent if the number of creditors exceeds a certain limit. As a result, it is crucial to include specific tax language in the credit agreement to avoid withholding tax payments.

ii  Lex Koller

The acquisition of real estate in Switzerland by persons abroad is restricted under the Federal Law of 16 December 1983 on the Acquisition of Real Estate by Persons Abroad (the Lex Koller).

A transaction is subject to a Lex Koller permit if (1) the real estate is acquired by a person abroad (which includes a company domiciled in Switzerland but dominated by foreign nationals), (2) the real estate involved is a property that is subject to the Lex Koller permit requirement regime, namely residential real estate, and (3) the acquired right is deemed to be the acquisition of residential real estate in the sense understood in the Lex Koller. These three conditions must be met cumulatively.

In simple terms, the realisation of commercially used premises is not subject to a Lex Koller permit, as is usually the case in the context of private sector project finance. With respect to PPPs, the analysis is more complex, since the Swiss Federal Tribunal ruled some years ago that certain administrative activities do not have commercial character and hence a Lex Koller permit is required. Although this decision is highly disputed among scholars, it has to be considered in the structuring phase of a PPP.

Lex Koller provides that the purchaser must apply for a negative declaration (ruling) by the competent Lex Koller authority stating that no approval is required if there is a doubt whether an acquisition is subject to a Lex Koller permit. A transaction requiring a permit is invalid until a legally binding permit has been obtained.

Subject to certain conditions, financing of residential real estate may also be subject to the Lex Koller restrictions if, because of the financing terms, the purchaser or borrower becomes strongly dependent on the secured lender, granting excessive control rights to the lender and resulting in an ownership-like position of the lender. As a result, the project finance standard security package may raise Lex Koller questions.

Recently, the Swiss parliament rejected a parliamentary motion to extend the Lex Koller restrictions applicable to Swiss residential properties to other properties as well.
X DISPUTE RESOLUTION

There are no state courts specialising in project finance or construction disputes. However, commercial contracts can generally be subject to arbitration.

Contracts for domestic construction projects usually provide for the jurisdiction of the local courts, especially if a public entity is involved. However, the Swiss construction industry has established arbitration rules whereby disputes may be referred to specialised arbitral tribunals.

Switzerland is a major seat of international arbitration, even for infrastructure projects outside the country. The most frequently used arbitration rules are the uniform arbitration rules of the Swiss Chambers of Commerce and those of the International Chamber of Commerce. Enforcement of foreign arbitral awards in Switzerland is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

Recently, dispute boards have occasionally been established for larger infrastructure projects, but this instrument is not widely used. Mediation is also not yet commonly used, although industry associations have adopted mediation and arbitration rules.

XI OUTLOOK AND CONCLUSIONS

The future demand for infrastructure and transport-related construction in Switzerland is expected to be high and will increase the need for structured finance. In addition, a hospital financing system was introduced in 2012, known as the diagnosis-related groups-based system, which includes investment allowances in case-based tariffs. As a result, the cantons must cease providing government deficit guarantees and low-cost loans to public hospitals. Project finance may become a valid solution to the provision and financing of infrastructure investment in this area.
Chapter 19

UNITED KINGDOM

Munib Hussain and Yi Ming Chan

I  INTRODUCTION

The United Kingdom has an established history of using project finance to fund infrastructure projects nationally in most sectors, including transport, telecommunications, schools, hospitals, power and water. A number of different project finance structures have been developed and adopted for this purpose, including the private finance initiative (PFI) and other variants of the public-private partnership (PPP) model, which have been used extensively to fund key infrastructure projects. The PFI and PPP models are discussed further later in this chapter.

The UK is also a key hub from where international project financings are structured, negotiated and documented, despite the underlying project being located elsewhere. The international English-law finance market far outstrips the domestic UK project finance market in both volume and size of deals.

As the UK emerges from the economic slowdown and moves into a period of economic growth, there is considerable demand for upgrading existing infrastructure or investing in new, greenfield projects. Each year, the UK government publishes a National Infrastructure and Construction Pipeline (the NIP). In 2018, the NIP confirmed that the current value of UK projects, relating to the transport, energy, utilities, digital infrastructure and flood and coastal, science and research, and social infrastructure sectors was at more than £188 billion (combined public and private investment), of which at least £125 billion is expected to be delivered by 2020–2021. Through these investments and projects, the government aims to improve living standards, drive economic growth and boost productivity. The two largest sectors, energy (which boasts investment of £51.7 billion from 2018–2019 to 2020–2021) and transport (£54.9 billion from 2018–2019 to 2020–2021), account for over half of the infrastructure pipeline’s total value.

Multilaterals and export credit agencies have continued to participate in the market, and existing institutions (re-branded with additional products to help fill debt financing gaps) have continued to invest in the UK’s energy and infrastructure sectors (especially in light of the UK’s anticipated exit from the European Union, which has, seemingly, buoyed government commitment to investing in UK infrastructure, and the availability of funds for UK bilateral and multilateral institutions investing abroad – this is particularly the case in the government’s treatment of UK Export Finance’s (UKEF) Direct Lending Facility).

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By way of example:

a the European Investment Bank continues to maintain its Europe 2020 Project Bond Initiative;

b the UK Green Investment Group, with a mandate to finance ‘green’ projects, saw its £250 million energy-to-waste project (Rookery South Energy Recovery Facility) reach financial close in March 2019; and

c UKEF’s Direct Lending Facility was granted a £2 billion direct lending capacity expansion, which is expected to come on-stream in two £1 billion amounts in 2020–2021 and 2021–2022.

II  THE YEAR IN REVIEW

The year 2018 marked a dramatic change in the UK projects and construction landscape. The most prominent development was the government’s announcement that it would no longer be using the controversial PFI approach for future infrastructure projects. This move was not entirely unexpected, however. PFI had become politically unpopular owing to the public’s perception that PFI projects were not good value for money² and that the operation of public infrastructure under the PFI model was sub-optimal.³ Moreover, the use of PFI had already been on a steady decline – PFI projects signed before May 2010 had a capital value of £50.6 billion, compared to £8.4 billion for projects after May 2010,⁴ while newly commissioned PFI projects had fallen from a high of 68 in 2004 to just one in 2018.⁵

Nevertheless, PFI will still be a feature in the UK projects and construction sector. The government has promised to continue to honour its commitments for existing PFI projects,⁶ partly because of the high cost of compensation required to voluntarily terminate PFI contracts.⁷ PFI contracts also typically run for between 25 and 30 years;⁸ there is even one contract with a term of 52 years that concludes in 2049–2050.⁹ Furthermore, capital spending on public infrastructure is a devolved policy area, and thus the devolved administrations of Northern Ireland, Scotland and Wales are still free to commission new PFI projects.¹⁰ PFI projects will thus be quietly humming in the background for many years to come.

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⁷ See footnote 5.
⁸ See footnote 2, above, (Briefing Paper Number 6007), page 2.
⁹ See footnote 5.
Another recent and significant development in the projects and construction sector is the collapse (or near collapse) of several major UK private outsourcing and construction groups. The slow descent of UK construction giant Carillion into liquidation in January 2018 with debts of £1.5 billion\(^{11}\) sent the sector into a tailspin, compounding its misfortune. Lenders to the sector were put on notice as to the creditworthiness of outsourcing and construction firms, restricting liquidity and forcing these firms to fix their balance sheets.\(^{12}\) Public infrastructure projects with which Carillion was involved, such as the HS2 rail project, required joint-venture partners to pick up the pieces after Carillion’s liquidation, further putting stress on their operations and finances.\(^{13}\) The UK government had to guarantee £100 million of business loans to thousands of Carillion’s suppliers\(^{14}\) and shoulder an estimated £148 million in losses associated with Carillion’s suppliers,\(^{15}\) which was undoubtedly a factor that influenced its eventual decision to abolish the use of PFI.

Few firms came out of this unscathed. For example, Interserve, one of the UK’s largest government contractors, went into administration in March 2019,\(^{16}\) and Kier, another major UK construction and services company, had to launch a £264 emergency rights issue in the year end of 2018 to shore up its balance sheet and pay down its debts.\(^{17}\) There is likely to be further volatility in this sector during the rest of 2019 and the years ahead.

On a separate note, at the time of writing (late May 2019), it remains unclear how the legal landscape for the UK projects and construction sector will be affected post-Brexit. The original date planned for the UK’s exit from the European Union (29 March 2019) was not met and the deadline has been extended to 31 October 2019 to allow the UK government to conduct further negotiations with the EU and pass legislation to approve the EU withdrawal agreement. Hence, there have been no concrete indications as to how important legal issues affecting the sector, such as tariffs on construction materials, access to the credit markets (including the European Infrastructure Bank) and the impact of the EU procurement directives (such as the Public Contracts Regulations 2015 SI 2015/102), would be resolved. Nevertheless, it has been suggested that there is cause for optimism regarding UK government liquidity support for infrastructure projects post-Brexit, such as through the creation of a UK infrastructure bank.\(^{18}\)

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15 See footnote 11.
Notable recent project finance deals include Hinkley Point C in Somerset, the Moray East offshore wind farm project, the Beatrice Offshore Wind Farm, the Triton Knoll Offshore Wind Farm, the Galloper Offshore Wind Farm, the £2.2 million Thames Tideway Tunnel, the £6.5 billion Thameslink Programme and the Intercity Express Programme Phase 1 PPP Refinancing.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

The contractual framework for project financings in the United Kingdom varies depending on the size, nature and revenue generation model of the project. Since 1992, the UK government has primarily used the PFI model for public infrastructure projects that are of a smaller scale and capital value, most notably in the health, roads, prisons and education sectors, while larger projects use other variants of the PPP model, such as the concession or joint venture model. What separates the PFI model from other PPP models is that the public sector enters into a contract with the private sector to purchase services in relation to an infrastructure project, rather than, for example, the public sector entering into a contract with the private sector to construct an infrastructure project and then granting the latter a concession to operate the infrastructure project. On the other hand, project financing for private infrastructure projects follows more generic models, such as build-operate-transfer or build-own-operate-transfer.

In most cases, a project financing will include the sponsors of a project and a project company, a government entity, lenders, a special purpose vehicle (SPV) of the project company to facilitate financing, contractors and subcontractors, an operator for the project, insurers and offtakers.

ii Documentation

The types and quantity of documents involved in a project finance transaction will depend on various aspects of the project, such as the sector and use of the project, the ownership structure, regulatory involvement and nature (public or private) of the project.

The sponsors of a project will typically incorporate a limited liability company to be the project company. The articles of association of the project company will govern the relationship between the sponsors as shareholders of the project company and the project company itself, as well as dictate the project company’s internal rules and decision-making process. In addition, if there is more than one sponsor of a project, the sponsors will usually enter into a shareholders’ agreement that governs their relationships with each other and how the project company should be operated.

The project company would typically will enter into a concession agreement with a government entity, under which the project company is required to, for example, construct, operate and maintain a facility during the concession period. The concession agreement is usually a lengthy document that contains, among other things, the parameters of the project, details and specifications of what the project company must achieve and the allocation of risks between parties.

As it is an SPV with few resources, the project company will seek to subcontract its construction obligations under the concession agreement to a single contractor or several contractors through a single engineering, procurement and construction (EPC) contract or
several construction contracts. The project company will also enter into a separate operation and maintenance (O&M) contract for the operation of the infrastructure facility, for when the construction work has been completed.

The project company will need to acquire debt to fund the aforementioned activities and will therefore require project financing. This kind of financing is provided through non-recourse financing that is secured against income streams of the project company, typically at high debt-to-equity ratios. As such financing is typically risky for lenders, various security agreements will be required, such as debentures, direct agreements and account bank agreements. It is also typical for parties to enter into a common terms agreement if there are multiple lenders to separate loan facilities for the project.

Depending on the kind of project, the project company may be required by the lenders to enter into offtake agreements to mitigate risks by ensuring a stable revenue stream once the project has been completed. The project company may also be required to agree to fuel and other supply agreements, especially if the project involves the project company processing raw materials.

### iii Delivery methods and standard forms

As has been explained, a project company will enter into construction contracts so as to pass down its construction obligations under the concession agreement to a more competent party. Under such a contract, a contractor will undertake to complete the whole or part of the construction of the project and will assume liability for performance defects, cost overruns and construction delays in relation to the project.

In contrast, under an EPC contract, a single contractor is engaged by a project company to deliver a completed project on a turnkey basis. This will require the contractor to manage all aspects of the design, procurement and construction of the project, including the procurement and management of multiple subcontractors. EPC contracts are typically used for complex building projects, especially in the petrochemical, mining and power industries.

Depending on the nature and location of the project, construction contracts may be bespoke or follow standard forms used in the construction industry (such as those from the International Federation of Consulting Engineers (FIDIC)), though these standard forms are often significantly amended to reflect the realities and risks associated with the project.

Project documents for PFI projects were not standardised until 2012 when the UK government introduced a new set of standard documents to be used in PFI projects.

### IV RISK ALLOCATION AND MANAGEMENT

#### i Management of risks

The United Kingdom is generally a safe and stable country and the risk of non-economic-related adverse events occurring (such as natural disasters and wars) is low. Risks associated with project financing transactions are therefore usually confined to:

- **a construction risk** – for example, the risk of there being design or construction issues, unforeseen problems and construction delays;
- **b operational risk** – for example, the risk of failure to complete a project to the standards required under the concession agreement and ongoing O&M issues;
- **c revenue risk** – namely the risk of a project not being able to repay its debt under the project financing because, for example, the project does not produce sufficient output or the anticipated market for the project fails to materialise;
d insolvency risk – namely the risk of an important party to the project, such as a contractor or the operator, becoming insolvent;
e environmental risk – namely the risk relating to any environmental liabilities that may arise out of the construction or operation of the project; and
f political risk – for example, the risks associated with political instability or policy changes brought about as a result of change in government that could affect the construction or operation of the project or the production of the project.

In so far as is possible, the lenders and the project company will seek to transfer as many risks relating to the construction, completion and operation of the project to the contractors, subcontractors and operators through the various project documents. Insurance may be obtained to mitigate risks that are not successfully transferred under the project documents, and the project company may enter into offtake agreements to reduce revenue risks and hedging agreements to reduce currency risks.

The UK government may also help to reduce project risks, for example by providing contracts for difference for the purchase of electricity or using the regulated asset base model for public infrastructure projects.

ii Limitation of liability
Project companies and their contractors and subcontractors will typically seek to limit their liabilities for any loss or damage caused by their actions, unless their actions resulted in any death or personal injury or such loss or damage was caused by that party’s fraud, gross negligence or wilful default. The cap on liabilities under construction contracts will usually be based on a percentage multiple on the construction contract itself, and there may also be a separate cap for damages as a result of delays in the construction. Liability for consequential losses will generally be limited or excluded by the parties.

Project agreements will typically include relief from liability in respect of force majeure. Under such provisions, parties may be required to mitigate losses and seek alternative means of delivering the project, and terminate the agreement if a force majeure event continues for a specific period. Provided that they are properly defined in the agreement, force majeure provisions and exclusions will be enforceable under English law. It must be noted that force majeure events are distinguishable from relief events, in that the latter entitle parties only to an extension of time to perform an obligation but not the right to terminate the agreement.

iii Political risks
Being a free market economy with few barriers for foreign investment in infrastructure projects, project finance transactions in the United Kingdom have not historically been exposed to significant political risks. However, there is a rising threat of (re)nationalisation of public infrastructure and the uncertainty surrounding Brexit’s effect on the projects and construction landscape still looms far ahead.

At the time of writing (late May 2019), the Labour opposition party has unveiled its plans to renationalise UK public utility companies and compensate the shareholders of those companies at less than the market value. As some legal commentators have noted, this low level of compensation could be in violation of the European Convention on Human
Rights or the UK’s many bilateral investment treaties, and would not stand in international arbitration tribunals.\(^1\) Despite this, the threat of renationalisation could still deter foreign investors and reduce much-needed private investment in UK infrastructure.

It is still uncertain how and when (and to a certain extent even whether) the United Kingdom will be leaving the European Union, and what the relationship between the two will be like in the future. If the UK and EU do end up agreeing to a deal, it is likely that there will be a transition period for a number of years, during which the UK will continue to be subject to EU laws.

V SECURITY AND COLLATERAL

The main types of securities under English law are mortgages (equitable and legal), charges (fixed and floating), assignments (equitable and legal), pledges and liens. Under English law, security interests over land and floating charges over a company’s property or undertaking need to be registered at HM Land Registry and Companies House, respectively. Failure to register a security interest over land will prejudice the priority of the security (but not render the security void), while failure to register a floating charge over a company’s property or undertaking within 21 days of the creation of the security will result in the charge being void against an insolvency officer or any creditor of the project company.

In domestic UK project financings, lenders will typically seek to obtain security over all, or substantially all, a project company’s assets. This is achieved through multiple agreements with various entities related to the project company.

The lenders will usually enter into a general security agreement, such as a debenture, with the SPV that is used for the project financing. This debenture will include a range of mortgages, charges and assignments depending on the nature of the security assets, and cover all the SPV’s rights and assets. The lenders will also seek to further obtain ‘cure’ and ‘step-in’ rights to supplement the security, which will allow the lenders to step into the project (or appoint a representative) to complete or operate the project in the event of a project company’s default under any of the project documents. This is based on the rationale that the lenders would not be able to recoup their loans even if they were successfully to realise their security over the project, if the project was half-completed.

Lenders may also seek to obtain parent company guarantees from the project company, a charge over the shares of the project company, equity support from the sponsors of the project, and assignments over important EPC contracts and subcontracts.

Finally, the lenders will also seek to restrict the distributions made by the SPV, to ensure that the lenders are paid first from any revenue generated by the project. This is typically done by requiring income streams from the project to be paid into multiple bank accounts with funding institutions and restricting how that money can be withdrawn from those accounts, for example by requiring the project company to hold enough funds in one or more accounts to maintain a specific ratio to the outstanding amount under the project financing. A payment ‘waterfall’ mechanism is also typically used to direct to whom the income streams of the project should be applied.

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VI  BONDS AND INSURANCE

It is common for contractors and subcontractors to provide bonds to employers in project finance transactions in the United Kingdom, so as to secure payments made by the employer against the release of retained monies. These types of bonds are payable on demand (i.e., upon the presentation of the stipulated documentation to an issuing bank).

Performance bonds may also be used in project finance transactions. In contrast to the aforementioned bonds, a beneficiary to a performance bond will only be entitled to the monies promised under a bond if a stipulated default occurs and the beneficiary has evidence of that default.

As mentioned in Section V, the lenders to a project financing may also take parent company guarantees from the sponsors of a project.

Projects may be funded by project bonds issued in the London market and there are no legal requirements that apply exclusively to project companies seeking to issue project bonds. Project companies seeking to issue and list securities on the London Stock Exchange will need to comply with, among other things, the UK Listing Authority’s Listing Rules, the London Stock Exchange’s Admission and Disclosure Standards, and the relevant Disclosure and Transparency Rules. The applicable rules may also differ according to the project company’s market sector and investor base. For example, mineral, oil and natural gas companies are subject to the additional disclosure requirements set out in Chapter 6 of the Listing Rules, whereas there will be less stringent disclosure obligations if the project company is issuing securities to solely professional investors.

VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

There are different types of insolvency proceedings under English law: administration, receivership or administrative receivership, compulsory liquidation, company voluntary arrangements and schemes of arrangement. In the event of insolvency, existing security will crystallise in relation to the relevant asset, and secured creditors will, in terms of priority in relation to being entitled to the relevant asset, rank ahead of all other parties. In contrast, unsecured creditors will rank behind various preferred creditors, including tax authorities and, to an extent, employees and pension interests.

Many security interests, such as step-in rights and charges of receivables, may be enforced outside insolvency proceedings.

VIII  SOCIO-ENVIRONMENTAL ISSUES

i  Licensing and permits

Projects in the United Kingdom are subject to onerous UK and EU environmental regulations (at the time of writing). Environmental considerations are generally dealt with through the planning permission procedure regime in the UK, and specific licences may be required in relation to the construction and operation of projects. Carbon-reduction legislation and emissions trading schemes may also apply.

Note that environmental liability attaches to the polluter, which, in most cases, is the owner of the land on which the project is situated. Hence, lenders must be wary of any potential environmental liability relating to the project when exercising their security rights.
ii  **Equator Principles**

The Equator Principles is an internationally recognised risk management framework adopted by financial institutions to determine, assess and manage environmental and social risk in project finance transactions and project-related corporate loans and bridge loans. Financial institutions that adopt the Equator Principles commit to not providing project finance or project-related corporate loans to projects if the borrower will not, or is unable to, comply with the Equator Principles. As at late May 2019, 96 financial institutions in 37 countries have adopted the Equator Principles. EP III is the current form of the Equator Principles, and an update EP IV is expected in the second half of 2019.

The Equator Principles do not have legal status in the United Kingdom and it is not mandatory for lenders to project finance transactions in the UK to adopt them. However, most financial institutions that are active in project financing in the UK have adopted the Equator Principles and are members of the Equator Principles Association.

iii  **Responsibility of financial institutions**

As discussed above, financial institutions are not required to adopt the Equator Principles, but most have done so anyway. Financial institutions have in recent times also placed greater emphasis on their environmental, social and governance policies in their lending policies.

Financial institutions are typically liable for any money laundering and sanctions issues that may appear in a project financing.

**IX  PPP AND OTHER PUBLIC PROCUREMENT METHODS**

i  **PPP**

The UK government has used various PPP models for public infrastructure projects, ranging from projects in the health and education sectors to prison infrastructure and defence projects. Since it was implemented in 1992, PFI has been the most commonly used PPP model in the United Kingdom.

There is no formal statutory and legal framework for the PFI model and there is some standardised documentation under the PF2 model. Under a PFI model, the UK government contracts a project company for the provision of services in relation to a public infrastructure facility – the government does not pay fees in relation to the construction of the project, but rather the operation of the project to the standards as specified in the project documents. There are often financial (and even termination) penalties for failure to meet these standards.

As mentioned in Section II, the UK government announced as part of its 2018 Budget that it would no longer use the PFI model to commission the construction and operation of new public projects.

ii  **Public procurement**

The EU procurement laws, as implemented by the Public Contracts Regulations 2015, Concession Contracts Regulation 2016 and Utilities Contracts Regulations 2016, are applicable to project companies developing public infrastructure projects in the United Kingdom, if the public contracts fall within the scope of the rules and exceed certain financial values. These will include most PFI contracts and must be advertised by the contracting authority in the EU’s Official Journal. They must also follow a specified award procedure, which will depend on the nature of the contract.
After it has decided to award a public contract, the contracting authority must notify all bidders of its decision, thereby starting a period during which successful bidders may challenge the award and apply for it to be set aside. The English courts have the power to grant injunctions to prevent parties from entering into the public contracts, to set aside awards made by the contracting authority, and to award damages for any breach of the aforementioned Regulations.

Note, however, that it remains unclear whether these public procurement rules will remain after the United Kingdom leaves the European Union.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There are no specific restrictions or special licensing requirements for foreign investors and contractors, but there are specific statutory regimes in place for certain industries. Authorisation is required for investment in specific regulated areas, including the nuclear industry, banking, media, financial services and defence.

UK and EU competition rules may affect ownership by companies that have UK, EU or global business turnovers exceeding specific thresholds. Compliance with EU directives may affect an entity’s ability to invest in or own certain assets.

The United Kingdom does not offer specific incentives to encourage foreign investments. For as long as the UK remains a member of the European Union, all UK investment must be satisfactory from the perspective of EU procurement regulations and wider EU law, including in relation to the restrictions on state aid. In terms of investor protection, the United Kingdom is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The UK is also a party to a large number of bilateral investment treaties (BITs) with a range of other states. UK BITs afford protection to investors that include protection against expropriation without compensation, the right to fair and equitable treatment and the right to repatriate profits.

The United Kingdom does not generally impose restrictions on foreign investments in particular industries, although this is a changing landscape in Europe. The European Parliament, Council and Commission reached an agreement in November 2018 on an EU legal framework for screening foreign direct investments into the European Union, which will apply to investments by non-EU investors. This framework placed particular emphasis on foreign state-backed acquisitions of European infrastructure and technology. Key sectors that will be subject to the framework include critical infrastructure, critical technologies, sensitive information, media, land and water supply infrastructure. The EU proposal also identifies control of a foreign investor by the government of a country outside the European Union, including through significant funding, as a potentially sensitive factor. Given the current uncertainty relating to Brexit, it is not clear how the proposed EU legal framework will apply to the UK.

In the event of foreclosure on a project or related companies in the context of security over an asset, the mortgagee could obtain a court order under which it becomes the owner of the property. A mortgagee’s right to foreclose arises once the liabilities secured by the mortgage have become repayable. Even in these circumstances, a mortgagee normally has certain obligations to the mortgagor, including an obligation to obtain a reasonable price for the sale of a mortgaged asset, and (pursuant to the ‘equity of redemption’) to return any excess
proceeds over the secured debt finalised by it to the mortgagor. In general, under English law, foreign investors are not treated differently from businesses established in England and Wales in relation to the enforcement of security.

Removal of profits and investment

The United Kingdom does not impose currency exchange controls, nor are there any laws that preclude the removal of profits or investments from the UK. There is an unrestricted regime in relation to the repatriation of profits. Other than the normal incidents of taxation, there are no particular restrictions on remittances of investment returns. The UK imposes a withholding tax at the basic rate of income tax (currently 20 per cent) on any payment of yearly interest arising in the United Kingdom. Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20 per cent of that interest payment and account for this withheld amount to the UK tax authorities.

The UK may impose withholding tax on repatriated profits. There is also a comprehensive regime of double taxation treaties.

XI DISPUTE RESOLUTION

Disputes arising from construction and engineering work in projects are commonly dealt with by three separate regimes: adjudication, arbitration and high court litigation.

i Special jurisdiction

Under the Housing, Grants, Construction and Regeneration Act 1996, all construction contracts in the United Kingdom must include provisions for the adjudication of disputes. If a construction contract does not include a provision for adjudication, then the statute will imply an adjudication regime into it. Statute will also imply an adjudication scheme if the adjudication provisions of a construction contract do not comply with the requirements of the Local Democracy, Economic Development and Construction Act 2009.20

However, there are several exceptions to these rules. Parties may avoid the statutory adjudication regimes if the construction contracts relate to energy and process plants or offshore construction works. Project companies and government authorities who are party to concession agreement in relation to a PPP project are also exempt from the adjudication regime; however, note that the other project contracts will not be able to rely on such an exemption.

The statutory adjudication regime requires construction contracts to include provisions that allow disputes to be referred to adjudication at any time. Upon making a referral, parties must appoint an adjudicator within seven days, following which the adjudicator must make a decision on the dispute within 28 days of their appointment. Such period may also be extended by the parties.

Any kind of dispute may be referred to adjudication, and the adjudicator’s decision is binding and enforceable through the English courts. However, either party may subsequently

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litigate or arbitrate the same dispute without restriction. The English courts are generally reluctance to refuse to enforce adjudicators’ decisions, unless the adjudicator clearly lacked jurisdiction or there had been a breach of natural justice in the adjudicative process.

ii Arbitration and ADR

Contractual provisions in project documents governed by the laws of England and Wales requiring submission of disputes to international arbitration are generally recognised and supported by the English courts. Under the Arbitration Act 1996, and provided that the arbitration agreement is in writing, the English courts will stay any proceedings brought in breach of that agreement, unless the court is satisfied that the arbitration agreement itself is null and void (Arbitration Act 1996). The UK is a signatory to the New York Convention, under which arbitral awards may be recognised and enforced.

Arbitration has historically been used by the construction sector and most arbitral proceedings are conducted by industry specialist arbitrators, including former engineers, architects or chartered surveyors who have subsequently trained and qualified as arbitrators. The Royal Institution of Chartered Surveyors is one of the largest nominating bodies for arbitrators and adjudicators in the United Kingdom. However, since the implementation of the statutory adjudication regime, construction arbitration has diminished significantly.

Matters that are arbitrable under English law are generally limited to civil proceedings; that is to say, criminal and family law matters, or matters relating to status, may not be submitted to arbitration. However, a claim for compensation arising out of a criminal act or property relating to a divorce may well be arbitrated. Note, however, that, although the English courts at one point suggested that an arbitration agreement would be considered ‘null, void and inoperative’ insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law,21 this approach has not been followed in subsequent cases.22 The Fern Computer Consultancy Ltd v. Intergraph Cadworx & Analysis Solutions Inc case has subsequently received positive judicial treatment. However, there has not yet been any ruling by an appellate court in relation to this issue and, therefore, some ambiguity remains.

XII OUTLOOK AND CONCLUSIONS

The United Kingdom continues to be committed to using project finance to finance domestic infrastructure projects and this will be a key source of funding for the significant infrastructure projects for which there is a commitment that they be completed during the course of the next decade. Furthermore, given the preference of project finance lenders and investors to use English law as one of the preferred laws to govern project and project finance documentation, the UK is well positioned to remain a key hub for international project financings.

Brexit will continue to affect project finance, not least the English legal framework relevant to project finance, since much of it draws from EU law. During any possible transition period, it is likely that the UK will continue to be subject to EU procurement directives (such as the Public Contracts Regulations 2015 SI 2015/102). This means that organisations subject to those rules must continue to advertise and award public contracts in accordance with the EU directives. It is unclear what the position will be regarding procurement post-exit and

21 See Accentuate Ltd v. ASIGRA Inc. [2009] EWHC 2655.
post-transition period, but it is likely that Parliament will not repeal the relevant legislation unless a pressing need arises. If the UK seeks to retain membership of the European Single Market, it would have to continue to apply all EU public procurement directives.

It has been suggested in the legal press that there is cause for optimism regarding government liquidity support for projects post-Brexit, such as the adoption of a looser monetary policy in the UK or potential policies to stimulate the economy via investment in infrastructure. Standard and Poor’s have commented that PFIs should maintain their credit strength. They have also noticed that, in the short term, projects have benefited from the higher inflationary environment. Whether this trend will continue remains to be seen.
I INTRODUCTION

The project finance market in the United States benefits from a well-developed legal framework and sophisticated financial markets. The US legal system is generally viewed as clearly codified, stable and efficient, as well as one that is enforced in a regular and open manner. Contractual agreements between parties are recognised by law with few exceptions related to public policy concerns. The project finance sector has strong access to both the public and the private financial markets and is in some limited areas even supported – directly or indirectly – by government policies.

This combination of a strong legal framework and financial markets has facilitated the development of a robust project finance sector in the United States. Project finance is premised on the ability of the parties to contractually allocate risks among themselves and to enforce those contractual obligations in a reliable manner. A successful project finance regime is also dependent on commercial laws that allow developers to protect themselves through special purpose entities that benefit from non-recourse financing and that, similarly, allow lenders and investors to obtain security in the project assets and to enforce their claims against the project. Likewise, a sophisticated private financial market has the flexibility to allow the developer and the financing providers to create complex financing structures and to tailor those structures to the specific needs of a particular project.

This chapter discusses various transactional structures available to projects and the legal documentation frequently used to implement them. It reviews the various risks associated with project finance transactions and how parties allocate these risks. It also examines how the US legal framework supports the ability of lenders and investors to protect their interests, including obtaining, perfecting and enforcing security interests in a manner that permits lenders to enforce their rights in the event that a project encounters financial problems. This chapter also considers how the legal framework is influenced and affected by social and environmental considerations. The role of a complex legal framework and sophisticated private financing providers and the public sector is also addressed, followed by a summary of the impact of taxes on investment, which may be of particular interest to foreign lenders and investors. The framework for how dispute resolution is processed in the United States is discussed in the final section.

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II RECENT TRENDS

The nature and complexion of project finance in the United States has been shifting, mostly as a result of the expiry of certain government incentives, regulatory changes relating to power plant emissions, declining prices of distributed generation technologies and lower natural gas prices as a result of increased domestic production. More recently, the sector has been shaped by the enactment of a package of amendments to the tax code at the end of 2017 and by the imposition of tariffs on imported solar cells and modules in January 2018 as a result of a petition filed by Suniva, Inc and SolarWorld Americas with the US International Trade Commission. Despite fears that the approval of the US tax reform (particularly the reduction in the corporate tax rate from 35 per cent to 21 per cent and the implications of the base erosion anti-abuse tax to certain international financial institutions active in the market) would curtail the availability of tax equity financing in the market in 2018, tax equity investors have maintained a substantial presence as financing sources and renewable energy projects continue to remain a significant component of the market. In 2018, approximately 29 per cent of the total value of project finance transactions in the country was invested in the renewable energy sector. For example, 7,588MW of wind energy (an 8 per cent increase from the 2017 level) and 10.6GW (including approximately 6.2GW of utility-scale installations, which was approximately the same as in 2017) of solar energy were installed in 2018. Approximately 16,521MW of wind capacity was still under construction at the end of 2018 and approximately 12GW of solar capacity is expected to be completed in 2019. Additionally, hydroelectric capacity could grow from 101GW to approximately 150GW by 2050, not only through the construction of new power plants but also through the upgrade and optimisation of existing plants and by the increase of the pumped storage hydropower capacity.

Throughout 2018, much of the project financing activity in the United States involved energy projects that were able to qualify for a production tax credit (PTC) or the 30 per cent investment tax credit (ITC) by meeting certain requirements. Additionally, developers of clean energy projects employing new or innovative technology that was not in general use were able in 2017 to request loan guarantees pursuant to Section 1703 of the Department of Energy’s Loan Guarantee Program. In 2013 and 2014, the Department of Energy published an US$8.5 billion solicitation for advanced fossil energy projects that avoid, reduce  

4 These statistics do not include public-private partnership transactions and were researched and extrapolated from data available at the Infrastructure Journal website (https://ijglobal.com/league-tables).
7 See footnote 5.
8 See footnote 6.
10 Section 45 of the Internal Revenue Code of 1986, as amended.
11 Section 48 of the Internal Revenue Code of 1986, as amended.
or sequester greenhouse gases\(^\text{13}\) and a US$4.5 billion solicitation for renewable or efficient energy technologies;\(^\text{14}\) in January 2017 both solicitations were supplemented to clarify that the deployment of infrastructure for alternative fuel vehicles that use alternative fuels may be eligible under those programmes.\(^\text{15}\) In December 2016, the Department of Energy announced a conditional commitment to guarantee up to US$2 billion of loans to construct a methanol production facility employing carbon capture technology in Lake Charles, Louisiana, which would represent the first loan guarantee made under those solicitation programmes.\(^\text{16}\) In February 2018, Congress enacted the Bipartisan Budget Act of 2018,\(^\text{17}\) which substantially increased the value of the Section 45Q tax credit available for carbon capture, utilisation and storage projects, and significantly expanded the universe of companies that would be eligible for this federal subsidy, which was originally made available in 2008 by increasing the eligible uses, decreasing the carbon capture threshold and eliminating the prior programme’s limitation to the first 75 million tons of carbon captures. The Section 45Q tax credit will be available for eligible projects placed in service after 2 February 2018 and before 1 January 2023 and can be claimed over a 12-year period.\(^\text{18}\) The development of carbon capture and sequestration projects will certainly increase once the IRS issues formal guidance to facilitate and implement the new Section 45Q rules.

Furthermore, the Protecting Americans from Tax Hikes Act of 2015\(^\text{19}\) extended the PTC programme for certain eligible facilities for which construction began before 1 January 2017 and for otherwise qualifying wind facilities for which construction began before 1 January 2020 (with a progressive phase-out reduction if construction begins after 31 December 2016) and the ITC programme for qualified solar facilities for which construction began before 1 January 2022.

Propelled by extended federal incentives, advances in green technology that decrease investment costs, state incentives and regulatory policies implementing renewable energy portfolio standards (RPS) on utilities, and the positioning of renewable energy as a key component for strategic energy independence for the nation, the development of renewable projects is expected to continue moving forward. As at October 2018, 29 states, the District of Columbia and three US territories have enacted RPS programmes, and eight additional states and one US territory now have voluntary goals for generation of renewable energy.\(^\text{20}\) For example, California’s RPS programme, one of the most ambitious in the United States, requires that utilities derive 33 per cent of their energy from renewable sources by the end of 2020, 44 per cent by the end of 2024, 52 per cent by the end of 2027 and 60 per cent by the end of 2030 (with the ultimate goal of obtaining 100 per cent of the retail sales of

\(^{13}\) See the Department of Energy website (https://www.energy.gov/lpo/services/solicitations/advanced-fossil-energy-projects-solicitation).

\(^{14}\) See the Department of Energy website (https://www.energy.gov/lpo/services/solicitations/renewable-energy-efficient-energy-projects-solicitation).

\(^{15}\) See the Department of Energy website (https://energy.gov/sites/prod/files/2017/01/f34/FactSheet_Vehicle_Announcements_01_9_17.pdf).


\(^{18}\) See Section 45Q of the Internal Revenue Code of 1986, as amended.


electricity to end-use customers and the electricity to serve all state agencies from renewable energy resources and zero-carbon resources by the end of 2045). While all three of the largest California utilities have enough renewable energy capacity under contract to meet the 2020 threshold, the generation forecasts that those utilities prepared in 2018 (risk adjusted to account for a certain degree of project failure) show that, in the aggregate, there will be a deficit beginning in 2026. Additionally, the bankruptcy filing by one of those utilities, Pacific Gas & Electric Company (PG&E) in January 2019 could provide PG&E with the ability to reject certain of its power purchase agreements (especially those with above-market prices) with renewable energy generators and increase the generation deficit. Other states, such as New Mexico and Washington, have similar 100 per cent carbon-free goals in the next few decades and Hawaii has gone further by requiring 100 per cent renewable energy generation by 2045. As a result, there is a need for additional renewable energy generation in California and the rest of the United States. As the existing fleets of wind generation projects developed before 2000 approach the end of their useful lives, it is also expected that repowering investment will significantly increase during the next decade.

While still in its early stages, the US offshore wind energy sector recently experienced noteworthy developments. In 2018, Vineyard Wind LLC’s 800MW offshore wind project was awarded six long-term power purchase agreements with Massachusetts utilities through a competitive process, which represents the largest single procurement of offshore wind in the United States. Besides the mere size of the award, the most significant feature of those power purchase agreements is perhaps the energy purchase price, which is substantially lower than the price in prior reported transactions and confirms the increased competitiveness of offshore wind energy. The first offshore project to be constructed and achieve commercial operations is the 30MW Block Island Wind Farm, which has a power purchase agreement with a starting price of US$244/MWh and the reported price in other subsequent offshore power purchase agreements ranged between US$132/MWh and US$160/MWh. In contrast, the starting price under the Vineyard Wind power purchase agreements is US$74/MWh for the first 400MW phase and US$65/MWh for the second phase. 

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21 See the California Public Utilities Commission website (http://cpuc.ca.gov/).  
25 The power purchase agreements were approved by the Massachusetts Department of Public Utilities on 12 April 2019 (see the order of the Massachusetts Department of Public Utilities, available at https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10617250).  
28 ibid.
in technology (lowering costs and reducing risk) and government support, particularly on the north-east coast of the United States, offshore wind is becoming widely seen as a notable opportunity; it was brought to the industry’s attention with Ørsted’s acquisition of Deepwater Wind (the owner of the Block Island Wind Farm) in November 2018.

In recent years, the US Environmental Protection Agency (EPA) has attempted to implement regulations aimed at limiting greenhouse gas emissions from existing fossil fuel-fired electric generating units in part by setting state-specific goals for reducing emissions from the power sector. The final rules were released in August 2015 (the Clean Power Plan) but were confronted by immediate legal challenges from a large number of affected states and state agencies, utility companies and energy industry trade groups, and, after an emergency stay was granted by the US Supreme Court, the US Court of Appeals for the DC Circuit heard oral arguments on the merits of the case in September 2016. In March 2017, President Trump issued an executive order setting forth his administration’s policy to promote energy independence and economic growth, and ordering the EPA to review the Clean Power Plan for consistency with the new policy. Subsequently, upon request by the EPA, the US Court of Appeals held the case in abeyance and last extended that status on 5 April 2019 for an additional 60 days. The EPA proposed on 16 October 2017 that the Clean Power Plan be repealed and published the proposed repeal rule on 31 August 2018. The EPA’s final repeal rule is expected by mid 2019.

Going forward, most renewable energy projects will increasingly rely upon commercial banks and capital markets to satisfy capital demands. For larger projects, mixed bank–private placement transactions with two or more tranches of funds may provide a preferred financing structure. In the past couple of years, the market has seen an increase in the amount of available capital for project financings combined with a reduction in the number of projects seeking funding, as a result of which financiers have been driven to offer almost

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29 For example, the Governor of New Jersey signed an executive order aimed at achieving 3.5GW of offshore wind-generating capacity (see Executive Order No. 8, signed on 31 January 2018, available at https://nj.gov/infobank/eo/056murphy/pdf/EO-8.pdf) and the Public Service Commission of the State of New York issued an order adopting an offshore wind standard (see Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement, issued and effective 12 July 2018, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b37EE76DF-81B1-47D4-B10A-73E21ABA1549%7d) authorising solicitations by the New York State Energy Research and Development Authority [NYSERDA], after which NYSERDA issued its first solicitation (see https://www.nyserda.ny.gov/All-Programs/Programs/Offshore-Wind/Offshore-Wind-Solicitations/Generators-and-Developers/2018-Solicitation).


33 82 FR 48035 (16 October 2017).

34 83 FR 44746 (31 August 2018).
unprecedented conditions (including a significant downward trend in pricing for capital) to remain competitive. This environment has allowed sponsors to refinance existing facilities with inexpensive long-term capital sources and has fostered an increased interest in the acquisition of operating assets.

New financing tools have also become increasingly important for renewable energy projects, particularly in the field of structured finance. For instance, approximately US$1,400 million (slightly more than in 2017) was raised in 2018 as part of the securitisation of thousands of residential and commercial solar energy contracts by Vivint Solar, Inc, Sunrun Inc, SunPower Corp, Solar Mosaic Inc, Sunnova Energy Corp and Dividend Finance, LLC. As other solar developers increase their portfolios, they may choose to follow this lead to secure financing.

After several years of uncertainty and doubt about its staying power, the ‘yieldco’ model has started to gain stability and remains a prominent feature of the US market. A yieldco is a publicly traded corporation similar to a publicly traded master limited partnership (MLP) vehicle except that its assets do not qualify for MLP status. In the renewable energy sector, a yieldco is expected to obtain stable cash flows from ownership of operating projects that have entered into long-term power purchase agreements and minimise corporate-level income tax by combining recently built projects that are still producing tax benefits with older projects. Yieldcos started achieving prominence in 2013 for energy companies and increased their presence exponentially until the downfall of prominent sponsors of yieldcos, such as SunEdison (TerraForm Power Inc and TerraForm Global Inc) and Abengoa (Atlantica Yield, formerly known as Abengoa Yield), turned investors’ attention to, and increased investors’ concerns about, yieldcos. After years of sharp declines in the value of shares of yieldcos and a flurry of dispositions by sponsors that led to the conversion of some yieldcos to private entities, some of the remaining yieldcos have shown improved health.

Outside the renewable energy space, the retirement of coal and nuclear facilities generated renewed interest by sponsors in the development of new gas-fired power plants. Since 2016, natural gas-fired generation in the United States has surpassed coal generation every year and the gap keeps increasing. Natural gas-fired electric generation is expected to grow to a forecast level equal to almost 39 per cent of the total generation by 2050 while coal-fired electric generation is expected to decrease to less than 17 per cent of total generation.

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35 See, for example: https://mercomcapital.com/product/2018-q4-annual-solar-funding-ma-report/.

36 TerraForm Global, Inc went private after it was acquired by Brookfield Asset Management Inc (see TerraForm Global, Inc Form 15, available at https://www.sec.gov/Archives/edgar/data/1620702/000095015718000059/form15-12b.htm) and 8point3 Energy Partners LP (the First Solar/SunPower yieldco joint venture) went private after it was acquired by an investment fund managed by Capital Dynamics, Inc and other investors (see 8point3 Energy Partners LP Form 15, available at https://www.sec.gov/Archives/edgar/data/1635581/000162828018008779/a8point3628201815-12b.htm).

37 For instance, between 17 April 2018 and 17 April 2019, (1) the stock price for Pattern Energy Group Inc increased by over 26 per cent, (2) the stock price for TerraForm Power, Inc increased by over 20 per cent, and (3) the stock price for NextEra Energy Partners, LP increased by over 17 per cent. These statistics were researched and extrapolated from data available at the Yahoo! Finance website (http://finance.yahoo.com/).

by 2050.\textsuperscript{39} The introduction of new capacity markets may further spur investment in gas-fired projects, which have been challenged by lower wholesale electricity prices in some markets, such as Texas. Additionally, project developers have devoted more attention on gasification facilities, which convert feedstock into a synthetic gas that is used as fuel or further converted into a variety of products, including hydrogen, methanol, carbon monoxide and carbon dioxide. These projects have commonly used fossil materials such as coal and petroleum coke as feedstock, although there are several gas-to-liquid projects in development and there is an intensified interest in the use of biodegradable materials, including municipal solid waste and forestry, lumber mill and crop wastes. The bankruptcy filings of Westinghouse Electric Company in March 2017\textsuperscript{40} and FirstEnergy Solutions Corp in April 2018\textsuperscript{41} may be a harbinger of further headwinds in the nuclear sector.\textsuperscript{42} Although still in its infancy from a technological and economic perspective, the nascent sector of electro-chemical energy storage (batteries that store electrical energy in the form of chemical energy) is beginning to attract the attention of a broad range of project finance participants.\textsuperscript{43} Reliable and cost-efficient battery energy storage systems have the potential to shake up the energy sector. Significantly, this type of storage system could become an ideal complement for intermittent resources such as wind and solar energy power plants and facilitate power grid balancing efforts. As a consequence, natural gas ‘peaker’ plants (those that are used when there is high demand for electricity) may become less significant and the electricity generation mix could be reshaped further.

Another development in the energy sector involves an ongoing transformation in the identity of the power purchasers in the market. As electricity prices have been declining, it has become more difficult for developers to secure long-term offtake agreements with investment grade utilities, and businesses, universities and other non-traditional offtakers gradually have been taking their place. Additionally, in some states, communities have started forming

\textsuperscript{39} This is based on the ‘reference case’ situation under the US Energy Information Administration, Annual Energy Outlook 2019 (24 January 2019), Table 8, available at https://www.eia.gov/outlooks/aeo/excel/aeotab_8.xlsx.


\textsuperscript{43} The battery energy storage projects currently operational in the United States are based on lead-acid, lithium-ion, nickel-based, sodium-based and flow batteries. See 2018 US Grid Energy Storage factsheet, Pub. No. CSS15-17, prepared by the Center for Sustainable Systems, University of Michigan, available at http://css.umich.edu/sites/default/files/U.S._Grid_Energy_Storage_Factsheet_CSS15-17_e2018.pdf.
Community Choice Aggregations (CCAs) to source electricity. CCAs purchase electricity from a utility and sell it to their residents and businesses. While only eight states have legislation governing CCAs, these entities may become more significant in the near future.

In addition, constrained state and local fiscal budgets, limited federal transportation funding, decreased tax revenue and the considerable need for new infrastructure assets and the refurbishment, repair and replacement of existing assets may hasten the further use of the public-private partnership (PPP) project finance structure (further described in Section IX). While most large infrastructure projects in the United States, at least since the introduction of the interstate system in the 1950s, have been completed using public funds rather than through the participation of private entities, a confluence of factors may be creating a fertile ground for the development of increased government and public acceptance of PPPs. According to the latest report card by the American Society of Civil Engineers, the infrastructure of the United States has a D+ grade point average and an estimated investment of approximately US$5.1 trillion (in addition to the approximately US$5.6 trillion currently contemplated to be funded) will be required by 2040 to maintain a state of good repair. The Trump administration’s infrastructure plan, published in February 2018, is intended to stimulate at least US$1.5 trillion in new infrastructure investment over the next 10 years and 12 federal agencies agreed on a framework to expedite the environmental review and approval of infrastructure projects. Given that existing legislation has been insufficient to satisfy the country’s needs for infrastructure funding, state and local governments started to turn to the private sector to fill the gap. Recent significant PPP projects include the up to US$4.9 billion Automated People Mover project and US$2 billion Consolidated Rent-A-Car facility at the Los Angeles International Airport, and the approximately US$3.7 billion I-66 Outside the Beltway project in Virginia. While in some jurisdictions developers will need to navigate
uncharted legislative and regulatory waters, and may also have to overcome negative public perception regarding the private management of public infrastructure, the opportunities for growth may be unprecedented.

III TRANSACTION STRUCTURES AND DOCUMENTS

i Transaction structures

The one basic structural feature common to almost all project finance transactional structures is that the project is operated by a single, non-recourse special purpose vehicle (the project company). Beyond that, the transactional structures are subject to a number of permutations based on the type of project, tax considerations, risk allocation, equity requirements and debt financing demands.

Limited liability companies (LLCs) have become the popular business organisation used for project companies. LLCs have the same limited liability protection that traditional corporations offer, but LLCs offer some advantages in the project finance area. LLCs have the option of being treated as a pass-through tax entity for US tax purposes, and gains, losses and depreciation can be passed to an LLC’s owners, who are known as ‘members’. LLCs allow for considerable flexibility in management and ownership structure, which is advantageous for partnership or joint venture transactions. Management rights can be vested in the primary developer, but can be shifted to a co-sponsor or equity investor upon the occurrence of certain events. Gains and losses for tax purposes can also be allocated to suit the business deal, which is key to the ‘partnership-flip’ structure discussed further below.

A common ownership structure involves a project sponsor owning the project company directly or indirectly through a holding company. In a joint venture structure, the ownership of the project company is allocated between the project sponsor and another equity participant.

Developers will often be simultaneously developing multiple projects owned by different project companies. Most often, developers will arrange for separate financing transactions for each project. Some developers will seek to engage in a portfolio financing for multiple projects through a holding company. In these portfolio transactions, the projects are typically cross-collateralised and cross-default against each other.

Broadly speaking, there are two sources of debt financing available in the United States: the bank market and the private placement market (including the bond market).

The bank market provides loan facilities and letter of credit facilities to a project company. Banks offer a broad variety of financial products. Most project finance transactions involve traditional construction and term loan facilities for the development, construction and operation of a project. Banks can also provide more specialised products. In the wind energy sector, some banks have offered turbine supply loan facilities to provide funds for the purchase of wind turbine generators from the turbine manufacturer prior to the completion of development and permitting of specific projects. These turbine supply loan facilities, which are sometimes provided on a portfolio basis, are extended with the expectation that they are refinanced by a construction and term loan facility. Banks have offered similar loans in respect of solar equipment. To the extent that project sponsors lack sufficient funds to meet their

52 We note that investors sometimes prefer to own interests in the holding company that is the owner of the project company, rather than the project company itself, as another layer to limit their liabilities with respect to the project company.
equity contribution commitments, some banks may be willing to provide equity bridge loans to support a project. Some project companies may qualify for reimbursements or repayments for the construction of network upgrades or for cash grant proceeds, and some banks have extended loans based on these expected cash receipts. In addition, back-leveraged term loans made to the holding company of a project company have been used in lieu of traditional term loans in some transactions, including the partnership-flip structure discussed below.

The private placement market is another potential source of debt financing. Institutional investors participating in a private placement will typically offer only a fixed interest rate and will not provide specialised financial products that are available in the bank market. Project financing can also be accomplished through issuances of bonds in the capital markets. Project bonds can be offered pursuant to Section 4(2) or Rule 144A of the Securities Act of 1933. Most private placements under Section 4(2) transactions are made to accredited investors, which are often insurance and pension companies. An offering under Rule 144A is only made to qualified institutional buyers, which are sophisticated purchasers with more than US$100 million of qualifying assets. Section 4(2) private placements are generally made directly to a very small number of accredited investors, but in mixed bank–private placement transactions, an administrative agent will be involved. Rule 144A transactions are typically sold to a larger number of investors and are administered by a trustee, pursuant to an indenture, on behalf of the qualified institutional buyers. The covenant package and level of oversight and consent requirements under a Rule 144A transaction are often less onerous than either a Section 4(2) transaction or a standard bank transaction.

In larger transactions, sophisticated arrangers may opt to use two or more tranches of funds for a mixed bank–private placement financing. In the energy sector, mature conventional and renewable assets are increasingly using long-term bond markets for leverage, both at the project and the portfolio levels.

In the renewable sector, federal renewable energy tax credits, such as PTCs and ITCs, have helped to shape transactional structures. PTCs offer designated tax credit amounts for certain classes of renewable projects that may be offset against income tax liability.\(^{53}\) ITCs offer reductions in federal income taxes depending on the resource type that is placed in service, and primarily benefit solar and geothermal projects.\(^ {54}\) Developers have taken advantage of these tax-driven incentives to attract investors with sufficient taxable income who are able to use these federal renewable energy tax credits (tax equity investors). Prior to the inception of the Section 1603 programme, which was established under the Recovery Act to fill the gap in the market place when the pool of tax equity investors dried up during the financial crisis of 2008 and 2009, these were the dominant drivers for the development of renewable projects. With the expiry of the Section 1603 programme, PTCs and the ITCs once again became increasingly important for the development of renewable projects.

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53 26 US Code, Section 45 identifies a number of resource types, including wind, closed-loop biomass, open-loop biomass, geothermal energy, landfill gas, municipal solid waste and large-scale marine and hydrokinetic projects and designates a credit amount for each type. To qualify, closed and open-loop biomass facilities, geothermal facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and qualified marine and hydrokinetic renewable energy facilities are required to meet the ‘begun construction’ requirement before 1 January 2017, and wind facilities are required to meet the ‘begun construction’ requirement before 1 January 2020 (subject to the credit being phased out between 2017 and 2020).

54 26 US Code, Section 48 provides credits that could offset between 10 per cent and 30 per cent of federal income tax liability. Small wind projects, fuel cells, combined heat-power, solar, geothermal and microturbine technologies are covered under Section 48.
The partnership-flip structure has been a popular vehicle for financing wind energy projects in which the project sponsors are unable to fully utilise the available tax benefits. As has already been mentioned, given the pass-through election available to LLCs, tax equity investors that are members, directly or indirectly, of the project company are able to benefit from the tax credits. For projects in the construction phase, a tax equity investor will enter into an equity contribution agreement committing to acquire a membership interest in a project company at the time the project has been completed and placed in service, and the proceeds of the equity contribution are applied to repay the construction debt. A variation of the partnership-flip structure is the pay-as-you-go (PAYGO) structure, in which the tax equity investor contributes roughly half of the initial equity that would be required under a traditional partnership-flip deal and, during the operational period of the project, will make periodic payments with respect to the remaining equity that would have been required under a traditional partnership-flip transaction. The PAYGO structure provides a tax equity investor with the ability to defer the timing of its equity contributions and ties its contributions to the number of PTCs actually generated (rather than projected).

Another alternative financing structure is to use a single investor lease or a leveraged lease transaction. Many energy assets have been financed using lease structures whereby a tax equity investor acquires the power project and the tax attributes of ownership, such as depreciation and investment tax credits, and leases back the asset to the project developer, who assumes operational responsibility. The lease structure has been popular with solar projects as it complements the ITC mechanics, and since 2010 there have been a number of single investor and leveraged lease transactions in the wind and solar sectors.

In some jurisdictions, utilities and developers have applied a build-transfer structure. This typically involves a developer agreeing to develop and construct a project that, upon commercial operation, would be transferred to the utility for a designated purchase price. Given the number of independent power producers (IPPs), however, utilities do not have as strong a need to own their electrical generation sources and have often elected to enter into economically feasible offtake agreements with IPPs.

**Transaction documents**

The transaction documents for a project finance deal can be classified broadly into three categories: project documents, financing documents and equity documents.

The project documents provide for the development, construction and operation of the project. The specific documents depend on the type of project and how risks are to be allocated in a particular project. Project lenders typically prefer a turnkey engineering-procurement-construction (EPC) contract entered into with a creditworthy contractor that has the requisite resources, capabilities and experience to engineer and design the project, procure all the necessary materials and components, and to construct and assemble the project. In

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55 To the extent that the holding company is the investment vehicle, the holding company would also be an LLC and any intermediary companies would also need to be an LLC to allow the tax attributes to flow to an entity that is taxable under federal tax laws.

56 To benefit from these federal tax credits, the tax equity investor must be an owner prior to the placed-in-service date.

57 These transactions include Terra-Gen’s Alta Wind projects, Pattern Energy’s Hatchet Ridge Wind project, the Ridgewind Wind project, the Lakefield Wind Project, the Pacific Wind project and the Shiloh IV Wind Project.
certain sectors of the energy industry, a turnkey contract may not always be available and the project developers have sought to allocate responsibilities among parties who are capable of performing the relevant obligation most efficiently and at the lowest cost; for example, in wind generation projects, wind turbines are customarily procured directly from a turbine manufacturer under a turbine supply agreement and, in situations where a project sponsor does not have internal operating personnel, accompanied by a service and maintenance agreement. The construction of the balance of the project, such as the turbine foundations, collection system, substation and transmission lines, are performed by a contractor under a balance of plant contract. The operation and maintenance of the project may sometimes be performed by an affiliate of the project sponsor that is in the business of performing operational and maintenance services for all the project sponsor’s projects. The offtake agreement is crucial for the viability of a project, as the lenders and investors rely principally on the revenues generated by the project. The offtake agreement mitigates the potential fluctuations of spot market transactions and allows for the project to provide a more reliable base case model to its lenders and investors. For electrical generation projects, an interconnection agreement will be required to interconnect the project to the relevant electricity grid. Projects that require fuel, such as coal-fired, biofuel, biomass or natural gas-fired plants, will need a reliable source of fuel that can be procured on a fixed-price basis under a long-term fuel supply or feedstock agreement.

The financing documents for a project finance transaction will generally depend on the type of financing structure being implemented. For a traditional bank financing transaction, the documents consist of a credit agreement that will provide a construction and term loan facility, often with a letter of credit facility or working capital facility, and the set of collateral security documents described below. A private placement transaction will include a purchase or subscription agreement entered into by the financial institutions for funding and an indenture to provide for the covenants that the project company must follow, along with the same set of collateral security documents typically used for bank financings. For transactions that combine bank and private placement sources, a master agreement or common terms agreement will typically govern the principal terms of the financing, such as conditions precedent, covenants, representations and warranties, events of default, indemnities and miscellaneous boilerplate provisions, with separate credit agreements and note purchase agreements or indentures for the respective tranches. A lease transaction will include a lease and, for a sophisticated leveraged lease transaction, a financing agreement and a participation agreement, along with customary tax indemnity agreements. The security for a financing will be provided under the security or collateral documents. Lenders will also often seek to have direct agreements with the counterparties to the material project documents that provide for consent by the counterparties to the collateral assignment of the particular project document, an agreement by the counterparty to deposit amounts payable under the project agreement to a designated collateral account, a right to receive default notices and other material notices, an ability to step in and cure events of default on behalf of the lenders, as well as an agreement not to amend, modify, assign or terminate the project document.

58 In some instances, even the balance of plant obligations are sometimes even further subdivided to include an electrical installation or engineering and design contract for the balance of the plant.
59 Some lease transactions will separate the personal property and real property into a facility lease and a ground lease, respectively.
The equity documents represent the commitment of the sponsors and owners of the project to make equity contributions to the project company under a variety of circumstances. Basic equity contribution agreements cover cost overruns and provide for the minimum equity required to maintain the debt-equity ratio prescribed by the lenders. A project company seeking tax equity will often enter into either a membership purchase and sale agreement (MIPA) or an equity capital contribution agreement (ECCA) with a tax equity investor. Tax equity investors do not typically assume construction risks and their investment is conditional on the satisfaction of a number of requirements, including that the project has achieved, or is about to achieve, commercial operation as required under the offtake agreement and subject to satisfaction of performance and other testing requirements under the relevant construction contracts. For ITC transactions, it is important that the tax equity investor become an owner before a project has been placed in service and reached commercial operation. A form of revised limited liability company agreement for the project company will be negotiated at the time of execution of the MIPA or ECCA to govern the relative rights and obligations between the developer and the tax equity investor, and to set out the respective allocations of cash, distributions and tax benefits, as well as to detail the governance rights prior to and after the date on which the tax equity investor has received its net economic return on its investment.

IV  RISK ALLOCATION AND MANAGEMENT

Project finance ideally allocates risks to the party that is best able to manage and mitigate the particular risk, and the relevant risk allocation can vary from project to project depending on the specific details of a project and the relative negotiating leverage of each party.

A basic project finance transaction can be broadly divided into two periods: construction and operational.

To understand the construction period, it is helpful to understand the importance of the operational period and its associated risks. A lender or investor to a project finance transaction relies on the cash flow generated by the project during the operational period for repayment or recovery of investment, as applicable. To give lenders and investors some degree of certainty about cash-flow generation, lenders and investors analyse a project’s base case projections based on the price of the offtake and the expected production, the two keys to generating cash flow.

An offtake agreement (between a project company and an offtaker) is the key project document that will mitigate the risk of fluctuating prices and give some degree of certainty as to what price is paid for the product generated by the project. A typical offtaker, however, requires some level of assurance that it will receive a minimum amount of product commencing by a certain date – essentially requiring minimum production guarantees. The offtaker will often obtain the right to receive liquidated damage payments for insufficient production. A production and performance guarantee is often provided under the equipment or construction contracts to provide the project company with some assurance that these minimum production levels can be met and are often evaluated as ‘back-to-back’ mitigation measures to protect the project company from failure by the contractor to complete the facility in accordance with technical specifications.

Each type of facility will also have a different risk profile. A baseload project, such as nuclear, coal or natural gas facilities, will be able to meet minimum production but will be reliant on fuel supply, and project developers of these types of facilities attempt to mitigate
the risk of commodity price fluctuations by entering into long-term fuel supply contracts. An intermittent project, such as wind or solar facilities, will require projections of wind resource or solar resource that are probability assessments based on historical resource reports for the specific region. Equipment warranties from construction and supply contracts also have a key role in ensuring that the facility will be protected against defects in design and manufacture.

Although lenders will be granted a security interest in all assets of the project company, the lenders cannot fully rely on this collateral package to repay their loans given that, at the inception of construction, the only real assets of the project company are the project documents and the rights in real estate, which in many transactions are often only leasehold interests. As such, it is fundamental to a project lender that a facility is constructed in a timely manner and in accordance with expected and agreed technical specifications. Given the reliance of lenders and investors on the ability of a project to produce enough energy or other product to generate sufficient cash flow, the risk allocation for the construction period is vital to the viability of a project and to ensure that the project sponsors are duly incentivised to complete it. Lenders in debt transactions will typically require equity contribution funding obligations in the range of 10 to 30 per cent of total project costs, depending on the perceived construction and operational risks of the particular asset being financed.

In addition to the need to cover the increased interest costs during construction caused by a delay in completion of the construction of a project, offtakers will often impose liquidated damages for delays in commercial operation and a termination date if the delay goes beyond a certain date. To offset the risk of delays in construction, developers will demand delay liquidated damages from suppliers and construction contractors to ensure that components are delivered in a timely manner and that the facility is erected and constructed on schedule. In certain cases, when new technology is being deployed, construction completion guarantees may also be required of project sponsors if the lenders are not comfortable with the allocation of risk to the EPC contractor, as well as in other cases where the completion deadline is critical (e.g., if a delay may result in the loss of the offtake contract, key tax benefits or critical operating permits).

Standard project documents will contain limitations on liability to the project counterparties. These limitations will customarily exclude special, exemplary, indirect or consequential losses (including lost profits) and punitive damages from the scope of the counterparty's liability. A limitation on the aggregate liability of the counterparty under the project document will also be imposed and, to the extent that liquidated damages are payable, there are often sublimits for delay liquidated damages and performance liquidated damages that are lower than the aggregate liability for liquidated damages.

Project documents are also negotiated to allocate the risk of force majeure events between the project participants. A force majeure event is generally defined as being reasonably beyond the control of the party affected, such as acts of God, floods, wars, riots and other similar events.

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60 These resource reports provide metrics based on probability scenarios. A P50 production means that there is a 50 per cent probability that the facility will produce the amount expected in a P50 production scenario for the designated period, and a P99 production means that there is a 99 per cent probability that the facility will produce the amount expected in a P99 production scenario for the designated period.

61 For technology that is well proven and construction risks that are not perceived to be high, the debt-equity ratio can be as low as 10 per cent; and for new technology that is being used or has not been fully commercialised, the level of equity contributions required can be even higher than 30 per cent.
Depending on the nature and size of the project, the parties may also need to address political risks. Certain projects, such as nuclear projects, must overcome local political and public concerns about safety and the handling of waste materials. On the other hand, even renewable projects, including wind and solar projects, have encountered public opposition for a number of reasons.\textsuperscript{62} PPPs, as discussed in Section IX, face their own particular challenges in terms of public and political opposition.

As previously noted, many renewable energy projects benefit substantially from federal tax grants or credits. These tax credits and benefits were designed to offer an incentive to developers, but these incentives are typically limited in time and subject to periodic renewal. Currently, PTCs will only be available for qualifying renewable projects that have begun construction before 1 January 2017 or, in the case of wind projects, before 1 January 2020. ITCs are available for solar facilities that have begun construction before 1 January 2022.

V SECURITY AND COLLATERAL

i Security interest and priorities
Secured transactions are primarily governed by state law. Given the potential variation among the 50 states, the National Conference of Commissioners on Uniform State Laws and the American Law Institute\textsuperscript{63} has sought to harmonise the commercial laws among the states through the promulgation of the Uniform Commercial Code (UCC). Each state has more or less adopted the UCC with few substantive modifications.\textsuperscript{64} Secured transactions with respect to personal property are covered under Article 9 of the UCC (Article 9). Real property transactions, however, have not been uniformly codified and are subject to the particular laws of the state and jurisdiction where the real property is located.

A lender or other secured party can obtain a security interest in the personal property of an obligor upon the execution of a security agreement, which will include a clause granting

\begin{footnotesize}
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\item \textsuperscript{62} Large wind and solar projects have significant ‘footprints’ across hundreds and even thousands of acres of land, even though the foundation for each individual wind turbine generator or solar module is not that substantial. Some members of the public have objected for aesthetic reasons, claiming that the wind turbines or solar arrays obstruct residents’ view of their surroundings. Others have raised concerns that wind turbines or solar arrays may affect endangered animals, particularly certain types of birds in the case of wind projects, and desert wildlife in the case of solar projects. The Shepherds Flat project in Oregon also faced an objection from the Department of Defense, which argued that, because of the proximity of the project to a military base, the blades of the wind turbines could interfere with radar. Similar objections have been raised with respect to solar projects near military installations and test facilities. We note that the objections of the Department of Defense in the Shepherds Flat project were settled. Most of these socio-political objections for wind and solar projects have not resulted in the closing down of projects, but these are risks that developers, lenders and investors must take into account.
\item \textsuperscript{63} The National Conference of Commissioners on Uniform State Laws and the American Law Institute are private, non-profit institutions.
\item \textsuperscript{64} The State of Louisiana has enacted most of the provisions of the Uniform Commercial Code [UCC], though we note that it did not adopt Articles 2 or 2A. See Cornell University Law School’s Legal Information Institute’s Uniform Commercial Code Locator at www.law.cornell.edu/uniform/ucc.html.
\end{itemize}
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a security interest in favour of the secured party. The personal property of the obligor will cover the hard, that is the physical and tangible, assets (e.g., wind turbines, solar panels, transmission lines, substations) and soft (intangible) assets (e.g., rights under material project documents and accounts). To the extent that the owner of the obligor is required to pledge its ownership interests as security for the benefit of the secured party, it will be required to execute and deliver an equity pledge agreement.

To protect the position of a secured party against other creditors, the security interest must be perfected under Article 9. The vast majority of personal property can be perfected by filing a financing statement in the ‘location’ of the obligor (for an organisation registered under state law, its location would be the state where it is registered). Article 9 provides that certain forms of personal property cannot be perfected merely by the filing of a financing statement and applies a different rule to perfection of such property. For certificated securities, tangible negotiable documents, instruments, money or chattel paper, perfection is obtained by actual possession of the documents. At the closing of a project financing, the originals of the documents are delivered to the secured party. A security interest in deposit accounts or letter of credit rights may be perfected only by ‘control’. Control of a deposit account is usually established pursuant to a tripartite agreement between the obligor, the secured party and the bank where the deposit account is maintained. The most basic ‘control agreement’ is an acknowledgment by the depository bank that it will comply with the instructions of the secured party without further consent of the obligor. A project finance transaction will involve a more complex depository agreement that provides detailed instructions as to the application of construction loan proceeds and operating revenues. For letter-of-credit rights, control is obtained through a consent by the issuer to an assignment of proceeds. In addition to Article 9, the choice of law for the validity, perfection and priority of a security interest in securities held by an intermediary is also governed by the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, which came into legal force and effect in the United States on 1 April 2017.

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65 See Section 9-203 of the UCC. We note that for a security interest to be enforceable, the following conditions must be satisfied: (1) value must be given; (2) the grantor must have rights in the collateral; and (3) the debtor has authenticated a security agreement that provides a description of the collateral (or, with respect to certain assets that can be perfected by possession or control, the assets are possessed or controlled).
66 See Section 9-301 and 9-502 of the UCC.
67 For the purposes of the UCC, corporations, limited liability companies and limited partnerships are ordinarily registered organisations (see Comment #11 to Section 9-102 of the UCC). For entities registered with the federal government, including foreign organisations, their location is in the state that the law of the United States designates or the state designated by the registered organisation if the law of the United States so authorises; however, if neither of the foregoing applies, the default location would be the District of Columbia.
68 This chapter discusses investment property, deposit accounts and letter-of-credit rights. Article 9 of the UCC also imposes specific rules on the perfection of agricultural liens, goods covered by a certificate of title, electronic chattel paper and other narrow types of personal property.
69 See Sections 9-305 and 9-313 of the UCC.
70 See Section 9-312 of the UCC.
71 See Section 9-104 of the UCC.
72 See Section 9-107 of the UCC.
Security interests in real property interests are obtained pursuant to the execution of a deed of trust or mortgage. Each state has its own special requirements, but generally requires that the obligor grants its rights in the real property to the secured party and clearly identifies the real property interests involved. The security interests in real property are perfected by filing a mortgage or deed of trust with the local county recorder’s office.

ii Credit support

Project companies will often be required to deliver credit support in favour of third parties, including construction contractors, suppliers and offtakers. Likewise, project companies will sometimes be able to obtain credit support from such counterparties to the extent that the counterparties are not creditworthy. The credit support will often take the form of a letter of credit or a guarantee from a creditworthy entity.

Despite the non-recourse nature of project financing, lenders will typically seek a limited guarantee from the project sponsor. This limited guarantee will usually cover specified risks, such as cost overruns or minimum equity contribution amounts. For loan facilities that are contingent on the receipt of cash grant proceeds, reimbursement amounts or cash rebates from a government agency, a guarantee might be required to cover a potential shortfall. Also certain risks allocated to the project that are viewed as ‘non-market’ by lenders may be expected to be covered by a limited guarantee of the project sponsor.

For partnership-flip transactions, the tax equity investor is typically a special purpose entity and credit support from the tax equity investor’s creditworthy parent will be required to backstop its capital contribution obligations. In some instances, a tax equity investor’s capital contribution can be reduced under the terms of the ECCA and lenders will often seek a ‘shortfall’ guarantee by the project sponsors to cover any such reduction.

VI INSURANCE AND PERFORMANCE BONDS

Insurance represents a highly specialised and regulated area of contract law. The allocation of insurance requirements among the parties in a project financing transaction follows the general project finance proposition that the party best able to manage the risk that is covered by a particular insurance policy should procure and maintain that insurance.

The project company will be required under the terms of financing documents to carry at all times commercial general liability insurance, worker’s compensation insurance, pollution liability and umbrella or excess liability coverage. Areas that are subject to floods, earthquakes or other natural hazards will also require appropriate coverage. During the construction period, the project company will typically maintain all risk builder’s insurance, and delay in start-up insurance and, to the extent applicable, marine transit insurance. The project company will also be required to maintain business interruption insurance during the operational period. These requirements represent a combination of standard industry practices and insurance requirements under project documents.

Lenders and investors will not carry their own insurance but rather will be added as additional insured parties to the project company’s insurance. Additionally, lenders will require that they are named as the loss payee and that the proceeds of insurance policies be deposited into collateral accounts.

Construction contractors will be required under the terms of the relevant construction contract to carry commercial general liability insurance, workers’ compensation insurance,
professional liability, contractors’ equipment and pollution liability, and umbrella or excess liability coverage. It is also customary for construction contracts to provide that the project company and its lenders be additional insured parties under these insurance policies.

During the operational period, to the extent that an operator is retained to operate the project, the operator will also be required to maintain commercial general liability insurance, workers’ compensation insurance and umbrella or excess liability coverage. Lenders and investors will retain an insurance consultant to review the insurance programme and to ensure that the insurance requirements for the project will meet market standards, the specific requirements of the project and the project company’s obligations under project documents.

Unlike insurance, performance bonds are not always required for every project finance transaction. A performance bond is a contract between a contractor and a surety to provide assurance to the developer of a project that if the contractor defaults under its construction contract, the surety will perform the obligations under the construction contract. The surety also has a few other options available, including to buy back the bond, to substitute another contractor to perform the construction contract or to deny the bond if permitted under the terms of the performance bond. The owner must not be in default under the construction contract to make a claim under the performance bond. In addition, state law may impose certain statutory requirements for a performance bond. The cost of the performance bond is a project cost and is sometimes not required if the contractor is well established and has a strong track record for completing projects in a timely manner. In addition, in certain geographical areas or markets, the availability of a number of proven construction contractors allows the option of substituting and replacing a defaulting contractor with a strong developer.

Some construction contracts may also be supported by payment bonds. In most construction contracts, liquidated damages for delays are payable by a contractor and a payment bond can be issued, in lieu of a letter of credit, to support the payment obligations of the contractor.

VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Upon the occurrence and continuation of an event of default under the financing documents, the lenders, as secured parties, may elect to exercise remedies against the project company and its assets. The remedies provided under a customary financing agreement will include the right to suspend making additional loans, to accelerate the outstanding obligations, to cure breaches of the project company under the project documents, to possess the project, to marshal the project’s assets and to conduct a private or public sale of the project company and its assets. The financing documents will also provide that the lenders are permitted to exercise all rights available to them under Article 9.

Chapter 6 of Article 9 is devoted to setting out the rights of creditors against personal property after a default in situations outside bankruptcy. A secured party may deliver notices to account debtors of the project company, including the counterparty to the offtake

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74 In many instances, this will not be a third-party operator but an affiliate of the developer.

75 In most transactions, a collateral agent is appointed to act on behalf of the lenders and the other secured parties under the credit agreement. Under customary financing documents, a collateral agent may only undertake actions to which the majority lenders have consented.
agreement and enforce the obligations of an account debtor to make payment or render performance. The secured party may take possession of the collateral and dispose of the collateral with or without judicial process. The disposition of collateral may be conducted privately or publicly, but in all instances, must be undertaken in a commercially reasonable manner.

Foreclosure on real property is subject to individual state laws. A foreclosing lender must also be aware that each state may have a special or unique statutory provision with respect to enforcement proceedings. For instance, California has the ‘one action rule’ under Section 726 of the California Code of Civil Procedure, which requires that a secured party exhaust all its remedies against a debtor’s collateral before suing the debtor for deficiency; failure to do so may result in the loss of the secured party’s liens on both personal and real property.

The proceeds of foreclosure are applied as follows: first, to reasonable expenses of collection and enforcement, including reasonable attorneys’ fees; second, to interest and bank fees; third, to principal; and fourth, to any remaining outstanding obligations.

Most lenders in project finance transactions prefer to enter into work-out arrangements with defaulting borrowers in lieu of exercising Article 9 foreclosure remedies because of the flexibility available under a workout arrangement, coupled with the basic reality that in a non-recourse project deal, the principal source of repayment is revenue generation rather than asset disposition. Federal bankruptcy of a project company is generally the least attractive option for lenders; a debtor is more likely to obtain some sort of relief under a bankruptcy proceeding than a private workout or Article 9 foreclosure.

Federal bankruptcy law pre-empts state law creditor laws, including Article 9. A bankruptcy case for a debtor may be voluntary (filed by the debtor) or involuntary (filed by creditors). Once a bankruptcy petition is filed, it creates a bankruptcy estate and imposes

76 As indicated above, it is typical for lenders to obtain consents to collateral assignment or direct agreements with counterparties to material project documents. A consent or direct agreement will set forth the collateral account to which payments must be directed, and as a result, a post-default notice is unnecessary since there is an existing agreement to deposit proceeds into the collateral account for which the secured party has rights to in an event of default.

77 See Section 9-607 of the UCC.

78 See Section 9-609 of the UCC. The taking of possession and disposal of collateral without judicial process may be done so long as it can be accomplished without a breach of the peace. A secured party may also agree with the debtor to have the debtor assemble the collateral and make it available to the secured party.

79 See Section 9-610 of the UCC. The factors for determining whether conduct is commercially reasonable is a function of statutory provisions, such as Section 9-627, and case law. The UCC provides for certain ‘safe harbour’ provisions to demonstrate that a secured party has acted in a commercially reasonable manner. Section 9-612 offers one such safe harbour: ‘a notification of disposition sent after default and 10 days or more before the earliest time of disposition set in the notification is sent within a reasonable time before the disposition’.

80 The purpose of Section 726 of the California Code of Civil Procedure was to protect defaulting debtors against multiple suits and harassment from secured parties by requiring ‘one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property’, but failing to comply with this provision has serious consequences for lenders.


82 Section 301 of the Bankruptcy Code addresses voluntary bankruptcy petitions and Section 303 of the Bankruptcy Code provides for involuntary bankruptcy filings.
an automatic stay against creditors that prevents any creditor from taking action against the debtor or its assets.\textsuperscript{83} The rights of a lender to exercise any of its remedies under the finance documents or Article 9 is prohibited after the imposition of an automatic stay, notwithstanding its senior secured position. In addition, some liens, such as unperfected security interests, may be invalidated under Section 544(a) of the Bankruptcy Code.\textsuperscript{84} There are two basic types of bankruptcy cases for corporations and other business organisations: Chapter 7 and Chapter 11.

Chapter 7 of the Bankruptcy Code covers a liquidation bankruptcy in which all personal property\textsuperscript{85} is converted to cash and distributed among the creditors. The bankruptcy court will appoint a bankruptcy trustee to oversee the liquidation of the debtor’s estate.

Chapter 11 of the Bankruptcy Code applies to reorganisation of a debtor’s assets, rather than liquidation. A debtor retains custody of its assets and is considered a debtor-in-possession. A debtor will be subject to a Chapter 11 plan pursuant to which a debtor will operate in the post-petition period. The debtor initially has an exclusive period in which to propose a Chapter 11 plan, but if the debtor fails to propose a plan that is accepted by creditors, any party in interest may file a plan and more than one plan may be filed.\textsuperscript{86} After confirmation of the Chapter 11 plan, the debtor must perform under the approved plan. The liens of a pre-petition lender will not extend to personal or real property acquired after the filing of Chapter 11.\textsuperscript{87} In some instances, when a debtor can obtain financing from a post-petition lender, that post-petition lender may be granted priority over pre-petition lenders, by order of the bankruptcy court.\textsuperscript{88} A debtor-in-possession may continue to use, sell and lease encumbered property in the ordinary course of business in accordance with the Chapter 11 plan.

\section*{VIII SOCIO-ENVIRONMENTAL ISSUES}

A number of licensing and permit requirements are relevant to project finance transactions in the United States. The project company will need to comply with federal permits as well as state, county and municipal permits applicable to projects in its jurisdiction. Permitting obligations are customarily spread between the project company and the counterparties to various project documents, ideally allocated to the parties best suited to perform and manage the obligations.

For the construction period, a number of permits will need to be obtained by the construction contractor in connection with the performance of its obligations, including

\textsuperscript{83} See Section 362 of the Bankruptcy Code.
\textsuperscript{84} Section 544(a) may only invalidate the lien of a creditor, but does not extinguish the underlying claim. A creditor with an invalidated lien will be treated as an unsecured creditor.
\textsuperscript{85} There are exceptions for exempt property, but this generally does not apply in project finance.
\textsuperscript{86} See Section 1121 of the Bankruptcy Code. The substantive terms of the Chapter 11 plan are set out in Section 1123 of the Bankruptcy Code.
\textsuperscript{87} To the extent that a security agreement includes a provision to cover property acquired after the execution of the security agreement, Section 9-204 provides that such after-acquired property will be part of the collateral covered under the security agreement. Section 522(a) of the Bankruptcy Code overrides this state law by making it clear that property acquired by debtor after the Chapter 11 filing will not be subject to liens pursuant to any pre-petition security agreement.
\textsuperscript{88} See Section 364(d) of the Bankruptcy Code. Section 364(d) sets out requirements as to when a post-petition lender can ‘prime’ the priority of a pre-petition lender.
building permits, air quality permits and construction permits with respect to any demolition, erection or construction of facilities. The project company will customarily obtain permits that will need to be issued in the name of the project owner during the construction period, as well as permits that may need to be in place during both construction and operational periods. These permits include local permits (such as any facility site permits and road use agreements) as well as federal permits (such as a Federal National Pollutant Discharge Elimination System permit if storm water is likely to cause discharge from a construction site). Certain types of projects will need to obtain specialised permits. For example, since wind turbine generators will exceed federal obstruction standards, a wind energy generating facility seeking a Determination of No Hazard to Air Navigation from the Federal Aviation Administration for each of its wind turbine generators, must demonstrate that there will be no substantial adverse effect.

Certain permits will need to be obtained at or around the time of commercial operation. Emissions and noise permits in certain jurisdictions are obtained during the testing period based on the results of the test performance of the facility. Other permits for use and operation will need to be obtained by the project company or its operator. To the extent that feedstock or other fuel is used to supply the facility, one or more permits will need to be obtained to allow the project company to transport and consume the fuel.

It is customary for lenders and investors to obtain a Phase I environmental site assessment (ESA) from an environmental consultant. A Phase I ESA will include a physical inspection of the site, examination of public records for environmental liens, prior land use and permits, and other investigations to determine whether any hazardous materials have been released or could potentially be released on the site. To the extent that a Phase I ESA reveals any recognised environmental condition or a potential environmental condition, a Phase II ESA will be undertaken and involve more intrusive sampling and measurements. In addition, a number of studies may be needed to demonstrate that the environmental and site impact does not adversely affect cultural resources or wildlife.89

Importantly, compliance with the Equator Principles90 may not be a legal requirement for financial institutions participating in project finance transactions, but it is an internal requirement for many banks participating in the project finance market. Accordingly, many financing agreements require that the borrower comply with the Equator Principles.

IX PPP

The PPP structure is used in a subset of project financing transactions when a government entity and a private sector entity are collectively engaged in the development, construction and operation of a public project. In the United States, the federal government does not usually engage directly in PPP transactions but has an important role through legislation and allocation of funding to states for infrastructure projects. The PPP market can be supported with legislation promoting infrastructure projects, with funding to states. States and local

89 The nature of the studies needed will depend on the type of project. For example, bat and avian studies are needed to assess the impact of wind turbine generators.

90 The term ‘Equator Principles’ is described in ‘An industry approach for financial institutions in determining, assessing and managing environmental and social risk in project financing’, dated 4 June 2003 and developed and adopted by the International Finance Corporation and various other banks and financial institutions.
government agencies are the principal players in the PPP market. Unfortunately, legislation for PPP projects is not uniform throughout the 50 states and private sector developers and investors must understand the differences in both process and substance in the state where they seek to bid for a PPP project. The bidding process itself varies from state to state, but the underlying tenet of establishing an open and competitive process is a common theme. The review and acceptance process for bids differs substantially as each state has its own statutory requirements regarding the evaluation criteria.

One of the major considerations for PPP transactions is the level of public support for the project, the potential private investor and its corresponding bid. Public support can, directly or indirectly, affect both legislation with respect to PPPs and the bid and approval process for any potential PPP project.

The vast majority of PPP transactions in the United States to date have been primarily focused on transport infrastructure projects.

X FOREIGN INVESTMENT AND TAX ISSUES

An investor in the United States must consider the application of federal, state and local income taxes, franchise taxes, transfer taxes and intangible taxes. There is considerable variation in state and local tax regimes, which makes it difficult to generalise about state and local tax considerations, which are therefore not addressed.

A non-US lender to a US project will generally be subject to US federal withholding tax at a rate of 30 per cent on interest payments. This withholding may be reduced if the lender is entitled to the benefits of any of the applicable income tax treaties, many of which provide for an exemption from, or reduction in, withholding tax on interest. However, almost all US tax treaties include fairly mechanical anti-treaty shopping tests, and there are a number of other anti-abuse rules that make it very difficult for a non-treaty lender to access the US treaty network. Nevertheless, certain non-bank lenders that are not treaty eligible may qualify for an exemption from withholding on interest if they are not otherwise related to the borrower and the loan is in registered form for US tax purposes (which is generally easy to ensure).

The tax consequences of an equity investment in a US project will depend on whether the investor invests in the project through a partnership or corporation for US tax purposes. In either case, project income will generally be subject to net income tax, although in the case of a partnership, this may be imposed on the partners (collected by partnership advance withholding). In addition, if an investment is made through a corporation, distributions that constitute dividends will be subject to US federal withholding tax at a rate of 30 per cent. If an investment is made through a partnership, an equivalent branch profits tax may be imposed on the non-US partners on amounts they are deemed to have repatriated. These withholding or branch profits taxes may be reduced or eliminated by an applicable income tax treaty. There can be substantial variation in tax consequences depending on the structure for the project and the relevant investment vehicles.
XI DISPUTE RESOLUTION

In US project finance transactions, the historical preference of lenders is to have the financing documents governed by the law of New York State and to require borrowers and other counterparties to financing documents to consent to the jurisdiction of the courts of New York. The comparatively straightforward issues raised in disputes involving loans and other credit facilities have been viewed as rendering those disputes more suitable to judicial, as opposed to arbitral, determination.

Nonetheless, US courts follow the strong policy in favour of arbitration to enforce agreements that have elected arbitration. There are a number of project documents that provide arbitration as the avenue for settling disputes. Parties choose from a large variety of institutions and rules, or ad hoc arbitration under rules of the parties’ own design. Arbitral proceedings can be tailored by contract to modify the institutional rules and meet the specific needs of the particular transaction. Parties in US transactions typically designate the American Arbitration Association for their project finance disputes, and frequently choose New York as the place of arbitration.

The United States is also a party to the 1958 New York Convention and the 1975 Inter-American Convention on International Commercial Arbitration, which requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states. Other enforcement mechanisms are available, including multilateral treaties, bilateral friendship, commerce and navigation treaties, and traditional principles of comity among nations.

XII OUTLOOK AND CONCLUSIONS

In the long term, project finance is expected to continue to be a popular vehicle to finance the necessary energy and infrastructure assets in the United States, particularly to replace the ageing fleet of coal-fired plants, nuclear plants and other public infrastructure, given the support of the strong legal framework and a strong, sophisticated private financing market (in addition to political support and other factors).

The US Energy Information Administration (EIA) estimates that energy consumption, across all sectors, will increase by 0.2 per cent per year between 2018 and 2050.91 While additions to power plant capacity are expected to slow from the construction boom years in the early 2000s, it is expected that there will be more long-term growth in certain sectors, such as projects from renewable sources and natural gas. For example, the EIA projects that electricity generation from renewable sources will grow so that its share of total US energy generation will increase from approximately 17.5 per cent in 2018 to more than 31 per cent in 2050 in the reference case, or as high as 36.7 per cent based on a high oil price case.92 Additionally, projections from industry sources foresee that the United States may need close to US$5.1 trillion in additional funding to support its standard infrastructure needs in the coming years.93 With the enduring need for energy and infrastructure, the United States will look to project finance structures as one of the tools for satisfying this need.

93 See footnote 47.
Chapter 21

URUGUAY

Beatriz Spiess and Federico Piano

I  INTRODUCTION

Infrastructure investment in Uruguay has traditionally been structured through public work concessions or financed through standard collateral secured loans, with occasional large-scale finance fostered by development banks, international financing institutions and export credit agencies. Between 2010 and 2016, the country received an increased flow of direct foreign investment in a large number of projects with expected high cash flow in non-traditional industries such as oil exploration, wind farms, photovoltaic farms and infrastructure.

During the past two years, new projects have been developed under the Public-Private Partnership Law No. 18,786 of 8 August 2011 (the PPP Law). The PPP Law only deals with private sector and government joint ventures in certain areas – mainly infrastructure (roads and railways), energy infrastructure and social investment (prisons, health centres, hospitals and education centres). The Large-Scale Mining Law (the LSM Law, approved in September 2013) regulates this specific kind of mining activity for the first time and sets forth the contents of mining exploitation agreements between, and to be signed by, miners and the executive branch; these agreements also regulate the assignment of exploitation rights as security in favour of the financing parties.

II  THE YEAR IN REVIEW

Two main investment projects are expected to take place in the years ahead: the construction of a new UPM Pulp mill and the construction of 290 kilometres of railway that will be used to carry the product from the new mill to the port of Montevideo.

On November 2017, a memorandum of understanding (MOU) was signed between the government and UPM, the Finnish pulp and paper maker, for the installation of a second mill, a project with estimated costs totalling US$6 billion. Under this MOU, UPM required the government’s commitment to update the country’s infrastructure, in particular the railway system. A call for bids for the construction of approximately 290 kilometres of new rail track (the Central Railway Project) was awarded in the last quarter of 2018 to a joint venture of local, Spanish and French companies.

Seven PPP road projects are under way – currently, only one of these is being executed, while the others are still at the negotiation stage. Lastly, the government has issued four PPP projects for the construction of education centres.

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The mining industry has seen less activity: the government failed to reach an agreement with the private sector regarding the first mining exploitation agreement to be governed by the LSM Law.

Regarding oil and gas, onshore and offshore exploration is ongoing, although some of the exploration companies have already renounced their rights and stopped exploration.

Uruguay has diversified its energy matrix and although most solar and wind plants have already been financed and are under construction, new projects include electricity transmission lines and international connecting systems with Brazil. In 2017, the government closed a deal with a private developer for the construction of more than 200 kilometres of a new transmission line to connect the Melo converter with the Tacuarembó substation. This was structured under an operation lease and construction began in 2018. New bids for additional construction of transmission lines are to be awarded in 2019.

### III DOCUMENTS AND TRANSACTIONAL STRUCTURES

Projects have been structured through public work concessions or PPP projects, or financed through standard collateral secured loans. Physical assets owned by the project company are provided as collateral. Other standard models such as build-own-operate transfer, build-operate-transfer and build-operate-lease are not frequently seen since project companies often own the assets and may or may not provide a service.

This was the case, for example, with one of the first pulp mill construction projects, where no public services were to be provided. Financing was secured by mortgages on the real estate properties where the mill was to be built and by pledges on each of the spare parts to be used to build the plant. Further, supply agreements with raw material suppliers were executed and, at the same time, conditional assignment agreements of the supply agreements were granted in favour of lenders. The aim was to place lenders in such a situation that, in the event of foreclosure, the whole project could somehow be sold or offered to a new developer.

Wind and solar farm projects, and construction lines are also being structured under project finance methods, using direct and indirect agreements, and operation and maintenance agreements. In other situations, a developer promises to pledge the wind generators once they have been constructed and the property transferred to the developer, and mortgages the land or executes conditional lease assignment agreements.

In the past, the Uruguayan state and companies developing large projects have entered into investment agreements covering different project areas, from tax benefits to transport, permits, among others. Agreements of this type are usually executed under Law No. 16,906 and Decree No. 455/007, which refer to the investment promotion regime. It is not clear whether Law No. 16,906 validates the full scope and obligations that these agreements may include; however, some or all obligations may nevertheless be valid.

More recently, once wind farm and photovoltaic projects have reached completion, the market has seen opportunities for the issuance of project bonds, locally or abroad.

### IV RISK ALLOCATION AND MANAGEMENT

#### i Management of risks

Common risks include the following:

- **Commercial risk:** Sponsors’ guarantees and share retention agreements are usually requested.
b Operational risk: Monitoring agreements have been used in, for example, toll road projects.

c Political risk: This is a low risk since Uruguay has been a stable democracy for most of the 20th and 21st centuries (interrupted only by a military government from 1973 to 1985) and has no recent record of creeping expropriation. Insurance may be requested to mitigate this risk.² Lobbying has occasionally occurred to obtain investment treaties addressing these matters.

d Inflation and exchange rate risk: Although exchange rate fluctuations occur, this risk can be mitigated by the fact that many agreements (including supply agreements) and loans can be agreed on any foreign currency. The sale of collateral in the event of foreclosure can also be carried out in a foreign currency. US dollars are widely used for all transactions, even in the power purchase agreements signed by renewable generators with the National Administration of Power Plants and Electrical Transmissions (UTE) and the operation leasing arrangements entered into by UTE with private constructors for transmission lines.

e Environmental risk: This is usually offset by providing an environmental impact assessment (EIA) and requesting compliance with not only local environmental laws but also international standards in the relevant industry.

f Offtaker risk: In public agreements in which the Republic or public entities act as counterparties, generally the risk of non-payment by the offtaker has not been seen by investors as a serious threat. The Republic has never been in payment default of public debt and currently enjoys investment grade status.

ii Limitation of liability

Under Uruguayan law, actual damages and lost profits may be recovered. Under contract law, the victim may also recover all other damages that a negligent breaching party could have foreseen, and if the breaching party acted intentionally, the victim may also recover unforeseen damages.

The concept of damages includes patrimonial and extra-patrimonial damages and a defendant is liable for the harmful results that have been caused by its acts. If no harm is caused by the negligent act, it is not liable. Recently, the courts have changed their stance and have granted moral damages to legal entities (such as companies). Prior to this, moral damages were only granted to individuals.

The general liability system of the Civil Code allows parties to arrange exemption from or limitation of liability, although restrictions apply in cases of wilful and grossly negligent behaviour, in which it is understood that no limitation may apply. Gross negligence implies any verified breach of contract that, because of the extremely careless manner in which it happened, cannot be excused. The term ‘extremely careless manner’ implies neither preventing nor considering that which any other party would have prevented or considered: in other words, failing to take the most obvious or evident actions, or failing to act in the most basic way necessary, to prevent the damage.

Further, under the Civil Code regime, force majeure is always a justified cause for non-compliance and works for both parties to a transaction.

² Multilateral Investment Guarantee Agency guarantees have been granted in the past.
iii Political risks

The state does not usually grant guarantees or letters of comfort for private entrepreneurs. However, Uruguay has ratified investment treaties with certain countries (e.g., the United States, Switzerland and Finland) that comply in terms of arbitration and compensation for damage caused to investors. Recently, an investment promotion and protection treaty was signed with India, under which investments in Uruguay by Indian nationals shall not be nationalised or expropriated (directly or indirectly) except for public purposes and pursuant to non-discriminatory laws, and in which case fair compensation (i.e., the market value of the expropriated investment) shall be paid immediately.

Property rights are expressly recognised in the Constitution for both nationals and foreign nationals. Furthermore, specific procedures are legally set out for expropriation, which establish that fair and due compensation has to be paid by the state to the former owner in all cases.

The Multilateral Investment Guarantee Agency has also participated in projects in Uruguay, providing guarantees, for example in the construction of a pulp mill.

The LSM Law states, particularly in relation to the mining industry, that exploitation agreements signed with the executive branch may be renegotiated should the public administration change the cost-benefit parameters in force at the time of execution of the agreement (invoking national interest and provided certain conditions are met).

V SECURITY AND COLLATERAL

A common form of security that may be required is collateral on the various assets of a project, since floating charges on the overall assets of an entity are not accepted.

The PPP Law authorises a contractor to institute pledges over the cash flows generated by the PPP project, guarantee trusts and all other real or personal guarantees over the goods and rights – whether existing or future – in favour of creditors (other than the administration) for the execution of the PPP contract. The Law expressly allows for a pledge over the rights originated under the PPP contract (concession pledge) but this is limited to obligations assumed with third parties for the financing of the operation or maintenance of the projects, as well as those resulting from a trust created for this purpose.

A wide range of collateral is available, including the following:

a Bank accounts: a pledge or a registrable pledge. To create a pledge, an agreement must be made in writing, signed by the title-holders of the account and the creditor, and notified to the bank; dispossession of the funds of the account may be effective or symbolic. In the case of a registrable pledge, an agreement must be made in writing, signed by the title-holders of the account and the creditor, and signatures must be certified by a notary public. The registration is made by the applicable national registry granting priority over any other security perfected thereafter and enforceable against all third parties (this applies to all registrable pledges, regardless of the assets being pledged).

b Equipment: This can be created by a pledge or a registrable pledge depending on the interests of the debtor and creditor. In both cases, the agreement must be made in writing and signed by the debtor and creditor. Under a pledge, dispossession of the equipment from the debtor to the creditor (or third party) must take place. Under a registrable pledge, the debtor maintains possession of the equipment.
c Real estate: a mortgage may be created. A public deed must be signed by the debtor and creditor before a notary public and registration thereof is made with the corresponding public registry granting priority over any other security perfected thereafter and enforceable against all third parties. The same applies to mining exploitation permits.

d Receivables: either an assignment of contract rights as security or a registrable pledge can be created. In the former case, an agreement must be made in writing, signed by the assignor and assignee, and the document (title) of the credit must be handed to the assignee. The parties must notify the obligor for payment to be made to the assignee. In the latter case, an agreement must be made in writing, the signatures must be certified by a notary public and the agreement must be registered with the corresponding public registry. For example, under the current power purchase agreement template signed by renewable generators, assignment of the agreement and its credit is already covered.

e Shares (in book-entry and certificate form and other securities): A pledge can be created for shares held in certificate form. An agreement must be made in writing between the debtor and creditor and dispossession of the shares from the debtor to the creditor, or to a third party (depositor), must occur. If the shares or securities are held in book-entry form, a registered pledge applies. An agreement must be made in writing between the debtor and creditor. Registry of the agreement must be made before the entity that holds the book entry of said shares or securities, which will make the proper note in the book.

Under Uruguayan law, a lender is not entitled to exercise self-help remedies (a court order is mandatory) and, in principle, step-in rights in favour of creditors without court process are not provided for in Uruguay.

However, the PPP Law, expressly states that in cases of early termination of a PPP contract upon default of a contractor or abandonment, the administration may step in for no more than 24 months to guarantee continuity of services. Upon expiry of this term, it must be resolved whether the administration will continue to render the services or whether a private entity will take over, using the mechanisms set out in the PPP Law.

The LSM Law, in turn, states that clauses may be included in an exploitation agreement signed with the executive regulating the assignment of the exploitation permit to financing parties as security so that said financing parties may assign it in turn to a third party with the executive's prior authorisation (to be granted if that third party complies with the legal requisites to be a holder of the mining exploitation permit).

VI BONDS AND INSURANCE

The use of bonds in construction contracts and project finance transaction is not widespread, although for projects that have reached completion, the market is starting to see this type of refinancing alternative. Standby letters of credit are not regulated under Uruguayan law. However, they are considered independent obligations of the issuing bank and are frequently used as a form of payment guarantee in the event of non-performance by the applicant of a contractual or other obligation with the beneficiary. The most common bonds are bid bonds and performance bonds.
Bank guarantees are similar to standby letters of credit, the main difference being that they are regulated by local laws and regulations. They are issued to cover an underlying transaction or contractual obligation. The most common guarantees are customs guarantees, lease guarantees and bid guarantees.

To engage in insurance business in Uruguay – for national or foreign individuals or legal entities and for any risk located in Uruguay – it is necessary to establish a corporation with registered shares (which may belong entirely to a foreign insurance company), having as its sole purpose insurance or reinsurance activities, and it must be authorised by the executive branch on the advice of the Superintendency of Insurance and Reinsurance within the Central Bank of Uruguay.

Further, foreign reinsurance companies that want to operate in Uruguay must have a risk rating equal or superior to A-, determined by a risk rating agency selected from the entities established by the Superintendency of Financial Services.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Similarities in the judicial enforcement of pledges, registrable pledges and mortgages have been reinforced with the recent amendment to the General Procedure Code brought about by Law No. 19,090.

These proceedings begin with the filing of a creditor’s enforcement plea furnished with the corresponding title and usually requesting attachment (embargo). Once the attachment is in place, the debtor is notified and summoned to appear within 10 days. The debtor’s only defences are payment of the debt or invalidity of the title.

One or more hearings may take place if defences are raised. Once the judgment has been affirmed on appeal (or in the event that the debtor fails to file a defence or appeal), the mortgaged or pledged assets are appraised (unless this was waived in the agreement) and following the appraisal, the title deeds to the assets are demanded from the debtor (mortgages and vehicles only), and finally the assets are sold at a public auction. The lender may appear at the auction and bid against the lender’s unpaid credit.

For registered pledges, judicial enforcement applies unless the parties expressly agree upon an extrajudicial enforcement, in which case there is no need for attachment of the assets; the creditor sells the assets directly.

According to the Reorganisation Act No. 18,387 (the Act), there are two types of reorganisation or bankruptcy procedure: voluntary reorganisation (when the debtor acts upon its own insolvency) or necessary reorganisation (when the same is requested by any creditor or by the debtor but its assets amount to less than its liabilities). The first stage is an automatic stay of all enforcement procedures (including automatic stays of the enforcement of secured credits by means of pledges or mortgages for 120 days) during which a reorganisation procedure is negotiated; if not, the court will order the sale of the company’s ongoing concerns as a whole, or if this option fails (i.e., no bidding is made), the company’s assets are sold in parts. The Act also calls for a private reorganisation agreement in which the debtor and 75 per cent of the creditors may enter into a reorganisation agreement (this does not affect secured creditors, who may pursue the recovery of their debts by enforcing their pledges or mortgages).

The Act provides that once bankruptcy has been declared, no creditor may initiate enforcement procedures against the debtor; however, in the case of credits guaranteed by pledges or mortgages, this prohibition (automatic stay) will terminate 120 days after the
declaration of bankruptcy, in which case enforcement must be sought from the bankruptcy judge. Further, contractual provisions that declare agreements automatically terminated, or enable any party to terminate the agreement in cases of insolvency or declaration of bankruptcy, shall be null and void.

Termination in a non-Uruguayan currency is permitted. Once bankruptcy has been declared, however, the insolvent party’s unsecured obligations shall be automatically converted into Uruguayan pesos at the exchange rate applicable on the date the bankruptcy is declared. Obligations secured by pledges or mortgages must be collected in the original currency, up to the amount of the security.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Prior environmental approval (AAP) is required for certain projects, such as construction of ports, terminals for the manipulation of oil or chemical products, electric generators of more than 10MW, plants for production and transformation of nuclear energy, energy transmission lines of 150kV or more, and construction of roads and railways. The procedure involves the following steps:

a notification of the project to the Ministry of Housing, Land and Environment (DINAMA) by providing information such as identification of the holder of the project, the landowners of plots affected and the responsible contractors; the location and description of the area of execution and influence; and a description of the possible environmental impact, stating any applicable pre-emptive or mitigating measures to be taken; and

b classification of the project by DINAMA as category A, B or C (see below). DINAMA has 10 business days to confirm or correct the classification proposed by the holder of the project. An environmental classification certificate is issued and communicated to the applicable competent authority.

A project is classified as category A if its execution has a non-significant negative environmental impact, category B if its execution has a moderate negative environmental impact, whose effects may be easily eliminated or minimised, or category C if it may cause significant negative environmental impact, whether or not preventive or mitigation measures are included.

If the project is classified as category A, the AAP is granted with no need for any further steps. Parties whose projects have been classified as category B or C need to carry out an EIA at their own cost and file a request for the AAP with DINAMA. Details of the project (except for information deemed to be of a commercially or industrially confidential nature) and the EIA are then made available to interested parties for comments for 20 business days. A public hearing follows if the project has been classified as category C or if DINAMA believes that the project will have a significant cultural, social or environmental impact.

Finally, DINAMA issues a resolution stating whether the AAP has been granted. The AAP will only be granted if the project is considered to cause only acceptable residual negative effects. Also, DINAMA may grant the AAP subject to the introduction of amendments to the project or the adoption of any preventive or mitigating measures deemed necessary. The AAP will be valid for a term determined by DINAMA.

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ii Equator Principles
Application of the Equator Principles is not common practice in Uruguay.

iii Responsibility of financial institutions
In principle, under Uruguayan law, financial institutions have no administrative, civil or criminal liabilities when participating as lenders in a project finance transaction. Laws are in place for the prevention of money laundering and terrorism financing and have to be complied with by financial institutions.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP
The PPP Law limits the application of PPP projects to the activities indicated therein. Infrastructure projects include:

- road works (including rural), railways, ports and airports;
- energy projects (except for monopolised activities);
- waste disposal and treatment; and
- social infrastructure, including prisons, health centres, educational centres, public housing, sports centres and urban projects (improvement, equipment and development work).

Contracting of educational, health or security services is expressly forbidden, as are contracting services relating to the rehabilitation of prisoners, and the implementation of educational and health centres or prisons. The exploitation of monopolies is also excluded.

The PPP Law expressly sets out the principles that PPP contracts should follow, including transparency and publicity, public interest, economic efficiency, proper distribution of risks, transfer of assets to the government when required, equanimity, temporality (not more than 35 years), fiscal responsibility, control, sustainable growth and regard for labour conditions. It further defines the ‘economic efficiency principle’, stating that the value-for-money concept includes the reduction of costs, risk levels and availability.

The content of PPP contracts is also regulated. They should include:

- purpose;
- risk-sharing conditions;
- performance objectives;
- remuneration – causes and procedures to modify the remuneration and maintenance of the contractual financial-economic equation;
- payment terms;
- control regulations;
- penalties;
- conditions for amendments and termination;
- ultimate purpose of the work and equipment after termination of the contract;
- contractor guarantees;
- mechanisms applicable to liquidation of the contract, including compensation;
- reference to the relevant general terms and conditions or particular ones; and
- other contractor obligations, such as the presentation of audited financial statements.
A contractor may assume different forms and be paid by the users, the administration or both. Compensation and retention rights in favour of the administration for the implementation of penalties under the PPP contract are granted. It also provides that the administration will be able to receive certain income whether from the contractor or users. Furthermore, it is stated that the administration will be able to give minimum revenue guarantees, but it is not allowed to ensure profits or levels of returns. When required, the executive should grant some of these contributions.

The contracting procedure as regulated in the PPP Law is divided into stages.

A contract can be initiated ex officio by the administration or by a private initiative submitted by a proponent. The administration should receive the assessment document referring to the feasibility and suitability of the project concerned. Based on the characteristics of each project, the subsequent initial evaluation will be based on the pre-feasibility, feasibility and impact studies. These studies will be presented to the Planning and Budget Office and the Ministry of Economy and Finance for their consideration and the preparation of reports.

The proponent of a private initiative (which must be submitted to the National Development Corporation) will have certain rights and preferences: it can obtain the reimbursement of certain costs incurred in feasibility studies if it is not awarded the contract, and can also obtain an advantage of up to 10 per cent of its offer with respect to the best offer; the promoter of the initiative will not pay to receive a copy of the terms and conditions of the bid documents (which is a requirement to place a bid). All the information regarding a private initiative is confidential.

Once reports from the relevant bodies have been obtained, the contracting administration can start the competitive dialogue, which is one of the most innovative aspects of the PPP system and consists of a debate held between the administration and the interested entities that fulfil the technical and economic solvency requirements. This allows the parties to discuss all the relevant aspects of the PPP contract and define the special terms and conditions. This phase is essential for the private sector to be able to introduce modifications or adjustments.

After the competitive dialogue and notification to participants, the administration will call for the submission of offers. The call can only be directed to those that have participated in the competitive dialogue. However, if only one party participates, other interested entities should be admitted. The call should also state whether the participants in the competitive dialogue will receive any preference or compensation. Upon completion of the stages and approvals mentioned in the PPP Law, and the institution of the relevant guarantees, the administration will award the PPP contract and execute the relevant agreements according to the terms and conditions discussed during the competitive dialogue.

**Public procurement**

The general public bidding law of Uruguay is set out in the Coordinated Text of the State Accounting and Financial Management Law (TOCAF), which states that tender procedures shall be ruled by the following principles: publicity, so that the largest number of competitors can be attracted; equal treatment of bidders and impartiality of the public administration; and stability, resulting from strict compliance with all applicable rules and regulations. Other general principles include flexibility, materiality and truthfulness.

Under TOCAF, however, preference may be given to national products provided they are of the same quality as foreign ones. In public work contracts, preference may be given to offers that imply a larger use of domestic raw materials and labour.
Administrative acts in bidding procedures or public work contracts may be challenged before the Court of Administrative Litigation, the body in charge of annulling or maintaining all administrative acts. Under the legal regime in force, the submission of a request for review in some cases has an automatic suspensive effect on the act being challenged, unless the administration, by a duly grounded decision, declares that a suspension would affect urgent needs of service or would cause serious damage.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

The Uruguayan authorities encourage all investment, without discrimination between local and foreign investors; incentives for investments are available for both. Furthermore, and under the Investment Law, the remittance of profits and repatriation of capital are guaranteed. However, specific restrictions on ownership do apply to foreign nationals regarding certain industries, such as aeronautics, the maritime industry and the media.

The tax system does not discriminate against nor favour foreign investment. However, the tax burden is influenced by the legal vehicle adopted to perform activities in Uruguay.

Further, there is a general system for promoting industrial activities, and a special promotion systems for specific activities and sectors such as fishing, merchant marine, national aviation and hydrocarbons, with varying benefits.

The Industrial Promotion Law makes it possible to grant national interest status (ex officio or at the request of the interested parties) to any activity, specific project or company fulfilling objectives such as:

- increasing and diversifying exports of processed goods incorporating the greatest possible added value;
- establishment of new industries and expansion or reform of existing industries, when this implies better use of raw materials and labour; and
- technological research geared to exploitation of non-exploited local raw materials, and training of technicians and workers.

National interest status implies promotional benefits in terms of credits (to buy assets, cover establishment expenses, imports, raw materials, etc.) and in terms of taxes (total or partial exemption from taxes, assessments, contributions and rates or public prices, as well as total or partial exemption from taxes and duties on imports or in connection with imports).

With the exception of certain generic benefits regarding imports of equipment, all other tax benefits must be requested by the interested parties and must be expressly granted or recognised by the authorities in each case.

Under Regulatory Decree 455/007, provision is made for a direct income tax exoneration based on two parameters: the project scale (determined according to the invested amount) and the ‘score’ obtained by the project, which will be determined on the basis of a matrix of objectives determined by the executive.

Repatriation of profits and investment

The Uruguayan exchange market operates under complete freedom of transaction and holdings in currency and metals; there are no exchange control laws in force. Similarly, there is total freedom regarding transfers and remittances to and from the country in any currency.

In principle, there are no restrictions, controls or fees on remittances of investment returns or loan payments to parties in other jurisdictions, but taxes do apply. In the case
of dividend distributions from Uruguayan corporations to non-resident entities without permanent establishment in Uruguay, a tax rate of 7 per cent applies on the amount of results distributed that constitute taxable income subject to corporate income tax.

If a reduction in the paid-in capital was resolved, and the capital was repaid to the shareholder, the 7 per cent rate will also apply to the amount that exceeds the face value of shares of Uruguayan corporations, as this payment will be assimilated into a dividend distribution and will be treated equally.

Payments of capital under loans are not taxable; however, payment of interest to non-resident entities without permanent establishment in Uruguay will be taxable at a rate of 12 per cent, or 25 per cent if the creditor is located in a jurisdiction of low or null taxation (based on a list issued by the fiscal authority).

XI  DISPUTE RESOLUTION

i  Special jurisdiction

There are no specific courts or tribunals in Uruguay dealing with project finance transactions or constructions contracts.

A foreign investor will not need to establish a place of business or be permanently domiciled in the country to appear before a court or arbitration committee; however, it is compulsory to establish a special domicile in Uruguay for the purpose of serving any notices, court papers or writs within any procedure.

ii  Arbitration and ADR

Although judicial proceedings are still the primary manner in which disputes are settled, alternative dispute resolution is widespread. The fact that courts are overburdened and judicial proceedings are time-consuming contributes to the success of ADR, the costs of which, however, are substantially higher.

Mediation bodies are created by the Supreme Court of Justice. Parties that consent to mediation discuss their issues and are encouraged to arrive at an agreement by the mediating bodies, which do not issue decisions or have power to impose them upon the parties. Mediation is generally limited to small claims.

Conciliation constitutes the most popular form of ADR. It entails one or more hearings before a judge to attempt settlement and is provided for by the General Code of Procedure (GCP), which determines that a party willing to take legal action must first engage in conciliation. Conciliation is also compulsory during proceedings at a first hearing. If the parties settle, any such agreements are binding upon the parties and directly enforceable.

Arbitration is laid down by the GCP, which includes thorough procedural regulations that apply in the absence of determination thereof by the parties. In principle, arbitration is decided in equity, but parties may agree that the arbitrators apply statutory law. All disputes – including project finance and construction disputes – can be resolved through arbitration, with the sole exception of matters that cannot be settled by the parties (namely criminal matters, family law and proceedings involving rights that cannot be waived or public policy).

Usually, parties to arbitration will agree to resolve their disputes according to the Arbitration Regulation of the Conciliation and Arbitration Centre, the International Court of Arbitration for Mercosur, the Uruguayan Stock Exchange, or even submit their disputes to the courts. In complex commercial agreements, parties may resort to international arbitral institutions such as the International Chamber of Commerce.
Uruguay is signatory to a number of international treaties regarding arbitration and enforcement of arbitral awards. In the absence of a treaty, the rules of enforcement of foreign judgments also apply to foreign arbitral awards (the procedure for recognition and enforcement can take between 12 and 18 months). Further, Uruguay is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

XII OUTLOOK AND CONCLUSIONS

Uruguay must continue to prioritise its stable rule of law and investment promotion regime and focus on identifying and promoting the opportunities it has to offer to foreign investors.

Construction of infrastructure (improvement of roads in particular) is needed to accompany economic growth and the development that various industries are experiencing. This is reflected in UPM’s request for the country’s railway system (which is practically non-existent) to be updated and the subsequent call for bids for the Central Railway Project. The PPP Law is finally being used by the government to foster infrastructure projects.

The national policies on large-scale mining will have to be clearly stated and the LSM Law should be correctly regulated.

Acknowledging the growth that the renewable energy industry is experiencing, regulations should be passed so that Law No. 18,362 on wind farm easements can be applied, and legislation should be drafted to address the wake effect (i.e., the disturbance of the flow of wind inside a wind farm).
Chapter 22

Uzbekistan

Ulugbek Abdullaev, Yakub Sharipov and Fayoziddin Kamalov

I INTRODUCTION

Since President Shavkat Mirziyoyev took office in 2017, Uzbekistan has introduced a number of significant changes to make investors more optimistic about Uzbekistan’s comeback within the world economy and its investment climate. Being rich in hydrocarbons, gold, copper and uranium with relatively cheap human resources, Uzbekistan had been on investors’ radar for a long time; however, currency exchange complications and repatriation difficulties prevented investors from entering the country. However, following the liberalisation of currency exchange and repatriation, the situation has changed considerably and has affected all sectors of the economy, including the construction industry.

After 27 years of stagnation, there is a construction boom in infrastructure projects, industrial facilities and as real estate. To foster the growing construction market, the presidential office, government and parliament have enacted an unprecedented number of legislative acts with the aim of easing the conditions for doing business in Uzbekistan.

President Mirziyoyev set an ambitious goal to double gross domestic product (GDP) by 2030 and to increase the industrial sector’s share of GDP to 40 per cent. Apparently, budgetary funds do not suffice to ensure such a growth; therefore, Uzbekistan relies on project finance and public-private partnerships (PPPs), especially in implementing infrastructure projects. With this in mind, Uzbekistan established a PPP agency to facilitate their use and to create a comprehensive PPP legal framework. The PPP Law has been signed and became effective on 12 June 2019. Although no project has been implemented based on the Law yet, the preliminary conclusion about the Law is that it allows for the majority of PPP models to be used in Uzbekistan.

Moreover, the country closely cooperates with multilateral development banks, credit agencies and export-import banks to support the need for capital funds. For the first time in its history, Uzbekistan appeared on a sovereign credit ratings list in December 2018, followed in February 2019 by the sale on the London Stock Exchange of US$1 billion of eurobonds in international debt markets.

Finally, to improve the overall business environment in the country, the government is implementing significant reforms in all areas, including construction, banking, public procurement, PPPs, energy, tax and investments.

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II THE YEAR IN REVIEW

Following the liberalisation of foreign exchange in 2017, there were a number of significant reforms during 2018, some of which are of particular importance.

First, construction reforms have led to (1) the establishment of a Ministry of Construction to oversee the construction sector, (2) a reduction in the number of licences and other licensing requirements, (3) the introduction of fast-track construction for engineering, procurement and construction (EPC) contractors (i.e., parallel design, procurement and construction), and (4) recognition of construction and design licences issued in OECD countries.

Second, industrial reforms have resulted in the separation of regulatory and commercial functions that were previously combined in state-owned companies. For example, in the energy sector, reforms have led to:

a. the establishment of the Ministry of Energy;

b. the division of the joint-stock company Uzbekenergo into three separate companies, namely a power generation company, an energy transmission company and a power distribution company, all of which are to be publicly traded companies;

c. the provision of access by the private sector to power generation (the first developers have already started work on their construction projects); and

d. setting enthusiastic goal to double existing power generation capacity by 2030.

Third, tax reforms have reduced both the quantity and the rates of taxes, making administration more transparent and business-friendly. The reforms are expected to continue with the adoption of a new Tax Code by end of 2019.

Finally, Uzbekistan obtained its first BB- sovereign credit rating and successfully issued its very first sovereign bonds.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In recent years, private companies acting as investors or operators have been widely involved in the construction and operation of economic and social infrastructure projects. This practice allows increased access to private investment and enhances the economic efficiency of infrastructure. Even though major infrastructure projects used to be operated by state-owned monopolies, the state aims to reduce its presence in business by selling its equity shares via initial public offerings or contracting out operations to trust management companies, while reserving control over strategic sectors.

Until recently, the majority of large infrastructure projects were implemented using public investment with no or limited scope for traditional PPP models.

Despite the lack of a regulatory framework, PPPs are expected to be frequently used. A few projects have been implemented under the build-own-operate (BOO) or build-own-transfer (BOT) delivery models. Importantly, a project can be transferred to a public partner free of charge subject to the provision of an investment commitment. As regards the BOO model, developers usually operate through joint ventures (JVs) set up by a foreign and a local company. The JV then raises financing for the project, builds, operates and owns the project. Examples of this delivery model include the Uzbekistan–China gas pipeline and Surgil Gas and Petrochemical Complex projects. Moreover, thanks to government incentives, PPPs are now being used in pre-school education, sports, tourism, energy, infrastructure, with state-investor relations being structured purely on a contractual basis.
Recently, the government has been showing an interest in new forms of PPP projects, inviting investors to put forward new proposals. The first two projects involving independent power producers (IPP) in the energy sector have been signed, with a concurrent tender for a solar IPP under an international fundraising consultancy.

**ii Documentation**

Depending upon the complexity and source of financing, a project finance transaction may generate quite a number of transactional documents. The precise requirements will depend upon the type of project, the ownership structure, the regulatory environment and the level and nature of public sector involvement.

A complex infrastructure project might require the following transactional documents:

- a government resolution outlining the project details, tax and customs benefits, and any other exemptions necessary for the project’s bankability;
- land allotment documents. As all land is currently in public ownership, it is allotted under an order issued by the local governor. However, this situation may change with the expected privatisation of land;
- tender documents consisting of general, technical and commercial parts;
- financing agreements with lenders;
- terms of reference or financial and economic reports, or both;
- feasibility studies or cost analyses, or both;
- contract documents (shareholders’ agreement, joint venture agreement, joint operation agreement, investment agreement, EPC contract, offtake agreement, supply agreement, concession or licensing agreement, production sharing agreement, power purchase agreement, operation and maintenance agreement, technical service agreement, etc.);
- design documentation adapted to local standards and examined by the local regulator; and
- security documents (bonds and insurances).

The number of documents required will vary depending on the procurement method, sources of financing (lender’s requirements) and the type of project.

**iii Delivery methods and standard forms**

The Uzbek construction industry is experiencing a transformation that includes switching from tailored to standard contract forms. The choice of delivery method and standard form largely depends on the lenders’ requirements. If a project draws financing from public sources, it must be delivered on a turnkey basis. Therefore, the EPC and engineering procurement and construction management methods are those most commonly used in public procurement as they offer maximum risk transfer from public owner to contractor. Given that there is no locally mandatory form, FIDIC Silver Book or other EPC forms might serve as a good starting point for negotiations. However, in privately financed projects, developers have more freedom to choose the appropriate delivery method and standard form. Thus, in projects funded by international financial institutions (IFIs), developers frequently use the FIDIC rainbow suite, including the multilateral development bank harmonised edition, the Engineering Advancement Association of Japan and the Japan International Cooperation Agency standard forms.
IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Different types of risks may be encountered during the course of a project finance transaction. Typically, parties tend to identify and allocate the risks contractually or pass them to the EPC contractor, subcontractors, suppliers, the offtaker and other counterparties on back-to-back terms, or obtain insurance against the risks insofar as is possible. Generally, insurance is obtained to address the risks that are outside the direct control of the contracting parties.

In large-scale infrastructure projects, the PPP sponsors also attempt to negotiate special regulatory exemptions (for example, offshore collection accounts) to address risks specific to the project.

ii Limitation of liability

Project companies and their subcontractors will frequently negotiate their contractual liability limitations. Under the freedom of contract principle, parties are free to set liability caps in a way they find most effective – as a fixed percentage, fixed sum or formula.

However, should parties fail to set the cap themselves, the statutory limitation will define the limits. Usually, liquidated damages are capped at 50 per cent of the outstanding obligation. Note that as a general principle, actual loss is payable by the breaching party if the agreed cap is not sufficient to cover the actual loss, unless the parties have expressly stipulated that a fine or penalty (liquidated damages) is the exhaustive measure in the event of a contract breach.

Parties are usually relieved from any liability as regards a force majeure event. If a force majeure event occurs, the parties try to seek alternative means to deliver the project. If the event continues for a specific period, the parties are usually entitled to terminate the contract.

iii Political risks

To date, the land in Uzbekistan has belonged to the state and therefore the state has used its domain powers fairly often, especially in recent years. The right of expropriation is limited to public and social needs, such as defence, deposits exploration, adherence to international agreements and construction of transport infrastructure. Expropriation is possible only after market price compensation is paid for the property located on the expropriated plot.

Similarly, the Foreign Investments Law protects investors from following political risks:

a expropriation or any other alienation of property;
b restrictions on the transfer of foreign currency outside the country;
c changes in law that discriminate against particular groups of investors;
d any intervention by the government and its officials in the contractual relations of investors; and
e any other kinds of political and legal risks associated with foreign investors and their investments.

V SECURITY AND COLLATERAL

Creditors may accept a pledge by means of a general security agreement or by concluding a general pledge agreement for movable and immovable assets and property rights. The pledge agreement should specify the objects of security and their value, as well as the nature and terms of the obligation underlying the security. Negotiation of pledge agreements should
take into account various perfection requirements for different types of assets. Creditors are free to register pledged rights with the Pledge Registry of the Republic of Uzbekistan. While retaining the voluntary character, creditors who have registered pledged rights can exercise priority of claiming and enforcing the pledges over those creditors who did not register with the Pledge Registry.

Uzbek law also allows for security to be taken over cash deposited in bank accounts and over shares in companies incorporated in Uzbekistan. However, a number of commonly used security arrangements (such as escrow accounts) have not yet been introduced in the country, pending the regulatory amendments that will pave the way for these arrangements.

VI  BONDS AND INSURANCE

i  Bonds

Generally, the Civil Code provides for the possibility of issuing a guarantee to ensure proper execution of a principal's obligations in relation to the beneficiary of that guarantee. Such guarantees may be issued by banks or other credit organisations, and are irrevocable and non-transferable by default. Although Uzbek law does not regulate demand guarantees, nothing precludes the parties from agreeing on such a guarantee contractually. At the same time, owing to the fact that the banking sector is still immature, the usual practice is to freeze the money in a guarantor's bank accounts up to an amount equivalent to the guarantee obligation; for this reason, this financial instrument is not popular.

By contrast, in large-scale investment projects that involve international contractors and financing by international financial institutions, various types of guarantees are widely used, including bid bonds, advance payment bonds, interim payment bonds and performance bonds. Our experience shows that, in practice, sovereign performance guarantees may be very tough to negotiate.

ii  Insurance

Under Uzbek legislation, a contractor has an obligation to insure the object of a construction project, and the construction work, at its own expense, if no other procedures and conditions have been determined in the contract between the parties.

If a project is financed from a state budget or through an international financial institution loan against the provision of a sovereign guarantee, the contractor's property rights, liability for injuries, health detriment and damage to third parties' property resulting from construction and installation work must be insured as well.

In addition, the following types of insurance are frequently stipulated in contract agreements:

a  workers' compensation;

b  cargo insurance (covering loss or damage occurring while equipment and materials are in transit from the point of shipment to their arrival at the construction site); and

c  mandatory insurance for vehicles and for employer liability.
VII  ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Failure of a project company to perform contractual obligations entitles the lenders to recourse to collateral based on a pledge or mortgage agreement. Recourse to collateral is subject to court proceedings unless the parties have agreed otherwise. As a general principle, mortgage and collateral agreements are subject to notary certification.

Once the court renders a decision in a lender’s favour, the collateral will be sold at public auction. If the public auction fails to sell the collateral, the lender is offered the chance to take the collateral in kind and set off the claims secured by the collateral against its purchase price. Should the lender not exercise this right, the pledge or mortgage agreement will be deemed to have been discharged.

If a project company becomes insolvent, enforcement against the collateral is subject to the bankruptcy procedure in accordance with Bankruptcy Law, which considers that the lender will not be able to enforce its rights individually. Instead, once an application for bankruptcy has been accepted by the economic court, all the creditors are represented by the board of creditors.

Importantly, collateral consists of the entire property of a project company and if the proceeds from its sale are not sufficient to cover the debts, then the proceeds are distributed to the creditors out after the following debts and expenses have been paid in full:

- court expenses;
- fees to the receiver or liquidator;
- utility payments and operation costs;
- the debtor’s property insurance costs;
- any debtor’s liability that has arisen since the insolvency; and
- claims from citizens arising from damage caused to their health or property.

VIII  SOCIO-ENVIRONMENTAL ISSUES

i  Licensing and permits

There are several instruments that regulate social and environmental aspects of project finance transactions and construction contracts. These instruments may be divided into three layers, namely laws, delegated legislation, and environmental and sanitary norms. Laws provide general principles and methods of environmental protection and thus serve as a framework for the other two layers. Delegated legislation, as adopted by the Cabinet of Ministers, sets out the procedures for ensuring compliance with the principles expressed in the laws. Finally, the environmental norms establish precise and detailed requirements to be complied with during the design, construction and operation stages. State environmental examination is the main instrument for ensuring compliance with environmental requirements. Both existing and new projects are subject to state environmental examination by the State Committee for Ecology and Environmental Protection, which is the principal body for the supervision of environmental issues.

As a part of state environmental examination process, the State Committee reviews and approves environmental norms that are mandatory for all entities. Additionally, with respect to new projects, state environmental examination is carried out in the form of an environmental impact assessment consisting of three stages:

- a draft environmental impact statement, which should be prepared before the commencement of financing of the project;
b an environmental impact statement, to be prepared before approval of the project feasibility study;

c an environmental consequences statement, which is a prerequisite for acceptance of a project after construction.

Moreover, production processes affecting the environment are subject to mandatory compensatory payments. These processes are divided into four categories depending on the hazardousness of the wastes they emit. Amount of compensatory payments depend on type of pollutants and volumes of emissions, dumped waste, and pollutants released.

ii Equator Principles

Project finance transactions and construction contracts are not subject to the Equator Principles, as they are not part of the Uzbek legal system. However, they are widely used in large infrastructure projects financed by IFIs, such as the Surgil Gas and Petrochemical Complex project financed by the Asian Development Bank.

iii Responsibility of financial institutions

Uzbek law does not provide for the criminal or administrative liability of legal entities; instead, criminal or administrative liability is imposed on the executive officers or other people in charge of relevant functions, who deliberately, or through negligence, commit such an offence. Depending on the severity of a violation, an officer who commits such a violation can be tried in an administrative or criminal court and liability may range from a fine to imprisonment. In this regard, note that employees and officers of multilateral development banks (e.g., World Bank, EBRD), by virtue of their establishing treaties, have immunity against the legal process.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

The institution of the PPP in Uzbekistan is still in its infancy. In recent years, the President has passed several resolutions providing for the implementation of PPP projects in the social sector, such as pre-school education, healthcare and culture. Until recently, the private partner selection process was largely unregulated, and direct negotiation on an ad hoc basis was the primary selection procedure until the adoption of the PPP Law. The latest IPP solar energy project, implemented by SkyPower under a presidential resolution issued specifically for the purpose, is evidence of a widely used case-by-case approach. However, this situation has changed since the PPP law was adopted in May 2019.

Another indication of a changing pattern is the establishment of the PPP Development Agency in October 2018, which was assigned to develop a PPP legal framework and to promote the use of PPPs in Uzbekistan. Importantly, the Agency has already initiated bidding for PPP projects in sectors such as energy, healthcare, toll road and airport construction, and utilities.

The PPP Law also introduced a comprehensive framework of principles, the private partner selection process and basic delivery methods. PPP projects may be initiated either

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2 See www.pppda.uz.
by a public body or by a private party with a mandatory proposal for development of the project comprising overview, costs and specifications of the potential PPP project. In the case of a private initiative, the potential public partner should provisionally approve the proposed PPP project. In addition, depending on the total value of the proposed project, the concept is subject to approval by:

- the relevant government authority, if the value of the project is less than US$1 million inclusive;
- the relevant government authority in conjunction with the PPP Agency, if the value of the project is between US$1 million and US$10 million inclusive; or
- the Cabinet of Ministers, if the project value exceeds US$10 million;

Following approval of a proposed PPP project, the public partner starts the procedure for selection of a private partner. The PPP Law provides for tendering as the principal method for this. The selection process can be a one-stage tender if the value of the project is less than US$1 million or a two-stage tender if the value of the project exceeds US$1 million. Alternatively, the Law allows the PPP agreement to be executed on the basis of direct negotiations when:

- the project is related to a national defence capability or security;
- the private partner owns rights to the property and this is indispensable for the PPP project;
- the project is implemented in accordance with a resolution of the President;
- there are no parties interested in implementing an unsolicited proposal other than the initiator of that proposal.

When the private partner has been selected, the parties should execute the PPP agreement, which may be effective for between three and 49 years. The Law establishes minimum requirements regarding the contents of the agreement. Importantly, the Law does not prohibit the transfer of the object of the PPP to the public partner or specify the stage at which the transfer may take place. In contrast, the Law provides that the transfer of the object of the PPP should take place in accordance with the PPP agreement allowing the application of well-established PPP models such as BOOT, BOT, build-transfer-operate, among others. Moreover, the Law envisages that lenders and public partners may have step-in rights that may be exercised in accordance with the terms of the PPP agreement.

Finally, the Law does not restrict the rights of the parties to choose the law that is applicable to the PPP agreement and dispute settlement mechanism.

Before the Law was adopted, PPP projects were implemented within the framework of laws regulating concessions, production sharing agreements, privatisation and attracting foreign investment. For instance, the method of privatisation at zero value against the provision of investment and social obligations by a privatising party may be considered as the appropriate form of PPP even though it is not named as such in the relevant legislation. The decision in early 2019 by the government to privatise a number of chemical plants may serve as an example of this PPP model in action.3

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Public procurement

The new Law on Public Procurement was adopted in April 2018. It incorporates international public procurement principles, such as professionalism of the procurer, reasonableness, rationality and cost-efficiency, transparency, competition and objectiveness, proportionality, consistency, and the impermissibility of corruption. The Law provides for five types of public procurement procedures, namely e-procurement, reverse auction (in electronic form), competitive bidding, tender and procurement from a single supplier.

Complaints relating to public procurement are reviewed by the Board of Complaints operating under the auspices of the Uzbek Commodity Exchange. Any participant in public procurement may file a complaint about the actions of the budgetary procurer, authorised body, procurement commission or any of its members. Complaints may be filed both before and after the conclusion of the contract. Before the conclusion of a contract, the Board may cancel a decision made by the budgetary procurer, decide to terminate procurement procedures or label the contractor as unconscientious. After the conclusion of a contract, the Board may suspend execution of the contract for a period not exceeding seven business days, during which time it will review the legality of the contract. The decision made by the Board may be further challenged in the courts.

Notably, during the implementation of investment projects financed by foreign loans and grants and executed by foreign contractors, bidding documentation must include a local content requirement in the amount of at least 50 per cent of the work, unless otherwise provided by loan agreements with the international or foreign financial institution.

At the same time, the application of Uzbek procurement laws can be excluded if a loan agreement with a foreign international financial institution provides for a different procurement procedure.

FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

International financial institutions and design or construction companies can act as lenders and contractors in project finance transactions. Foreign lenders are not required to obtain permits or licences to finance projects. Uzbek banks undertaking to refinance, or other Uzbek commercial banks attracting foreign loans, have to notify the Central Bank of Uzbekistan within five days of receiving a foreign loan, for the purpose of identifying the total amount of Uzbekistan’s liability in respect of external loans.

Generally, Uzbek law does not require a foreign company to obtain a licence to construct in the territory of Uzbekistan. However, construction work in certain areas or sectors is subject to licensing. The main sectors within which contractors (irrespective of nationality) need to obtain a licence are:

a. design, construction, operation and maintenance of gas or oil pipelines;
b. design, construction, operation and maintenance of bridges and tunnels;
c. design, construction, operation and maintenance of objects for which production is high-risk and potentially dangerous;
d. design of architecture and construction documents; and
e. examination of design documents.

Foreign contractors are subject to the same legal regime as local companies, therefore no additional registration is required to carry out the work. As a general principle, under Uzbek law, licences are issued in favour of contractors that can meet licensing requirements.
However, in practice, the licensing body may issue a licence in respect of the project itself, thus entitling the contractors involved to execute the licensed work within that project. As Uzbek law does not provide for these types of project-specific licences, they are usually issued under a special government resolution when it is necessary to expedite the commencement of work on high-priority projects.

As of December 2018, EPC projects may be implemented using a fast-track procedure, provided that the EPC contractor and design company form a consortium and accept joint liability for breach of contract. A fast-track procedure implies that the contractor may finalise part of the design and then submit it for state examination. The contractor may commence the work, or parts thereof, that have been submitted for state examination and approved by the Ministry of Construction, and the design company may proceed with the next stage of the design. In other words, the contractor may be entitled to prepare the design step-by-step and have it examined in parallel with the construction work. Ultimately, it enables the contractor to reduce the time taken for completion. The implementation of fast-track construction shall be approved by the National Agency for Project Development, subject to the contractor providing evidence of previous EPC experience, that it is financially sound and capable of carrying out the project. Depending on the specifics of the project, the National Agency for Project Development may impose additional requirements, as the case requires.

Another development is that Uzbekistan now recognises design and construction licences issued in OECD countries.

**Removal of profits and investment**

Foreign investors can change operating funds or profits from one currency to another without any restriction. There is no control or law restricting repatriation of profits from Uzbekistan. The law on foreign investments expressly guarantees foreign investors’ rights to repatriate profits without any restriction. Even though the repatriation of profits or cross-border currency transactions is not subject to any restriction, currency payments are subject to currency control to adhere to Uzbekistan’s international obligations to combat money laundering, financing of terrorism and proliferation of weapons of mass destructions.

### XI DISPUTE RESOLUTION

1 **Arbitration and ADR**

Alternative dispute resolution (ADR) mechanisms are not very popular in Uzbekistan because of the relatively low cost of litigation and parties’ intention to settle a dispute amicably before resorting to court proceedings. However, in cross-border transactions, including project agreements and large-scale government projects, parties prefer to submit disputes to international arbitration rather than litigation. In the absence of specific legislation on arbitration or relevant arbitration infrastructure, parties usually refer their disputes to internationally recognised arbitral institutions, such as the London Court of International Arbitration, the International Chamber of Commerce, the Stockholm Chamber of Commerce or Singapore International Arbitration Centre, seated in London, Paris, Stockholm or Geneva. To make arbitration more accessible for local and regional businesses in their cross-border transaction, and to develop local arbitration infrastructure and expertise, President Mirziyoyev signed a Decree in November 2018 proposing the establishment of the
Uzbekistan

Tashkent International Arbitration Centre,\(^4\) which is to be launched later in 2019. The same Decree envisages the adoption of the UNCITRAL Model Law to serve as an Arbitration Law, as such. As part of the government’s endeavours to promote ADR, the Mediation Law was enacted in June 2018, although it is designed to facilitate mainly domestic disputes.

Uzbekistan does not have specialist project finance or construction courts; these types of disputes come under the jurisdiction of local economic courts. Nevertheless, nothing in Uzbek legislation precludes parties from opting for international arbitration once a transaction involves a foreign element. In other words, disputes between local residents without any foreign element are likely to be found as not arbitrable under Uzbek law.

Uzbekistan is a party to both the ICSID Convention and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Historically, enforcement of foreign arbitral awards was not an easy task in Uzbekistan. The main complication was the foreign currency exchange restrictions that existed until 2017, which is no longer an issue. Uzbek courts recognise and enforce foreign arbitral awards in accordance with the Economic Procedural Code, which is not fully in line with the New York Convention. Specifically, the Economic Procedural Code stipulates that a claim to recognise and enforce a foreign arbitral award shall be filed with the economic court local to the award debtor’s place of residence or, if that place is unknown, at the place of the award debtor’s incorporation. In practice, it means that if the award debtor is a foreign company with assets located in Uzbekistan, the court is likely to refuse to consider the claim on the basis that it lacks jurisdiction because the award debtor is neither resident nor incorporated in Uzbekistan. The existence of any discrepancy complicates the enforcement of an arbitral award as judges tend to adhere to the Procedural Code rather than taking a pro-enforcement approach in line with New York Convention. Enforcement difficulties are mainly attributable to problems arising from the courts’ capacity and lack of experience rather than a general pattern of non-enforcement.

Moreover, the absence of an Arbitration Law makes the interaction of courts and arbitral tribunals almost impossible. In addition, the Procedural Code does not provide for procedural tools to deal with challenges regarding the validity of arbitration agreements, interim relief orders issued by arbitral tribunals, set-aside procedures, stay requests, among others, making Uzbekistan less suitable as a seat of arbitration.

Adjudication

The adjudication of construction disputes is not common practice in Uzbekistan for several reasons. First, the concept and commercial advantages of dispute adjudication are not familiar for the majority of construction practitioners. Second, Uzbek legislation is silent about the legal effect of decisions made by dispute adjudication boards (DABs) and therefore it is not clear how to enforce a DAB decision if it is not complied with voluntarily. Thus, the prevailing party has no legal instruments to obtain a writ of execution to enforce a final and binding DAB decision. Moreover, voluntary compliance is somewhat uncertain, especially in public procurement construction. It is doubtful that a DAB decision can serve as a solid legal basis for money transfer for state-owned companies. Finally, contracting parties very often ignore dispute adjudication provisions or do not constitute a board at all, or else they delete any references to dispute adjudication throughout the contract.

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\(^4\) See https://www.tiac.uz.
Uzbekistan has been undergoing transformative changes in almost all sectors of the economy. These changes are accompanied by a comprehensive revision of the regulatory framework to meet the needs and expectations of businesses. Uzbekistan has set an ambitious goal to double GDP by 2030, emphasising the importance of project finance and PPP as part of the country’s economic growth. Legislative changes have already spurred the growth of the construction industry, making that sector one of the drivers of the Uzbek economy. Similarly, the number of project finance and PPP projects is expected to increase steadily. Despite the current political risks, Uzbekistan is striving to become a safer and more predictable harbour for foreign capital and to secure landmark PPP projects, coupled with the interest of foreign investors in the country.

In the short term, we have yet to see the launch of a land privatisation programme as a sign of private property supremacy evolving in Uzbekistan. In parallel, the number of privatisations is also expected to accelerate in the coming years, reflecting the government’s intention to discontinue its involvement in non-strategic sectors of the economy.

Assigned credit ratings and the issuance of eurobonds serve as further indicators of Uzbekistan’s commitment to provide favourable treatment for all investors.
Appendix 1

ABOUT THE AUTHORS

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Ulugbek Abdullaev is a counsel with Dentons Tashkent’s corporate and technology, media, telecommunications and intellectual property practice. He is also actively involved in the firm’s real estate, commercial and investment projects. He regularly advises clients on complex trans-border transactions, including finance projects. Ulugbek has advised on and managed the negotiations of major construction projects in the chemicals, mining and transport industries.

Ulugbek is a graduate of the University of Westminster (United Kingdom) and the University of Oslo (Norway).

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Darko Adamovic is a counsel in the global energy and infrastructure group in Paris, specialising in project and asset finance. He focuses on the development and financing of energy and infrastructure projects, public-private partnerships, public infrastructure projects, highly regulated projects and complex multi-tranched, issuer-borrower and hybrid debt and bond financings.

Darko regularly advises sponsors (both industrial and investment sponsors), lenders, multilateral institutions, host governments, contractors and offtakers on a number of projects in the energy and infrastructure sectors. His experience in the infrastructure sector includes advising on the development and financing of airports, seaports, roads, toll roads, railways, hospitals and telecommunications, among others. His experience in the energy sector includes advising on the development and financing of various power plants, hydropower plants, and combined cycle gas turbines, wind, solar, biomass, petrochemical and industrial projects. He advises on both project and finance documentation mainly in France, Europe and Africa. Additionally, he has been actively involved in recent years advising on the financing of large privatisations and M&A transactions in various sectors.

Admitted to the Paris Bar as avocat à la cour, Darko is fluent in French, English and Serbo-Croatian.
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Alejandro Alfonso’s practice focuses on the structuring and financing of infrastructure and energy projects, government procurement, public-private partnerships, real estate finance and investment and related corporate matters, including joint ventures, mergers and acquisitions.

He has represented clients from Mexico and Latin America in a wide range of sectors, including water projects, toll roads, oil and gas, renewable energy, social and cultural infrastructure, in which he has advised financial institutions, government entities, state governments, national and multinational companies and private equity funds.

Alejandro graduated as an attorney at law from the Ibero-American University (2012) and received a master’s degree in government and public policies from the Panamerican University (2015) and a master’s degree in constitutional law from the Centre for Political and Constitutional Studies in Madrid, Spain (2017).

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Rafael Bernal holds a law degree from Del Rosario University, Colombia, where he was recognised for academic excellence for his outstanding performance in national and international moot court competitions. He went on to specialise in commercial law at the same university.

Mr Bernal is a member of the infrastructure and public utilities practice group at Brigard & Urrutia and focuses his practice on advising national and international clients, including both public and private entities, in structuring and developing infrastructure projects and project finance transactions.

At Brigard & Urrutia, Mr Bernal has participated in the structuring of private-initiative PPPs for the construction of health centres in the city of Bogotá, one of the first PPP initiatives in the healthcare field in Colombia. He has also provided assistance in connection with the structuring of a public infrastructure PPP for the design, construction and maintenance of two urban highways in Bogotá. He is currently involved in the contractual management of the Perimetral del Oriente de Cundinamarca 4G road concession project (estimated investment of US$339 million) and providing legal advice to a potential bidder on the renewal of the fleet for the bus rapid transit system TransMilenio in Bogotá (estimated investment of US$500 million).

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Samuel Bordeleau is a managing associate in the global energy and infrastructure group in Paris and a member of the Quebec Bar (2007) and the Paris Bar (2011). He concentrates his practice on infrastructure and energy projects of all types, with a particular focus on the renewable energy sector.

Samuel advises a diversified client base on project financing, project development and M&A transactions in the infrastructure and energy spheres in France and abroad. Since joining Linklaters LLP in 2012, he has acted on more than 60 deals representing, for energy projects alone, an aggregated installed capacity of more than 1.2GW of wind assets and more than 1.2GWp of solar assets. Landmark transactions in which he was recently involved...
include ongoing advice to the lenders on the project financing of the three first offshore wind projects to be financed in France (Courseulles-sur-mer, Fécamp and Saint-Nazaire); advising the lenders to EQT on the financing of the acquisition of the Saur group; advising a major infrastructure fund on the sale of a portfolio of more than €1 billion of infrastructure (rail, telecommunications, motorways) and wind assets across Europe; and advising Sumitomo on the acquisition, from Engie and EDPR, of an equity stake in the Noirmoutier and Le Tréport offshore wind projects.

NANAAMA BOTCHWAY

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NanaAma Botchway is the founder and managing partner of N Dowuona & Company. NanaAma’s key areas of focus include construction, infrastructure and project finance. She has advised on the development and implementation of the US$1 billion National Identification System Project, the financing and development of a floating dry dock, the Volta Lake Transport Company’s US$300 million Eastern Corridor Multi-Modal Transport Project, and on the proposed construction of a new liquefied petroleum gas pipeline from the port of Tema to the Tema Oil Refinery. She has significant experience in advising on various aspects of construction projects, including planning, permitting and finance, and has advised local and international developers on the construction of significant real estate projects in Ghana, including the Mövenpick Ambassador Hotel, the first mixed-use hotel project of its kind in Ghana, and One Airport Square, the first certified green office building in Ghana.

Before returning to Ghana, NanaAma was an associate in the mergers and acquisitions and corporate tax departments of the New York office of Simpson Thacher & Bartlett. NanaAma received her Juris Doctor from Columbia University School of Law. She is licensed to practise law in Ghana.

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Matt Bradbury is a partner in McCullough Robertson’s projects group. He is an infrastructure, construction and engineering lawyer who has advised on civil, building, mechanical, renewable energy resources and structural projects in each state and territorial jurisdiction of Australia and throughout South East Asia. Mr Bradbury advises on all aspects of construction, infrastructure and major engineering projects, working side by side with his clients and their external consultants to successfully deliver their projects. He advises clients on risk mitigation and administration of contracts so as to avoid disputes. He also currently acts on behalf of state and local governments, government-owned corporations, owners, contractors and consultants and advises a number of professional bodies and industry associations. He is currently advising a number of major contractors with respect to the various LNG and resources projects that are being completed in Queensland, the Northern Territory and Western Australia. Mr Bradbury has practised in both Australia and the United Kingdom.
JÚLIO CÉSAR BUENO

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Júlio César Bueno has been a partner at Pinheiro Neto Advogados since 2001. He is based in São Paulo and has considerable national and international experience in focusing on the practice of construction law and engineering contracts (including the use of FIDIC standard forms), project finance, public procurement, as well as on arbitration and mediation proceedings, and dispute boards. He represents some of the world’s largest organisations (owners, multilateral agencies, financial institutions, contractors and developers) in global infrastructure and construction projects in Brazil, the rest of Latin America and Africa.

He assists clients across the entire project spectrum, including gas facilities, power plants (nuclear, coal-fired, gas-fired, combined cycle and hydro), wind farms, steel manufacturing facilities, copper mining facilities, coal mining facilities and ports.

He is Chair of the Society of Construction Law, Brazil and President-Elect of the Dispute Resolution Board Foundation Region 2, and a former officer of the International Bar Association’s Latin American Forum and the International Construction Projects Committee. He is also a fellow of the Chartered Institute of Arbitrators, the Royal Institution of Chartered Surveyors and the International Academy of Construction Lawyers, coordinator of the Dispute Board Commission of the Center for Arbitration and Mediation (CAM/CCBC), a co-coordinator of the Brazilian Arbitration Committee’s working group dealing with arbitration in infrastructure contracts, a board member of the International Construction Law Association, and a member of the Mediation and Arbitration Chamber of the Institute of Engineering of São Paulo and the Brazilian Institute of Civil Procedure Law.

He holds a law degree and a doctorate from the University of São Paulo Law School (LLB, 1991; PhD, 2001) and a master’s degree from the University of Cambridge (LLM, 1995). He has published several articles on matters relating to civil procedure law, energy, engineering contracts, infrastructure and construction law.

ANDREW BUKOWSKI

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As a commercial and corporate lawyer who has worked in-house for a major mining company, Andrew Bukowski specialises in business transactions, sales and acquisitions and joint ventures in the resources and energy sectors. He has acted for a range of clients from listed and large private companies involved in exploration and operational projects in coal, gas, minerals and metals through to junior explorers and service providers. His work has covered multiple jurisdictions, including Australia, North America, Myanmar, Mongolia, Russia and Indonesia.

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Niall has particular strength in the resolution of construction and engineering disputes, having successfully represented clients in high-value and complex international arbitrations.

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Aled Davies is a partner based in Milbank LLP’s Tokyo office and is a member of the project, energy and infrastructure finance group. He regularly represents key stakeholders, including sponsors, lenders and export credit agencies, on large-scale infrastructure and energy projects throughout the world, including major liquefied natural gas, mining, refinery, petrochemical power and transportation projects. Aled is listed by *Chambers* and *The Legal 500* as a Tier 1 lawyer in Japan, and is ranked by Euromoney’s *Expert Guides*, which placed him in the world’s top 35 practitioners in project finance worldwide. Aled has written articles for publication by *Project Finance International*, *Japan Overseas Investment Organization*, *Infrastructure Journal* and *Getting the Deal Through*. 
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She earned her juris doctor degree from Ateneo de Manila University School of Law where she competed in international moot court competitions such as the Asia Cup Moot and the Stetson International Environmental Moot. She was also part of the executive committee that helped spearhead the launch of the school’s first edition of its international law review journal.

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Mario Forero joined Brigard & Urrutia in 2012. He is an attorney and political scientist, and graduated from the School of Law of the University of Los Andes. He also obtained a specialisation in public management from the University of Los Andes, and is currently a professor there.

Mr Forero provides advice to local and foreign clients in public procurement and matters relating to administrative law. He has also advised clients in the participation, structuring and financing of public-private partnerships, and on the performance of infrastructure projects, including several 4G highway concessions projects.

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Vanessa Franyutti specialises in real estate finance and investment, projects and project finance, energy, structured finance, financing of public entities and M&A. She has particularly strong experience in financing and investments in the hospitality sector as part of a wide real estate practice that also covers the retail, residential and industrial markets. Her hospitality work includes advising on investments in hotels, mega-developments, fractional and timeshare regimes, and their related financing.

Vanessa is also an expert in project finance and public-private partnerships, including energy and infrastructure projects. She was instrumental in implementing the PPP schemes in Mexico, advising both local governments and the federal government on the structuring, bidding and implementation of the first PPS projects, and has since been involved in major hospital, road, water and prison PPP projects. She has also advised clients on the preparation of unsolicited proposals and bids under the Mexican PPP law.

Vanessa’s international experience is substantial. She regularly advises multinational and national clients, particularly major hotel, tourism and leisure groups, on real estate investments and development in Mexico, as well as in forming bidding consortiums and other aspects of infrastructure and energy projects in Mexico. She also advises financial institutions participating in tourism, energy and infrastructure.
Vanessa is ranked in Band 1 in projects and in Band 2 in real estate by *Chambers Latin America*, in which she has been described as a key partner who, according to clients, is ‘a great negotiator who really knows how to communicate information’. Vanessa obtained her LLM from the University of Chicago Law School, having graduated as an attorney from the Autonomous Technological Institute of Mexico with honours. She is fluent in English.

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Marianna Frison-Roche is a managing associate in the global energy and infrastructure group specialising in public law. She focuses on corporate transactions in regulated sectors and public-private partnerships and has significant experience in infrastructure, energy, public procurement, environmental and town-planning matters, and public law litigation. She is a graduate of Paris II Panthéon-Assas, Paris I Panthéon-Sorbonne and the College of Europe, and is fluent in French, English and Polish.

Recent transactions of significance (where substantial involvement can be disclosed) include advising on the sale by LBC of its south Europe operations to Alkion Terminals, including the ownership of tank terminals; National Grid on French law aspects in relation to a grid interconnection between France and the United Kingdom; the financing of the SEA high-speed link; the refinancing of a portfolio of broadband network concessions operated in France by Axione Infrastructures; the implementation of the Perpignan-Figueras concession for a high-speed link between France and Spain; the privatisation of Nice and Toulouse airports; the financing of the Nîmes-Montpellier high-speed link; and the acquisition of the shares of Géosud, a company holding 50 per cent of the share capital and voting rights of Géométhane, a company that owns saline cavern facilities in southern France. Marianna is also notably involved in renewable energies transactions, including offshore wind projects. Her experience includes advising in relation to all French invitations to tender (ITTs) for offshore wind projects, in particular, advising (1) lenders on the financing of the Fécamp and Saint-Nazaire projects awarded through the first ITT, (2) a bidder in relation to the potential acquisition, from Engie and EDPR, of an equity stake in the Noirmoutier and Le Tréport offshore wind projects awarded through the second ITT, and (3) a bidder on its potential participation in an offshore wind consortium within the framework of the third ITT, off Dunkirk.

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David Gilham is a partner in McCullough Robertson’s finance group. He acts for financiers and corporate borrowers on a broad range of debt financing transactions, including real estate investment and development financings, leveraged and acquisition financings, project financings and general corporate financings. He has significant experience in advising foreign financiers and corporates on their participation in Australian projects.

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Deon Govender focuses his practice on project development and corporate and project finance transactions across Africa, with a particular emphasis on southern Africa. His experience ranges from advising on the development and financing of renewable energy and thermal
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Hammad & Al-Mehdar Law Firm
Abdulrahman M Hammad is a member of the New York State Bar. He earned his juris doctor degree with magna cum laude honours from the University of Miami, United States, concentrating on securities, finance and business law. Before that, Mr Hammad obtained a Bachelor of Science degree with cum laude honours from Southern Illinois University, majoring in finance (investments). Mr Hammad worked for a major US law firm in New York, concentrating on energy, infrastructure and project finance work. Mr Hammad also worked at the Saudi Aramco law department, where his practice concentrated on projects and project finance.

Mr Hammad’s most significant roles have been as a legal adviser to the Ministry of Petroleum and Mineral Resources in redeveloping the Saudi Energy Efficiency Centre, and the establishment of the Saudi National Energy Services Company; lead counsel to Saudi Aramco with regard to negotiating and structuring the formation of a fuel retail joint venture with a major international oil company. He was also counsel to Saudi Aramco and subsidiaries with regard to negotiating and structuring the formation of the GCC Electrical Equipment Testing Laboratory joint venture, and advised on the negotiation and structuring of several power generation plants covering both traditional and renewable energy production. He was also legal counsel to a major construction contractor with respect to the construction of a US$2 billion project in Riyadh, Saudi Arabia.
OWEN HAYFORD

DLA Piper Australia

Owen Hayford is one of Australia’s leading projects and construction lawyers, with more than 20 years’ experience in the procurement, delivery and through-life support of major infrastructure projects.

Having acted for owners (both government and private sector), financiers, contractors, consultants and subcontractors, Owen has advised extensively on contract structuring, funding, contract drafting, negotiation, contract management and issue resolution across a range of sectors, including transport, energy, resources, defence and social infrastructure. Owen is highly regarded for his ability to develop innovative commercial and legal solutions to procurement and delivery problems.

Owen is a senior fellow at the University of Melbourne, where he teaches a course on public-private partnerships as part of the master of laws programme. He chairs the thought leadership committee of the Society of Construction Law Australia and is a former council member of the Australia branch of the International Project Finance Association.

Owen is recognised as one of Australia’s leading lawyers for construction and infrastructure in several legal directories, including Best Lawyers, Doyle’s Guide, Who’s Who Legal and The Legal 500 Asia Pacific.

RINTARO HIRANO

Nagashima Ohno & Tsunematsu

Rintaro Hirano is a partner at Nagashima Ohno & Tsunematsu. He has advised Japanese clients in a number of international projects, and he has experience in negotiating with host-country governments, international lenders, and contractors and sponsors in those projects. In particular, Mr Hirano was involved in large-scale infrastructure projects during a two-year secondment to the Japan Bank for International Cooperation. The sectors he covers range from transport, such as rolling stock, light-rail concession, airports and toll roads, and telecommunications, such as submarine cable systems, to power and energy, including conventional power projects, renewable power projects (solar, wind, etc.) and liquefied natural gas projects.

Mr Hirano earned an MBA from INSEAD in 2009, an LLM from Columbia Law School in 2007 and an LLB from the University of Tokyo in 2000. He is admitted to the Bar in Japan (2001) and New York, United States (2008).

LOUISE HORROCKS

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Louise Horrocks is a corporate and commercial lawyer who specialises in resources and energy transactions, corporate restructures and transaction taxes. She has extensive experience of advising on unregulated mergers and acquisitions and provides technical advice and implements complex commercial transactions to structure acquisitions, disposals and establish new ventures with advantageous stamp duty and capital gains tax outcomes. Louise has a particular focus on the renewables sector and leads the management of the firm’s renewables team. She acts for clients, both established and seeking to enter the sector, on opportunities for investment and project delivery. Louise is also closely involved with the Queensland Resources Council and Queensland Exploration Council and their initiatives.
MUNIB HUSSAIN

*Milbank LLP*

Munib Hussain is a senior associate in the London office of Milbank LLP and a member of the firm’s global project, energy and infrastructure finance group. Munib has significant expertise in advising lenders, sponsors and sovereigns on ‘first-of-a-kind’ international projects, energy and infrastructure financings in the oil and gas, power and mining sectors, and in particular specialises in multi-sourced financings involving ECAs, multilaterals, commercial and Islamic banks.

He is also a member of the firm’s Islamic finance business unit and is recognised as an expert for project finance by *The Legal 500* and for Islamic finance by *Who’s Who Legal 100*.

NAOKI IGUCHI

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Naoki Iguchi is a partner in the international projects and arbitration practice team of Nagashima Ohno & Tsunematsu. He has been advising construction companies, investment companies and infrastructure management companies in construction, transport, crude oil pipeline and other infrastructure projects in various jurisdictions, including Asia, the Middle East, Africa and the Americas. Mr Iguchi also provides advice to national and foreign construction and investment companies that have projects in Japan, including advising construction projects for famous entertainment facilities. Mr Iguchi has represented many companies in international arbitration in Asia. He was the representative for Japan on the Dispute Resolution Board Foundation and is a regular workshop lecturer for the Overseas Construction Association of Japan, Inc. Mr Iguchi also taught international project law at Keio Law School.

He studied at the University of Tokyo (LLB, LLM), Stanford Law School (LLM) and the Beijing Language University (Mandarin training), and has worked at law firms in Japan, China, Taiwan and the United States. Mr Iguchi is a member of the Japan ICC Arbitration Committee and was a member of the ICC Workforce on Costs. He is fluent in Japanese, English and Mandarin, and he also understands Spanish.

ANDREW JONES

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Andrew Jones heads the construction practice at Dentons in Doha. He specialises in the resolution of engineering and construction disputes. His practice involves all forms of dispute resolution, from litigation in the Technology and Construction Court to statutory and contractual adjudication, alternative dispute resolution (including mediation and expert determination) and national and international arbitration. Most recently Andrew has been involved in cases regarding issues arising from delay to projects, loss and expense, termination issues, final account disputes, professional negligence and defects.
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Fayoziddin Kamalov is a paralegal at Dentons’ Tashkent office. He is involved in the firm’s corporate, international and investment projects. Mr Kamalov has recently advised clients on construction, energy and chemical projects.

Fayoziddin is a graduate of Westminster International University in Tashkent.

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Paul Lignières is a partner at Linklaters LLP and head of the public law, public-private partnership (PPP) and regulatory practice in Paris. He is also co-head of the firm’s infrastructure and transport sector and co-head of the francophone Africa desk.

Paul’s practice focuses on regulations, public law litigation, corporate transactions in regulated sectors, energy and PPPs. He has an extensive experience of over 25 years in a wide variety of projects in government-related areas, privatisations, liberalisation of regulated sectors, PPPs, public procurement, competition law applied to public entities, state aids and environmental law.

Before joining Linklaters, he was senior private sector development specialist in the infrastructure division of the World Bank.

He is widely regarded as one of the top public law practitioners in France, with a leading market reputation in the strategic practice of public-private interface. He is ranked as a leading lawyer in all major professional directories (The Legal 500 EMEA, IFLR1000, Chambers), which say that he is ‘one of the brightest lawyers in the market’ and ‘a well-established leader in this field’. Interviewees admire his in-depth knowledge of public law and comment on his ‘excellent technical skills and connections with the major players in the area’.

Paul is a member of the management committee of the Centre on Changes in Governance and Public Law, co-editor of Droit administratif (LexisNexis), a lecturer at French universities, and the author of numerous publications, including several books.

WEI LIM

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Wei Lim acts for major banks and borrowers in lending transactions across various sectors, including apartment construction, land subdivision, healthcare, general corporate, agribusiness, industrials and resources. His experience spans more than 10 years of private practice in Australia, the United Kingdom and Hong Kong, and almost five years in-house at a major Australian bank.

Wei has a strong background in corporate and institutional property financing, and in debt capital market and project finance transactions.

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Kgabo Mashalane is a South Africa-qualified lawyer in the anti-corruption and compliance practice, with experience in working on market entry considerations, research on anti-corruption and bribery in Senegal, Mauritania and Ghana. She has advised international...
clients on lobbying compliance laws in South Africa in interactions with members of government, parliament and other authorities. She also has experience in working on infrastructure and renewable energy projects and corporate transactions across Africa and the Middle East, having practised in the project finance and development practice at Covington. Kgabo’s experience includes corporate transactions (including mergers and acquisitions) relating to international energy and infrastructure projects and advisory experience in the financing of transport in South Africa.

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Gabriel Miranda is a junior associate in the banking and finance department at Clifford Chance’s office in Madrid. He specialises in project and asset finance.

He obtained his degree in law from the Carlos III University of Madrid, where he also obtained his master’s degree for admission to the Bar. He obtained a second master’s degree in international law and foreign trade from ISDE Law Business School in Madrid. He studied abroad for a year at the University of Texas at Austin School of Law (USA). He is fluent in English and Spanish. He joined Clifford Chance in 2017.

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Peter Motti is a senior associate in Dentons’ corporate and commercial practice group based in Doha. Peter has experience in advising on government, aviation, commercial contracts, corporate governance, mergers and acquisitions, capital raisings, and general commercial matters within a broad range of sectors, including government, aviation, real estate and property, agriculture, and energy and resources. Prior to joining Dentons, Peter trained and worked at the international law firm MinterEllison in Brisbane, Australia.

THOMAS P MÜLLER

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Thomas P Müller was educated at Basle University (lic iur 1990, Dr iur 1996, summa cum laude) and completed his studies as a Certified Specialist SBA in construction and real estate law. He gained working experience as a law clerk (District Court of Laufenburg, Administrative Court of the Canton of Argovie), a research and teaching assistant at Basle University and as a lawyer at law firms in Argovie and Basle. He advises clients in matters relating to public-private partnerships, real estate law (construction, planning, environment and infrastructure, including real estate financing), public procurement, administrative law and privatisations.

He joined Walder Wyss Ltd in 2006 and became a partner in 2012. Mr Müller is a lecturer in the administrative law master’s programme at Basle University and a member of the Swiss PPP Association experts panel.
ZAHER NAMMOUR

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Zaher Nammour has practised law in the Middle East for more than 20 years. He has extensive experience in corporate joint ventures, mergers and acquisitions, restructuring, corporate governance, public offerings, private placements and the related regulatory framework. Zaher has advised on restructuring and the acquisition of multimillion-dollar companies in Qatar and abroad. He is also experienced in the field of regulatory compliance associated with funds, sukuk, initial public offerings and state bonds.

In addition to his corporate expertise, Zaher is recognised for his real estate experience. Over the years, he has counselled both foreign investors and local entities (private and government) on a number of large-scale infrastructure projects, including the Pearl, Lusail and the Qatar Integrated Railway Project.

PEDRO NICHOLSON

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Pedro Nicholson is the head of the real estate and hospitality department of Beccar Varela. He has vast experience in real estate, hospitality, tourism, mergers and acquisitions, and corporate finance. He has advised local and foreign clients in all sorts of local and international deals.

Pedro has lectured in conferences in Argentina and abroad. He was awarded the title Real Estate Lawyer of the Year 2017 by Best Lawyers and has been recognised by Chambers Latin America, The Legal 500, Latin Lawyer 250, LACCA Approved and Practical Law Company publications from 2008 to date.

He is co-chair of the Real Estate Committee of the American Chamber of Commerce in Buenos Aires, a member of the Executive Committee at the Housing Entrepreneurs Association, an officer of the Real Estate Committee at the International Bar Association, an officer of the Latin American Law Committee of the International Council of Shopping Centers, and a former president of the Alumni Association of the Real Estate Business Centre of the University of San Andrés. Pedro obtained postgraduate degrees in real estate transactions (2006) and hotel investments (2009) from the University of San Andrés (2006), an LLM from the University of Illinois at Urbana-Champaign (1993) and worked as a foreign associate at Hogan & Hartson, Washington, DC (1995).

FRANCIS NORDMANN

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Francis Nordmann was educated at the University of Zurich and Basle University (lic oec publ 1993, lic iur 1995, Dr iur 1996) and at the University of Melbourne (LLM 1999).

He gained work experience as a clerk at Basle Civil Court, as a trainee in a Basle law firm and as an associate in law firms in Zurich and London. He advises institutional and private investors and owners of real estate in all aspects of real estate law, including real estate financing. Another focus of his practice is legal advice relating to financial services and all types of national and international corporate finance (including structured finance) and capital markets transactions. Mr Nordmann joined Walder Wyss Ltd in 2001 and became a partner in 2007. Mr Nordmann is recognised as a leading real estate practitioner by Chambers and Partners and Practical Law Company, and is a member of the Royal Institute of Chartered Surveyors.
CARLOS ALFONSO T OCAMPO
Ocampo Manalo Valdez & Lim

Carlos Alfonso T Ocampo is the founding partner of Ocampo & Manalo. He currently handles the firm’s commercial law practice with an emphasis on infrastructure, public-private partnerships, energy and transportation law. He likewise supervises the conduct of due diligence audits and advises in mergers and acquisitions. In 2014, AsiaLaw named him as a market leading lawyer in the Philippines primarily for his contributions in commercial law. In June 2018, the Asia Business Law Journal recognised him as one of the top 100 lawyers in the Philippines.

He obtained his bachelor of arts degree in economics (cum laude) and his bachelor of laws from the University of the Philippines. In 1997, he completed an executive management programme at the Asian Institute of Management. He was also awarded certificates from the Executive Education programme of the John F Kennedy School of Government at Harvard University for completion of the Mastering Negotiation and Infrastructure in a Market Economy programmes, in April 2016 and July 2017, respectively.

Mr Ocampo is a director of various private corporations and an independent director of two publicly listed companies in the Philippines. He is also a visiting lecturer in law at the Lanzhou University School of Law.

ROBERT S PECKAR
Peckar & Abramson PC

Robert S Peckar is a founding partner of Peckar & Abramson PC, one of the largest and leading construction law firms, with 10 offices in the United States and affiliated offices in the United Kingdom, China, India, Mexico, Brazil and Peru. He has been a leading construction practitioner for 48 years. He has been integrally involved as a legal adviser and advocate for major contractors and projects throughout the world. He is highly respected for his unique ability to guide project participants through troubled projects and difficult relationships to solutions that do not require formal dispute resolution, while having major success as a litigator of construction disputes when efforts to avoid formal dispute resolution are not successful. In addition to providing project specific advice, Mr Peckar’s practice has focused in recent years on counselling both international and US contractors in the formation of joint enterprises, including consortiums and other collaborations in the United States and abroad, and guiding construction companies in the formation, implementation and oversight of corporate integrity programmes that comply with domestic and international requirements.

Mr Peckar is a fellow of the American College of Construction Lawyers and a member of industry and professional associations, including serving as general counsel of several US associations and as a legal adviser to others. He is an author and a frequent lecturer.
ANDREW PENDLETON
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Andrew Pendleton is a senior associate in the project, energy and infrastructure finance group based in the Tokyo office of Milbank LLP. He has experience in advising lenders and sponsors on a variety of international project financings. His sector and regional representations include petrochemicals, oil and gas, natural resources, power, satellites and other infrastructure projects in Asia, Europe, the Middle East and Africa. Andrew has also contributed to various legal publications. He is a co-author of the Oxford University Press guide *International Project Finance: Law and Practice*. Andrew is ranked by *Chambers* as a ‘rising star’ of project finance.

MELINDA PETERS
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Melinda Peters is a tax and duty lawyer who specialises in providing tax advice to listed and privately held corporate groups. Melinda acts for multinational corporations with Australian resource interests, ASX-listed companies, widely held investment funds, a number of Australian start-ups and privately owned groups. In addition to providing transaction structuring and tax opinions, Melinda provides tailored and commercial structuring advice in relation to restructure arrangements, with a particular focus on achieving effective taxation outcomes. She is experienced in obtaining rulings from the Australian Taxation Office, confirming taxation outcomes of public and private transactions, and regularly acts for clients in taxation objections and disputes on a range of matters.

FEDERICO PIANO
Guyer & Regules

Federico Piano is a senior associate at Guyer & Regules. He works in the corporate and banking department, with a focus on project finance, infrastructure projects (PPP) and capital markets. Federico regularly assists underwriters in international issuances of public debt by the Uruguayan government. He also acts as counsel for HSBC in its day-to-day operations in Uruguay.

In 2012, he was awarded the Alberto Lasheras-Shine scholarship, which is granted by the International Bar Association. Federico obtained his juris doctor from the University of Montevideo. He completed a master's course in corporate law at the University of Montevideo and a foreign exchange student programme at the University of Minnesota Law School in 2006. Between 2014 and 2016, he worked as a foreign associate at Shearman & Sterling in New York, focusing his practice on project finance and capital markets.

MAKOTO (MACK) SAITO
Nagashima Ohno & Tsunematsu

Makoto (Mack) Saito is a partner at Nagashima Ohno & Tsunematsu (NO&T). He has represented domestic and international energy companies in solar, wind and various other renewable energy project finance transactions. He started his practice in 2000 and has vast experience in project finance, real estate finance and other types of structured finance. Since the feed-in tariffs system was first introduced in Japan in 2012, Mr Saito and other NO&T infrastructure practice team members have dynamically taken the lead role in creating...
new project finance structures designed for renewable energy projects using their extensive knowledge of energy regulations, real estate regulations, securities regulations and corporate laws. He also regularly advises engineering, procurement and construction contractors, financial institutions and trading companies in energy and infrastructure areas.

He earned an LLB from the University of Tokyo in 1999 and an LLM from University of Michigan Law School in 2006.

HENRY SCOTT
Milbank LLP

Henry Scott is a partner in Milbank’s global project finance group in the Los Angeles office. Mr Scott’s experience includes project finance, asset-based financing and general corporate work. He has experience in representing both financing parties and sponsors in debt and equity financing transactions involving wind, solar and geothermal generation projects, coal gasification facilities and onshore LNG terminals, as well as rail and road PPP infrastructure projects. He regularly advises buyers and sellers in the acquisition, workout and disposition of energy and infrastructure assets.

DENIS SERKIN
Peckar & Abramson PC

Denis Serkin is a partner in the construction law practice at Peckar & Abramson PC. Mr Serkin represents construction managers, developers, general contractors, speciality contractors, owners and subcontractors in contentious and non-contentious dispute resolution. He regularly provides project support to clients in many market segments, including construction management, general and EPC contracting, real estate development, power and energy, and infrastructure. A large part of Mr Serkin’s practice is devoted to implementation and oversight of corporate integrity programmes that comply with domestic and international requirements. In addition, Mr Serkin advises clients in the drafting and negotiation of various levels of construction agreements. Prior to entering the legal profession, Mr Serkin worked as a project engineer.

YAKUB SHARIPOV
Dentons Tashkent

Yakub Sharipov is an associate at Dentons’ Tashkent office. He is part of the firm’s growing construction and dispute resolution practice. Yakub regularly advises clients on litigation and international commercial arbitration matters, including enforcement of foreign arbitral awards in Uzbekistan. Further, Mr Sharipov advises clients on construction contracts based on FIDIC, ENAA and JICA forms. He recently advised a major international construction company in relation to extension of time and an additional costs claim and dispute adjudication under a FIDIC contract.

Yakub is a graduate of the University of World Economy and Diplomacy in Tashkent and Queen Mary University of London.
BEATRIZ SPIESS
Guyer & Regules
Beatriz Spiess is a partner at Guyer & Regules. A notary public, she joined the firm in 2004 and specialises in structuring and financing of urban and rural real estate investments, assisting developers at all stages of their projects, the purchase, sale and lease of real estate properties for housing or commercial purposes and advising on the development of agribusinesses. Beatriz is part of the regulatory and environmental practice group and participates in due diligence processes, regulatory analysis and advice on compliance with permits and authorisations in various industries, energy projects and infrastructure projects. She has advised both sponsors and lenders in the purchase, sale and project financing of renewable energy projects, mainly photovoltaic and wind. She has advised oil and gas companies carrying exploration activities onshore and offshore within the Ronda Uruguay bids, in regulatory matters and easements. She has experience in mining, having advised national and international clients on mining easement processes, due diligence, lease and mortgages of mining permits and she completed the graduate course on mining law at the University of Uruguay in 2007.

As a professor, Beatriz delivers courses for the notarial graduate programme at the University of Montevideo on rural real estate, regulatory matters and mining and has delivered graduate courses on renewable energy at the Catholic University of Uruguay. She has been recognised for her experience in her area of practice by the international publications The Legal 500 Latin America and Chambers Latin America. Beatriz is also a certified English public translator, having graduated from the Law School of the University of the Republic (2001).

CARLOS UMAÑA
Brigard & Urrutia
Carlos Umaña, managing partner of the firm, holds a law degree from Del Rosario University (1983) and a master’s degree in comparative jurisprudence from the New York University School of Law (1985). He advises national and international clients on matters relating to public services law, administrative law, free competition, commercial law and insurance.

Mr Umaña has been a partner at Brigard & Urrutia since 1990 and has more than 25 years of experience. He has advised national and international clients such as Siemens, Johnson & Johnson, 3M, Iberia, Votorantim, Endesa SA (Spain), LAN Chile and Monsanto, among many others, in connection with public services law, administrative law, energy projects, commercial law and insurance.

RONY VERMEERSCH
Stibbe
Rony Vermeersch is an internationally recognised construction and real estate lawyer, working across the construction and real estate industries. His practice is a mixture of contentious and non-contentious construction, projects and dispute resolution work.

He is well versed in the leading forms of contracts used domestically and internationally, including the forms published by FIDIC. Rony also advises on innovative ways of successfully bidding for and closing PPP and PFI project delivery. Rony has experience in all types of projects, including airports, ports, road and rail projects, power generation, waste facilities, warehousing and accommodation.
EVA VICIC
McCullough Robertson

Eva Vicic is a real estate partner with more than 10 years’ experience in providing advice and guidance on major real estate transactions across Australia. Her expertise spans all stages of the development lifecycle, including acquisition and structuring through to disposal of assets, developments for commercial, industrial, mixed use and residential projects, strata and community title and complex leasing (commercial, industrial and retail). She has a diverse client base acting for local and overseas developers, institutions, corporate real estate clients and high net worth individuals.

CAROLINA WALther-MEADE
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Carolina Walther-Meade is a member of Milbank’s global project finance group and the firm’s Latin America practice group in the New York office. A partner since 2007, Ms Walther-Meade has extensive experience in cross-border financings and international project finance and development, with an emphasis on infrastructure, mining and energy projects throughout Latin America. She has also been involved in numerous acquisition financings and structured financings in the region. Her practice includes representation of commercial bank syndicates, multilateral and export credit agencies and other lenders, as well as corporate developers and industrial groups. She spent one-and-a-half years with Milbank based in Brazil and continues to spend a significant amount of time in Milbank’s São Paulo office.

Ms Walther-Meade is consistently recognised as a leading project finance lawyer by Chambers Latin America. She grew up in Mexico and speaks Spanish and Portuguese fluently. She is an advisory board member of the Women in Law Empowerment Forum.

STEPHEn WHITE
McCullough Robertson

Stephen White is an insurance and corporate risk lawyer with more than 15 years’ experience of practice in contentious and non-contentious insurance-related matters. He has managed significant claims for insurers and insureds in a number of policy classes, including general liability, product liability, professional indemnity, industrial special risk and personal lines. He advises on policy reviews, interpretation and drafting, and insured client insurance programmes. He also assists with the design and review of contractual and insurance solutions for construction, property and resources projects.

MITCH WINDSOR
Stibbe

Mitch Windsor is an associate in Stibbe’s projects team. Mitch is qualified as a solicitor in England and Wales, and is also admitted to the Brussels Bar. He practised in the United Kingdom, focusing on major energy and infrastructure projects from 2014, before moving to Brussels in early 2017 to join Stibbe. Mitch advises on the procurement of construction and engineering work, as well as whole-life support services required for large projects (security, facilities management and transport). Mitch advises on common international standard forms of contract (in particular the FIDIC and NEC suites) and on PPP projects.
KAREN WONG  
Milbank LLP

Karen Wong has been a partner in Milbank’s global project finance group since 1996 and is resident in the Los Angeles office. Ms Wong has represented sponsors and financing parties in connection with the development, acquisition, financing and restructuring of power, petrochemical and other infrastructure facilities in Asia and North America. In the past few years, she has focused her practice on the renewable energy sector and has represented a number of financing parties in debt and tax equity financings, M&A transactions and leveraged lease and single-investor lease transactions involving wind, solar, hydro and biomass projects, as well as representing the project sponsors of several coal and petroleum coke gasification projects in the United States.

In 2018, Euromoney Legal Media Group named Ms Wong as Best in Energy, Natural Resources and Mining and she was selected as one of the Daily Journal’s top 25 clean-tech lawyers in California and featured as one of the state’s top 75 women lawyers. She is listed as a leading project finance lawyer in IFLR1000, Chambers USA and Chambers Global for projects and Who’s Who Legal, and was recommended in PLC Which lawyer? for banking and finance.
Appendix 2

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