Project Finance Report **2017**

Featuring contributions from

Africa Finance Corporation
Asian Development Bank
Atsumi & Sakai
Henriques Rocha & Associados
Hermawan Juniarto
Inter-American Investment Corporation
Khan Corporate Law
Latham & Watkins
MHM Yangon
Mitsubishi UFJ Financial Group
VELMA Law
Zhong Lun Law Firm

Lead contributors

LATHAM & WATKINS LLP

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SURVEY PARTICIPANTS

BOTSWANA

KHAN CORPORATE LAW
RESULTS DRIVEN

CHINA

中倫律师事务所
ZHONG LUN LAW FIRM

INDONESIA

HERMAWAN JUNIARTO

JAPAN

渥美坂井法律事務所・外国法共同事業
Atsumi & Sakai

MOZAMBIQUE

MYANMAR

MHM YANGON

RUSSIA

LATHAM & WATKINS LLP

SAUDI ARABIA

LATHAM & WATKINS LLP

TANZANIA

VELMA LAW

US

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ADB

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4 & 8 Bouverie Street, London EC4Y 8AX
e-mail: [initial][surname]@euromoneyplc.com
Customer service: +44 20 7779 8610

EDITORIAL
Commercial projects editor: James Wilson
james.wilson@legalmediagroup.com
+ 44 (0) 20 7779 8079

Managing editor: Tom Young
tom.young@legalmediagroup.com
+44 207 779 8596

Editor: Amélie Labbé
amelie.labbe@euromoneyplc.com
+44 207 779 8381

Americas editor: Edward Price
edward.price@iflr.com
+1 212 224 3402

EMEA editor: Lizzie Meager
elizabeth.meager@legalmediagroup.com
+44 207 779 8030

Staff writer: Brian Yap
brian.yap@iflrasia.com
+852 2842 6915

Managing director: Tim Wakefield
Head of sales: Richard Valmarana
Production editor: Richard Oliver
Sub editor: Gemma Grocott

ADVERTISING
Associate publisher: Americas
Roberto Miranda
rmiranda@legalmediagroup.com
+1 212 224 3494
Associate publisher: Asia Pacific
William Lo
william.lo@iflrasia.com
+852 2842 6970
Business development: Europe, Middle East & North Africa
Liam Sharkey
lsharkey@iflr.com
+44 207 779 8384
Business development: Africa (excluding North Africa)
Esra Ermis
esra.ermis@euromoneyasia.com
+852 2842 6966

SUBSCRIPTIONS AND CUSTOMER SERVICES
UK/Asia hotline tel: +44 20 7779 8999 Fax: +44 20 7246 5200
US hotline tel: +1 212 224 3570 Fax: +1 212 224 3671
hotline@euromoney.com
Customer service: +44 20 7779 8610
CEO, Legal Media Group: Matthias Paul

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A global view

Craig Nethercott, **John-Patrick Sweny** and **Kelsey Emms** of **Latham & Watkins** assess the forces acting on global project finance over the past 12 months

Uncertainty surrounding macro-political events have dominated news headlines throughout 2016, including the UK referendum on whether to leave the European Union and the US presidential elections. These events have exacerbated the tentativeness of a project finance market that already was suffering in many parts of the world due to prolonged lower commodity prices, slow economic growth, ongoing sanctions in formerly active markets and increasingly stringent capital requirements placed on commercial banks.

These factors appear to have resulted in an overall decline in investor appetite for large-scale projects in 2016, particularly those relying on the market price of commodities to support investor returns. A number of analysts have observed that fewer and less valuable projects were reaching financial close in 2016 compared with levels seen in recent years (which were themselves low when compared to the levels seen in the lead up to the 2008 financial crisis). The second quarter of 2016, which typically is the busiest quarter of the year, saw the lowest number of project finance transactions closed in any Q2 since 2009. In addition, a number of projects are looking to alternate funding sources or hybrid structures to meet capital costs.

2016 has been a record year for sovereign downgrades. At the time of writing, Fitch Ratings had downgraded 16 countries, S&P had downgraded 21 countries and Moody's a total of 25. Countries downgraded by some or all major credit rating agencies so far this year include Kazakhstan, Mozambique and the United Kingdom. Although different events and circumstances impact on different countries, the three major rating agencies have attributed recent downgrades largely to lower commodity prices (in particular falling oil prices) and a stronger US dollar. This has created further pressure on countries that are oil exporters and reliant on buoyant oil prices, including Russia, Nigeria and Angola.

> **2016 has been a record year for sovereign downgrades**

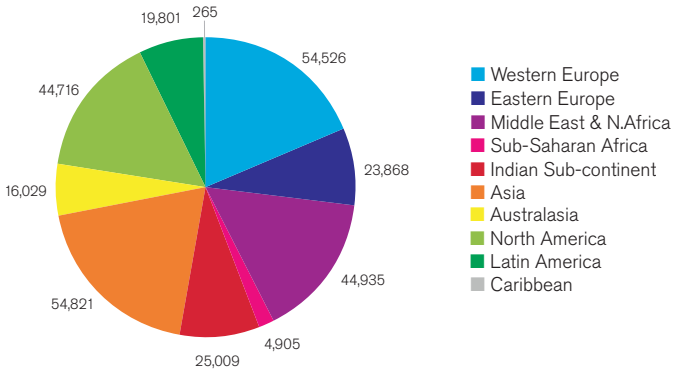
A number of oil & gas companies have divested assets and cut back their exploration activities in 2016 due to the low oil and gas prices, and the market has seen some consolidation amongst the key players with some notable mergers. However, despite the challenges faced by the oil & gas sector, renewable energy and infrastructure projects have enjoyed a strong year globally with a number of projects going out for tender or reaching financial close in 2016.

A change in the wind

The markets have continued to show signs of shifting from traditional fossil fuels to cleaner energy, particularly renewable solar, wind and geothermal power. Technological advances, increased efficiencies and lower costs in a number of renewable sectors have enabled a continued uptick in the number of renewable energy projects that are being undertaken and the spread of such projects into new regions. More countries across Latin America, Asia, the Middle East and Africa have undertaken renewable energy projects in 2016, in addition to more established markets in North America and Europe. The ratification of the Paris Agreement, which came into effect on November 4 2016, has been hailed as a key milestone towards securing a further step-change in the levels of investment in renewable energy project financing. International initiatives such as the Terrawatt Initiative, which is seeking to reduce the cost of developing solar projects around the world, including through the standardisation of project finance documentation, point to an increased willingness by industry participants to embrace change.

A number of countries have seen large increases to their renewable energy commitments. South Africa, Mexico and Chile all have seen several billion dollars of investments committed to solar and wind projects to bulk-up their clean power sources. In South Africa, alongside the launch by the government of a tender for an additional 1.8GW renewables programme, investment in renewables project reached $4.5 billion, showing a marked rise from the $1 billion in 2014, including the estimated $756 million 100MW Redstone solar thermal project, which received significant backing from multilateral agencies.

Global project finance by region 2016 YTD (1 Jan - 30 Nov)



Key: Amount ($m)
Source: Dealogic

Under President Obama's tenure, over two thirds of the projects undertaken in the US by the end of 2015 were solar and onshore wind projects. Although the future direction of US energy policy under a new administration is yet to be confirmed, the market should soon have a clearer indication as to how US energy policy will affect investment in projects, including in the renewables sector, over the next few years.

Against the backdrop of a continued increase in renewable energy project financing, mining continues to struggle as a sector globally, with depressed commodity prices combining with a shifting regulatory burden to limit the opportunities for project financing in this sector.

The bond is back

Project bonds recently have enjoyed a renaissance in 2016, particularly in Asia. The Asian Development Bank launched an initiative to support credit-enhancing project (CEP) bonds (both in US dollars and local Asian currencies) for the funding of infrastructure, including power, projects among its 48 member countries in Asia, seeking to mitigate commercial and political risks. For example, the Tiwi-MakBan geothermal power plant complexes in the Philippines successfully utilised the CEP guarantee to support the dominant tranche of green project bond debt for the $252 million project. Also in Asia, China continued to see a rapid growth in green bond issuance, a development that promises to attract additional sources of liquidity to the renewable project sector, providing access to a diverse investor group, such as asset managers, insurance and pension funds.

In addition, largest renewables bond issuance by value took place this year, to refinance the debt of the Meerwind project, an offshore wind farm in the German North Sea. The refinancing represents the largest ever European project bond issuance, totalling €978 million. The benefit of tested technology and a history of reliable wind conditions was said to have assisted the success of the sponsors in raising financing through a structure that requires stable projected cash-flows.

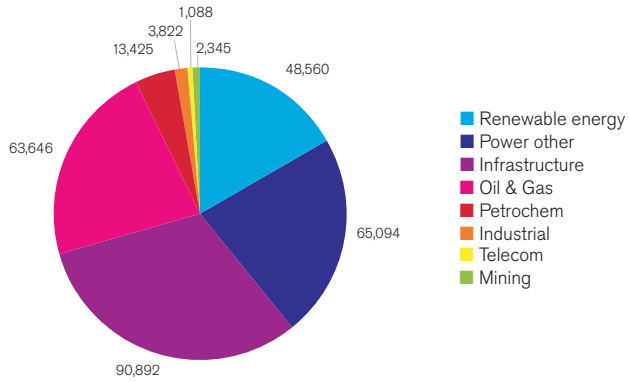
Gas sector project financing continues to evolve

2016 saw the steep decline of LNG prices on the Asian spot market, which further encouraged downward price pressure on the long-term LNG sale and purchase agreements that have underpinned project financing of liquefaction facilities to date. When added to the slowdown of energy demand growth in certain key markets, including China, and the continued oversupply in the market as new projects come on-line, the financial investment decisions with respect to a number of liquefaction projects particularly in the US, Canada and Australia (where project costs are comparatively high) have been suspended or cancelled. This in turn has put pressure on the LNG shipping sector, with shipyards having to become increasingly price-competitive in the over-supplied shipping market in their need to secure future orders and cash flow. In addition, EPC contractors have been required to revisit their cost bases, as projects need to cut costs to stay viable. Against this backdrop, Yamal LNG announced that it successfully raised the required financing for its three-train LNG project in northern Russia, despite the continued application of US sanctions, relying predominantly on debt from Russian and Chinese banks to date. A number of other LNG projects, including traditional onshore projects and an increasing number of offshore floating LNG (FLNG) projects currently are seeking project financing. While the smaller-scale FLNG projects provide an entry opportunity for new participants as the market evolves, the technology does not yet benefit from the strong track-record of operations that onshore plants now enjoy, making project financing more challenging.

While lower gas prices have made it harder for LNG liquefaction projects to be developed and financed on viable terms, a number of new LNG import terminal projects are being planned or are underway in Latin America and the Caribbean, previously under-utilised markets for LNG suppliers, to take advantage of the close proximity to the US market and its abundant supply of gas. Cheaper gas has made gas-fuelled power projects a more competitive source of power in comparison to coal or other fuel sources. This has encouraged a wave of new LNG-to-power project initiatives around the world designed to use regasified LNG to supply plants generating power in a number of jurisdictions across South America, Africa, the Middle East and Asia, with a number of government-led tenders for such projects, including in South Africa.

The Omani Ibri and Sohar 3 combined-cycle natural gas-to-power and desalination projects in Oman reached financial close in June 2016, as the largest tendered independent power producer (IPP) with the largest IPP debt transaction in Oman. Producing 1,509MW and 1,710MW respectively, the Oman Power & Water Procurement Company is the sole offtaker for both projects; however, the projects are separate contracts and financings. Both projects were funded with a debt component exclusively comprised of commercial bank debt without any export credit agency involvement, unlike other similar recent projects.

Global sector breakdown 2016 YTD (1 Jan - 30 Nov)



Key: Amount ($m)
Source: Dealogic

In addition, the US, now a key producer of natural gas, is one of the countries undertaking increased numbers of gas-fired power plant projects domestically to use the surplus of LNG in the market. Market analysist speculate that natural gas will be a key player in generating electricity in the US in the coming decades, as coal-fired power plants are replaced with gas-fired plants.

Around the market

The UK saw the approval of several large-scale infrastructure projects under a new administration. Hinkley Point C, the nuclear power station in Somerset, England, was given government approval in September 2016. The power station will deliver seven percent of the UK's electricity when completed in 2025 and doing so with low-carbon emissions, contributing to

[LNG] EPC contractors have been required to revisit their cost bases, as projects need to cut costs to stay viable

the UK's climate change goals. The 50 year battle over building a third runway at the UK's busiest airport, Heathrow, was brought closer to conclusion in October 2016 with the government sanctioning the £17.6 billion expansion, anticipated to be completed by 2026. Other large-scale UK projects include the HS2 project, the high-speed rail network planned to connect London to Birmingham in phase 1 and then from Birmingham to Manchester and Leeds in phase 2. Phase 1, expected to cost £56 billion, is scheduled to open in December 2026.

Elsewhere, the presidents of Mexico and Indonesia have continued to push infrastructure projects forward, including the plans for a new international airport in Mexico City and the next phase of the Trans-Sumatran highway. The US has seen increased activity over the last couple of years in large-scale infrastructure projects. The $815 million public-private partnership (PPP) for the Texas State Highway SH 288 Toll Lanes project in Houston closed in May this year, notable for being the first US toll or managed lane project where the procuring authority received a concession payment.

In conclusion, despite continued difficult times for those governments and investors that rely on commodity prices to raise project financing, many sectors that utilise project finance saw growth and in some cases were able to take advantage of the low prices to launch viable projects. Whilst macro-political uncertainties continue into 2017, the hope remains that 2017 will bring growth and stability across all sectors of the project finance world. We hope that you enjoy this year's selection of country chapters, and that the insight they provide is of use to you.

Craig Nethercott
Partner, Latham & Watkins

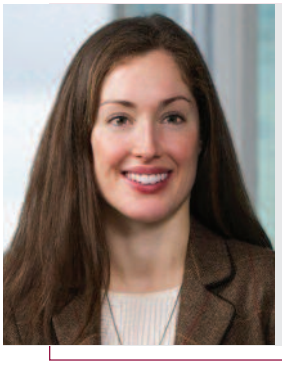
London, UK
T: +44 20 7710 1118
E: craig.nethercott@lw.com
W: www.lw.com

About the author
Craig Nethercott is a partner in the Finance Group at Latham and is Chair of the Middle East Practice. Nethercott specialises in project finance and development, bank finance and Islamic finance in the energy, natural resources and infrastructure sectors. He has advised sovereigns, corporates and financial institutions in transactions in Europe, the Middle East, Africa and Asia.

John-Patrick Sweny
Counsel, Latham & Watkins

London, UK
T: +44 20 7710 1870
E: john-patrick.sweny@lw.com
W: www.lw.com

About the author
JP Sweny is a counsel in the London office. He represents sponsors, corporates, export credit agencies, commercial banks and private equity investors on a wide range of project finance and structured finance transactions, particularly in the energy sector.



Kelsey Emms
Associate, Latham & Watkins

London, UK
T: +44 20 7710 1115
E: kelsey.emms@lw.com
W: www.lw.com

About the author
Kelsey Emms is an associate in the Finance Department of Latham & Watkins and is a member of the Project Finance Practice Group.

Emms has experience across many areas of finance law, including leveraged finance, refinance and project finance. She has particular experience in relation to large-scale, multi-sourced energy and petrochemical project financings.

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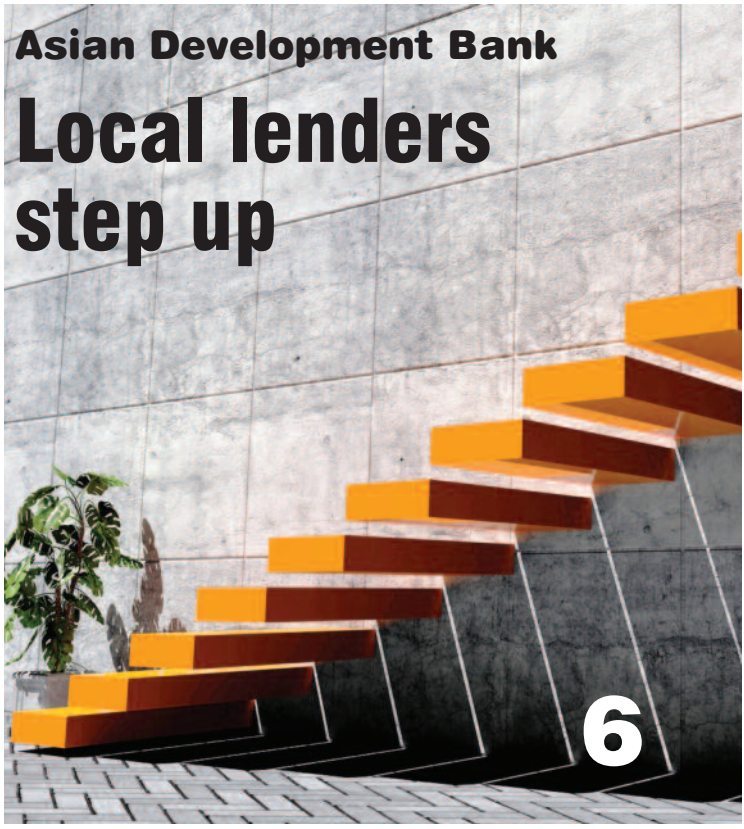

Country reports

Local lenders step up

Ryuichi Kaga, head of the **Asian Development Bank**'s Office of Public-Private Partnerships, analyses the environment for PPP projects across Asia and the growth of domestic players

Ryuichi Kaga heads the ADB's Office of PPP (OPPP) and manages its efforts to develop and advance PPP projects across the entire Asia region. The office was set up in September 2014 with this express purpose and since its establishment it has signed MoUs with several leading global commercial banks, launched a fund backed by Japan, Canada and Australia and evolved to target early-stage development. Kaga identifies the lack of well-structured PPP projects as a key hurdle but points out that since the Lehman Brothers crash in 2008 domestic financiers and sponsors have increasingly stepped up to the plate. Kaga sees these local players as the potential future drivers of the sector.

What are the biggest challenges in establishing successful PPP projects across Asia?

The biggest challenge is a lack of well-structured PPP projects that are viable and bankable. In the past few years many of the Asian Development Bank's developing member countries (DMCs) have become aware of the PPP concept and launched PPP policies and regulatory or institutional frameworks. However, their implementation capacity is still at a developing stage, especially in line ministries and local governments. The DMCs are facing lack of implementation capacity, for example in screening, selecting, prioritising and structuring individual PPP projects, as well as weak capacity to coordinate various PPP stakeholders, including line ministries, local governments and the private sector.

> It is very important to have strong PPP focal points so central governments can facilitate coordination

This enhanced implementation capacity is essential to allow countries to structure PPP projects that have the appropriate risk-sharing between public and private sector parties. This requires multilateral development banks to provide hands-on advice or funds to help governments recruit advisors, consultants and lawyers with PPP expertise based on international best practices and transfer knowledge to those countries.

What have been some of the key projects that the OPPP has helped launch?

The OPPP was established in September 2014 to help DMCs structure viable and bankable PPP projects. It has been expanding its transaction advisory services (TAS) to provide hands-on advice to PPP stakeholders and to date it has obtained advisory mandates for the following four projects: in 2015 there was the North-South Railway South Line Project, the largest PPP project in the Philippines amounting to $3.8 billion. In 2016 we had the Colombo Port East Container Terminal Project in Sri Lanka, the Rampura-Amulia-Demra Road Project in Bangladesh and the Melaka Energy Efficiency Project in Malaysia. Even in upper middle income countries such as Malaysia, the ADB can provide PPP support through its TAS.

The unique feature of our TAS is that we provide co-advisory services with other financial institutions such as international project finance banks or local financial institutions. In 2015, the ADB signed a co-advisory MOU with eight international banks: Bank of Tokyo-Mitsubishi UFJ, BNP Paribas, Credit Agricole CIB, HSBC, Mizuho Bank, Macquarie Capital, Société Générale and Sumitomo Mitsui Banking Corporation. The goal of this is to create business opportunities rather than distort the market and crowd out crucial private sector players. The ADB also inked another MOU with PT Sarana Multi Infrastruktur (PT SMI) in Indonesia that year as a local partner.

> **In recent years there has been good progress on PPP framework development in Asian countries**

In addition to advisory services, in January we launched the Asia Pacific Project Preparation Facility (AP3F), a $73 million trust fund, to meet the funding requirements of DMCs for PPP capacity building, project structuring and project monitoring and or restructuring. The donors are Australia, Canada, and Japan. In September the AP3F approved its first two transactions for the Energy Efficiency Project in Kazakhstan and the Tibar Bay Port Project in Timor-Leste.

The OPPP has provided transaction advisory services to public sector players in the past few years and it is expanding its services to private project sponsors or concessionaires. This new approach was announced at the ADB's Annual Meeting in Frankfurt in May. We also have some deal flows with project sponsors in Korea, Japan and France and through this new approach the OPPP would like to encourage innovative proposals from the private sector with new business models which the public sector is less familiar with.

How has the arrival of the OPPP changed the way the ADB engages in projects?

The OPPP's activities such as TAS and the AP3F enable the ADB to be involved in individual PPP projects from the very early stage, even during the conceptual stage before feasibility studies are conducted. Our early involvement allows viable and bankable PPP projects to be structured based on international best practice. We can be proactive in structuring PPP projects as a kind of joint developer with project sponsors and we are no longer just waiting for projects to be presented with a bankable security package structure by other parties.

What types of project in Asia have been most successful with the PPP model?

The successful PPP models are mostly for projects with availability payment schemes, which ensure stable cash-flows for project sponsors. Political and market risks are mitigated through the PPP modality. Availability payment schemes are sector-oriented rather than country-oriented. Across the region the scheme is already common in power generation projects. However, in some countries like the Philippines, availability payment is no longer applicable to power generation because the government unbundled the power sector and promotes merchant power now. Other countries seem to be taking more time to enter this phase of market liberalisation. Independent power producer (IPP) project history shows that availability payment has contributed to attracting private sector participants through its risk mitigation measures and there are many successful IPP projects with availability payment scheme.

Therefore, this approach could be useful in other sectors too as one of attractive PPP modalities for private sector players. There are some similar approaches in the water sector. Private sector players are keen to venture into other sectors such as transport because one of the biggest challenges to private sector partnerships in the transport sector is traffic demand (ridership) risk. The availability payment scheme covers such a risk.

Have there been any important recent developments in PPP frameworks that project financiers, developers or sponsors should know about?

In recent years there has been good progress on PPP framework development in Asian countries such as the People's Republic of China (PRC), Thailand, Vietnam and Bangladesh. The PRC created a PPP Centre in the Ministry of Finance; Thailand enhanced its PPP capacity of State Enterprise Policy Office; and Bangladesh strengthened the operations of its PPP Office by transforming it into the PPP Authority. It is very important to have strong PPP focal points so central governments can facilitate coordination with line ministries, local governments and the private sector, as well as for selection and due diligence of individual PPP projects. On the regulatory/policy side, Vietnam launched its new PPP Decree (Decree 15) and Bangladesh enacted its PPP Law. These regulations have contributed to improved transparency, fairness and predictability of government actions on PPPs.

How difficult it is to marry the bank's development goals with the commercial aims of private parties?

The ADB's support for private capital mobilisation for infrastructure projects is a core ADB operation to achieve the region's development goals. We are structuring PPP projects to make them viable and bankable to mobilise private capital flows. This means our operations are in line with private parties' aims to find such projects.

The ADB identifies the national infrastructure needs in Asia at $750 billion of investment a year, how much have the OPPP strategies helped to meet that target?

It is premature to evaluate the impact of the ADB's PPP operations on addressing the demand for infrastructure financing in Asia as we are still in the middle of expanding our PPP support to the public and private sectors in our DMCs. Countries with big PPP markets such as India and Indonesia have set some targets in their national development plans to mobilise private capital flows for infrastructure development. We are committed to supporting our DMCs to achieve such targets in a comprehensive manner through capacity building, the establishment of PPP frameworks, and structuring and financing of projects.

Has the private sector responded positively to the call for PPP projects throughout Asia?

It varies from country to country. Those with relatively advanced PPP frameworks or policies, including India and the Philippines, and those that are in the process of developing their PPP frameworks or policies, such as Indonesia, Vietnam, Thailand, and Bangladesh, could attract private parties more easily than other countries. These PPP frameworks or policies ensure and demonstrate the government's commitment to PPPs, transparent and fair process, as well as predictability of the government's actions. Those are key issues for private parties as the big challenges for them are political risks in the host country.

What key trends have you seen recently in project financing and what do you hope 2017 will bring?

Since the Lehman crisis in 2008, local sponsors and financial institutions have demonstrated a big presence in PPPs given relatively liquid financial markets with money inflows from advanced nations, such as the US looking for investment opportunities. This trend may gradually change due to future Federal Reserve Bank monetary policy tightening. However, in the long-term the presence of local sponsors and financial institutions is expected to be bigger. They have accumulated experience and expertise on PPPs in local markets and have become active outside their home countries now too.

Local sponsors and financial institutions have demonstrated a big presence in PPPs given relatively liquid financial markets

Cross-border investments and infrastructure finance are also increasing in the Asian region. This trend is expected to continue in 2017 and onwards. Projects sponsors and financial institutions in advanced nations will face strong competition from newcomers in Asia which have much bigger project risk appetites than players from Europe, the US and Japan.

What dynamics are unfolding that will encourage a greater role for local entities in PPP projects?

Generally, local sponsors and lenders are more tolerant of potential political risks caused by their government and local currency fluctuation risks than foreign players. In the past they did not have adequate expertise due to their limited experience on PPP projects and heavy dependence on foreign partners from advanced countries. In recent years, however, and especially after the Lehman Brothers crisis, they rapidly accumulated PPP expertise by taking on a leading role in dealing more with their domestic liquidity markets and less with foreign competitors, which were not so active in the region due to the crisis in their home markets.

Foreign players are more cautious about the two risks stated above. They will transfer those risks to the government or alternatively raise tariffs on their services or the risk premium of lending to absorb the risks. This means foreign players are less competitive to get a concession or provide limited-recourse financing. Having said that, it is too early to mention that the economic growth in the region will be mainly driven by local players, as their corporate scale is smaller than that of advanced countries. What we can say at this point is that local players will be more competitive and gradually increase their presence with their risk advantage and accumulated experience.

Ryuichi Kaga
Head, Asian Development Bank Office of Public-Private Partnerships (OPPP)

Manilla, Philippines
T: +63 2 6324444
E: rkaga@adb.org
W: www.adb.org

About the author

Ryuichi Kaga is head of the ADB's operations for PPP and transaction advisory services (TAS) at the Office of PPP (OPPP). He is responsible for supporting developing member countries to facilitate PPP policy and regulatory/institutional frameworks in collaboration with ADB's regional departments and for structuring individual PPP projects with advisory operations.

Kaga was previously senior advisor for PPPs at the ADB's South Asia department, where he headed PPP and TAS operations in India, Bangladesh, Sri Lanka, Nepal, Bhutan and the Maldives. Since 2013 he has served as chair of PPP Community of Practice, a bank-wide committee for PPP operations. Before joining the ADB in 2012, Kaga acted as executive for Asia and Oceania at Japan Bank for International Cooperation (JBIC) and director general of the project finance department and deputy director general of the policy and planning department at JBIC's Tokyo head office. He has been engaged in project finance operations globally for over 20 years.

New path for African financing

Adesegun Akin-Olugbade, CEO of the **Africa Finance Corporation**, analyses the increasingly cross-border nature of project financing in Africa and the challenges it raises

The AFC's approach to project financing is undergoing an interesting evolution, from standard project financing into providing corporate financing to holding companies that control multiple projects, sometimes across several national borders. Here the AFC's CEO, Adesegun Akin-Olugbade, analyses the increasingly cross-border nature of project financing and the challenges that it brings navigating multiple systems. He raises a call to lawmakers to overcome the uncertainties that arise when legal systems clash in multi-jurisdictional projects and to develop robust public-private partnership (PPP) regimes. The AFC is well placed to comment, given that in its advisory role it maintains constant interaction with the region's regulators from both a financier's and investor's perspective.

How does the AFC support project development and financing throughout the African region?

In order to facilitate the development of projects in Africa, the AFC participates in various finance tranches in a transaction and deploys its financing through multiple financing instruments. The latter include project development loan facilities and equity, senior debt, mezzanine and subordinated debt and equity.

> **The difficulty of enforcing security in the event of a default is a major concern**

These approaches spread or mitigate risks and ease bankability. Project development financing assists the sponsors in developing the project to fund the required feasibility studies. The returns of the project development facility are subsequently used to subscribe for shares in the company from financial close. This structure aligns with the sponsor's interests and has been used in a hydro dam project in West Africa, a wind farm in West Africa and a thermal power plant in Southern Africa.

As for senior debt, mezzanine facilities and convertible debt instruments, in certain cases we will also provide credit cover to enable a third party financing institution to participate in the lending group and thereby achieve financial close. A recent example was in a peat power plant project in East Africa, where in order to bridge the funding gap and enable the participation of a finance institution that required insurance cover for its facility, we agreed to provide the initial insurance credit cover. The AFC cover makes it clear that cover is contingent on the coverage (indemnity) from insurers, such that any claims made under the cover would only be payable if payment has been received from the AFC's own insured coverage.

What have been the greatest pressures on project financing and development?

The key pressures on projects remain the typical issues relating to sponsors' expertise, currency unavailability or shortage, local currency convertibility issues, regulatory complexities and the environmental and social issues in a given sector. In particular, the decline in commodity prices and the global economic downturn this year have impacted on liquidity available for projects and the returns on projects. We have seen more restructurings of projects owing to the decline in commodity prices. In addition, financing institutions have less risk appetite for non-recourse project finance trans-

actions and now favour limited recourse transactions with credit enhancement from the sponsors, which makes projects potentially more costly.

How has the AFC been evolving its approach to financing projects?

We continue to lead and participate in standard standalone project finance transactions in Africa but we are also moving towards creating scalable infrastructure investment platform vehicles. These vehicles are a combination of multiple assets into one investment vehicle as a holding company. The holdco sits on top of the operating companies (the merged assets). These platform vehicles will expand our capacity to invest without diluting the shareholders, enable us to take controlling interests in projects (therefore driving faster execution), and facilitate exits and liquidity events through the participation of third-party investors as a means of attracting finance for projects. They are also expected to achieve the benefits of improved economies of scale by reducing operational costs; for example by spreading operating costs across the combined assets and optimizing technical know-how and expertise. Lessons learnt in one project would be taken into account and corrected in the next, especially where the combined projects in the investment vehicle are at various stages of development.

The vehicles create a stronger balance sheet to attract financing and are more attractive for a portfolio-wide refinancing, rather than refinancing on an asset by asset basis. We have so far participated in creating platform vehicles in the power sector, the transport sector and the industrial sector.

What challenges have you been facing in this more cross-border and cross-project approach to project financing?

The trend is for the AFC to participate in projects structured more on a wholesale corporate basis rather than as project financing. On the wholesale corporate basis, the funds are provided to the holdco for financing of its various operational assets or projects in multiple jurisdictions. In these cases, the multi-jurisdictional nature of the assets adds a different layer of complication because of exposure to different legal systems. The difficulty of enforcing security in the event of a default is also a major concern given the diverse locations of the underlying assets in several countries.

Coordinating legal opinions from multiple jurisdictions and ensuring the desired protections for the lenders is challenging. There is an increasing tendency to have a diverse financing group of banks which can provide multi-layered support to the sponsors and other financiers. For example, a lending group of international banks with presence in the local country together with multilaterals would provide a form of political risk cover to the project.

What have been the AFC's biggest achievements in 2016?

A key achievement in 2016 was successfully reaching financial close on a peat power plant in East Africa. The project has been developed by the sponsors and the AFC for the past three years and the AFC was mandated to lead, arrange and structure the financing for the project. We utilised our preferred creditor status to obtain support from the host government and our participation provided a form of political risk cover for other lenders. This project showcased the AFC's strength as a project developer.

We successfully completed a maiden Swiss Franc (CHF) bond issuance. Part of the funding strategy for 2016 was to diversify our funding and investor base into new markets at a competitive price, thereby reducing overall funding cost. The oversubscription of the maiden AFC Eurobond in 2015 served as a launching pad for the CHF Bond. On the back of this bond issuance, the AFC completed USD/CHF swap with leading hedging banks. The CHF Bond reinforced AFC credit amongst new financial investors in different markets and provided extra resources at a time of reduced financial flows to emerging markets.

The AFC participated in a $550 million financing to a thermal power plant and coal mining project in Southern Africa. The facility was provided by commercial banks, development financial institutions and the sponsors. It was structured to be repaid from electricity payments (receipts from utility charges) from designated customers into a designated escrow account, backed by a government guarantee. This financing augmented the relationship between the AFC and its member country, resulting in strong political support for the project.

In conjunction with the government of a central African country and other private sponsors, the AFC also invested in a public-private partnership (PPP) platform to develop and operate various infrastructure assets, including a mineral port, a cargo port, power plant, water and electricity distribution network and industrial plants, within a dedicated special economic zone. This transaction gave the AFC a one-stop shop opportunity to diversify its investments and indirectly take majority stakes in the investee companies without having to consolidate such assets onto its books.

How do you evaluate the current legislative and policy environment for project financing in the region?

There are not enough tailored made all-encompassing legislative and policy frameworks for project financing but rather the approach has been to have laws regulating each sector. When viewed from a project finance perspective of allocating risks, we find that there are multiple laws which potentially lead to divergent results and thus create uncertainty about the applicable law. We would like to see more consolidated PPP laws being developed. For regulators to consider that development of infrastructure projects requires huge capital financing and the assignment of assets to third party lenders as security while balancing national policy interests. Direct Agreements should be seen as a necessity rather than a sweetener for such transactions.

> **There are not enough tailored made all-encompassing legislative and policy frameworks for project financing**

In addition, given the cross-border nature of project financing, the combination of foreign law (English law, French law or New York law) and local laws may also create a conflict in terms of enforcement. Certainty of applicable local laws, expertise of the local judicial system and ease with obtaining a judgment will give more confidence to financiers in the selection and applicability of local laws.

The AFC is increasingly involved in regional projects and it has become apparent that there are no regional laws for such project financing. We are currently involved in the development of a regional power project in West Africa. The project consists of building two power plants in a Francophone country (civil law based) and an Anglophone country (Common law based), with the off-takers across several West African countries. Whilst developing this project, it became apparent that there are no regional laws to govern such a project and each country has a different legal system. The interplay of civil and common law is posing difficulties and direct dialogue with each local country is required.

Have you seen any specific legislative, policy or framework developments recently that is relevant to the project finance community?

There has been recent legislation in the oil and gas sector in West Africa and East Africa. Given the dearth of infrastructure projects in Africa and the need to ensure bankability for the projects, the AFC is partnering with leading project developers and key stakeholders in Africa to form the Africa Infrastructure Development Association (AfIDA), a non-profit initiative. AFiDA's mandate is to assist in ensuring the bankability of projects at an early stage. If done right at the project development stage, the project will attract financing enabling it to reach financial close quicker or at later stages

There are multiple laws which lead potentially to divergent results and thus create uncertainty

after the project has been de-risked. AfIDA will cut across infrastructure classes, develop template documentation relating to project development such as Joint Development Agreements, Memorandum of Understanding and Power Purchase Agreements which should serve as a guide to form industry standards. The resultant effect is to reduce the time and costs involved in negotiating project development documentation, and project development in general.

What is your outlook for 2017?

We expect to see more political will to support the realisation of projects in the infrastructure space. Political will includes, amongst other things, ease of granting licences and permits, including license renewals and consistency in the implementation of the local laws, which would facilitate the execution of projects and give financiers and investors comfort in the local legal system. Government participation in infrastructure projects exposes the gaps in the regulatory environment, and indirectly aids in developing laws to encourage project financing.

We would also like to see increased participation of non-African funds in financing projects in Africa and more industrialised platforms, for example pulling different assets together and transforming a typical project finance structure to a corporate structure. This will enable easier exits from such assets.

Lastly, we would like to see the development of new financing instruments to enable active participation of African financiers in providing finance for projects. For example, mechanisms which encourage participation by pension funds and provide longer tenors and credit enhancements. These instruments would foster a deeper relationship between the international financiers and the African financing institutions, thereby improving liquidity available for projects.

Adesegun Akin-Olugbade
General counsel, Africa Finance Corporation

Lagos, Nigeria
T: +234 70340 61576
E: Adesegun.akin-olugbade@africafc.org
W: www.africafc.org

About the author

Adesegun Akin-Olugbade is an executive director and chief operating officer of the Africa Finance Corporation (AFC). He is also the general counsel and corporate secretary of the AFC. His oversight functions include corporate governance, legal, IT, administration, corporate communications, procurement, country membership and investor relations.

A former GC and director at the African Development Bank (AfDB) and a graduate of Harvard Law School and King's College London, Akin-Olugbade has over 30 years of experience in the legal and financial sectors, having worked at both technical and management levels, in the public and private sectors, for leading corporate and commercial law firms and for international financial institutions.

Akin-Olugbade was the pioneer CLO and head of the legal department of the African Export-Import Bank (Afreximbank). He was appointed to the board of directors of Ecobank Transnational (ETI) as a non-executive director in June 2014 and chairs its governance committee. Akin-Olugbade is an Officer of the Order of the Niger.

Closing the gap

James Scriven, CEO of the **Inter-American Investment Corporation (IIC)**, takes a look at developments across Latin America, from renewables to local capital markets

In this exclusive interview James Scriven, CEO of the Inter-American Development Bank (IDB) Group's private sector arm IIC, analyses the environment for project financing across Latin America. Contrasting with the prospect of a more climate change-sceptic administration in the US, Scriven picks this area as one of the IIC's key priorities going forward and argues that the drive toward sustainability has spurred multiple megatrends. He maintains that renewable energy has been a fertile ground for commercial lenders, which have been stepping into a territory previously dominated by development institutions, and that the cost of renewable projects has dramatically fallen in just the past three years. Scriven also highlights the increasing use of local debt and equity markets in project financing.

What have been the biggest trends for you in the region through 2016 in terms of project development and financing?

We are seeing three major trends: crowding in private sector financing, innovation and sustainability.

Crowding in private sector financing is happening in the renewable energy, port, road and airport sectors. This is a trend that started with public and multilateral money. As a result of their work to demonstrate commercial viability, the private sector has shown growing interest. For example, in the renewable energy sector, local and international commercial banks are increasingly coming to the table to participate in deals that development banks and private companies traditionally financed. Increasing scale, technological advances and rising private sector financing in the solar industry have driven a rapid decline in power purchase agreement (PPA) prices. In Chilean solar, for example, this has lowered the cost of the energy price awarded in tenders from $130 per MWh in 2013 to $48 per MWh in 2016. Similarly, Mexico auctioned 300 MW recently at $27 per MWh.

Innovation and pushing new frontiers describe how the Inter-American Investment Corporation aims to be bold in infrastructure. Upstream, we work with governments that never before generated power from sources such as wind and solar, for example. Downstream, we offer financial additionality such as longer-tenors and mobilised resources from financial institutions and institutional investors. Most recently in El Salvador, we financed the first utility scale solar project in Central America and in Uruguay we financed a wind farm that raised its equity by listing itself on the Montevideo Stock Exchange. In Jamaica, we financed the country's largest infrastructure project, a container terminal, committing $94 million and mobilising another $111 million. We aim to see more financial structures with new players in new markets in the years ahead.

> **Local and international commercial banks are increasingly coming to the table to participate in deals**

Sustainability takes into consideration several megatrends revolutionising project development. By 2050, there will be 9.7 billion people on the planet and in Latin America and the Caribbean 90% will live in cities. Added to that, the earth is warming and much of the population lives in areas of high water stress. These factors place tremendous demands on existing infrastructure systems and project development continues to identify projects that are

of the highest quality and likely to withstand the long-term pressures of climate change. To align ourselves with the realities of project development in the context of climate change, this year the IDB Group committed to ensuring that 30% of its portfolio is dedicated to climate-related financing by 2020.

What are the biggest challenges the region faces in getting good projects off the ground?

The main challenges we see have to do with underlying concession contracts and power purchase agreements that are legally sound and feasible in the commercial sense. To address this, we work upstream with national governments to incorporate international best practices for contracting. These allow nascent markets to recognise the considerations facing investors and ultimately open their doors for business. Additionally very large infrastructure projects in the region require significant international funding in US dollars, adding currency risk to the projects and the governments in moments of higher foreign exchange volatility in the Latin American market.

What changes have you witnessed specifically in financing and the way that financing is structured?

We see three main trends in project structuring: local currency financing, project bond issuances and utilising local stock exchanges to raise capital. The new IIC is seeking to expand its offering of local currencies in markets such as Brazil and Mexico. This allows clients to avoid currency mismatch, mitigate exposure to exchange rate fluctuations and still receive long-term tenors.

International project bond issuances take advantage of our B-loan programme which uses the IDB Group's preferred creditor status to mobilise third-party resources. A recent hydroelectric plant in Costa Rica tested this structure. Reventazón Hydroelectric Power project sold a B-bond into the private placement market and brought in $135 million in senior secured debt from institutional investors. A guarantee in favor of the B-bond resulted in a $50 million reduction in project costs and protected institutional investors from non-pro rata exposure.

Moreover, the local debt capital markets are increasingly active in financing infrastructure projects, particularly when the risk is assimilated to sovereign credit risk as in Peru. The IIC is well-positioned to join forces with the institutional investors and underwriting investment banks by issuing partial credit guarantees or first-loss guarantees to credit enhance construction and commercial/operational risks that the pension funds and the insurance companies are not willing, not prepared or not authorized to take. In this respect, we foresee that next year the IIC will be very active in providing these type of solutions to our clients.

Lastly, local equity capital markets are proving a powerful platform to channel funding to project financing and offer a way for retail and institutional investors to invest in their local economy. Recently in Uruguay, we tested this structure by listing 80% of Colonia Arias Wind Project's equity on the Montevideo Stock Exchange. The IPO included the participation of pension funds and individual investors. Remaining equity came from the project sponsor, Administración Nacional de Usinas y Transmisiones Electricas (UTE). The Colonia Arias IPO represented the second wind project to access Uruguayan capital markets and was largely over-subscribed. This IPO expects to have a demonstration effect, introducing new options for the financing of renewable energy projects, as well as redirecting assets held by institutional investors to emerging markets.

Have there been specific recent developments in countries in the region in framework, legislation or policy that have been especially interesting?

In Argentina, we are encouraged by the public-private partnership (PPP) framework that will lower regulatory barriers to foreign investment. The law received final approval by congress this week. The country seeks to attract investment to road, energy and housing projects. Legal and financing structures that make projects bankable will attract the private sector. This coupled with a stabilising of the power sector from a financial perspective could catapult further investments.

In Peru, the government has provided additional resources, authorities and scope to the national project investment office (*Proinversion*) from the programming and design through the financial and physical completion of the projects. This should allow the country to review the private initiatives at a faster pace and have a more strategic approach to the implementation of the announced National Infrastructure Plan.

What type of regulatory or policy issues are having the most influence on the ability to develop and finance projects across region and why?

We see the effectiveness of laws that require electricity-providing companies to demonstrate that a certain percentage of their total energy committed was produced by non-conventional energy sources. The energy can be produced by their own plants or by contracting from third-parties. In Chile, we saw the impact of a renewable energy law positively influence project development. In 2008, the country had less than 20 MW of non-conventional renewables, and the government implemented the non-conventional renewable energy law to promote investment in geothermal, wind, solar, tidal, biomass and small hydroelectric. In solar, for example, we then witnessed the capacity of installed solar photovoltaic skyrocket. In 2015, there was 370 MW. We aim to close 2016 with 770 MW, and by 2017, we hope to achieve 1,400 MW. This demonstrates the exponential growth that is achievable when government and business align their goals.

How is the role of development financing evolving and what are the IIC's key priorities in Latin America at the moment?

The region seeks to close a $120 – $150 billion per year infrastructure funding gap, which could reach more than $1 trillion over the next decade if left unattended. Public sector investment has been tepid, growing at one to two percent per year while demand has risen steadily at more than five percent per year. Development banks like the IIC are best positioned to fill this gap in two ways.

> **In Argentina, we are encouraged by the PPP framework that will lower regulatory barriers to foreign investment**

First, there is our upstream work with governments. We can leverage the IDB's public sector relationships and expertise to position regulation and policy that can facilitate the closing of this deficit. Knowledge and sharing of our best practices has proven catalytic for addressing the region's infrastructure needs. The IIC seeks to leverage its resources, knowledge and expertise to open market opportunities for others to address the infrastructure gap and maximize development through the private sector. We are currently undergoing a strategic shift from being a single-product institution providing US dollar-based loans and now positioning ourselves as an agile bank able to tailor financial multiple products in various currencies to best address evolving client needs.

What would you say have been the IIC's highlight projects in 2016 and what are you hoping from 2017?

In March, the IIC disbursed a historic mobilisation that counted on the largest number of B-lenders to date in the Trade Finance Facilitation Program. Banreservas in the Dominican Republic received an A-Loan tranche for $20 million and a tenor of two years and two B tranches with tenors of 12 and 18 months. The $130 million total transaction (upsized from an

The region seeks to close a $120 – $150 billion per year infrastructure funding gap

initial $80 million given high demand) attracted 14 B-lenders, including eight new relationships from global banks and institutional investors.

In June, the IIC closed the financing for the first utility-scale solar project in El Salvador and Central America. Providencia Solar will receive $57.7 million from the IDBG's own capital, $30 million from the Canadian Climate Fund and $30 million from Proparco.

In July, the IIC closed and disbursed the financing of the largest infrastructure project in Jamaica, committing $94 million and mobilising $111 million in B-loans and $60 million in Co-loans for the Kingston Freeport Container Terminal.

We aim to be bold in infrastructure come 2017. This includes participating in project finance in Argentina, Brazil and the Caribbean. In Brazil, for example, we will see the Brazilian Development Bank (BNDES) pulling back due to fiscal constraints, and we hope to complement their efforts by providing local currency and long-term tenors as well as guarantees to develop renewable energy, transmission lines and eventually fund the airports program of the Brazilian government. We are comfortable with Brazil risk and we think our partial credit guarantees can support bridge loans and debentures issuances that facilitate the completion of infrastructure projects in the country.

James Scriven
CEO, Inter-American Investment Corporation (IIC)

Washington DC, US
T: + 1 202 623 3901
E: iicmail@iadb.org

About the author

James Scriven is the chief executive officer of the Inter-American Investment Corporation (IIC), the private sector arm of the IDB Group. With a current portfolio of $7 billion under management and 330 clients in 20 countries, the IIC finances sustainable enterprises and projects to achieve financial results that maximise social and environmental development for Latin America and the Caribbean.

Prior to joining the IIC in 2015, Scriven held several positions at the International Finance Corporation (IFC) of the World Bank Group, from 2002 to 2014. His last assignment was as vice-president for corporate risk and sustainability and a member of the senior management team of the IFC. Before joining the IIC, Scriven was chief financial officer of Banco Hipotecario, one of the largest commercial banks and leading mortgage bank in Argentina.

Scriven holds a master's degree in finance from CEMA (Argentina) and a BA in business administration from UCA (Argentina).

The euro liquidity boon

Philip Roberts, head of energy and natural resources for EMEA at **Mitsubishi UFJ Financial Group**, analyses the currents dominating EMEA project financing

Philip Roberts co-heads the EMEA structured finance department and leads the energy and natural resources practice at MUFG. The bank was the biggest lead arranger on project finance deals in EMEA in 2015. In this interview he argues that in 2016 regulatory pressures on banks played second fiddle to currency liquidity issues in determining lending trends. He also believes that project financing as a core instrument in national development is being given due consideration in the shaping of future regulations.

What have been the headline project finance trends of 2016?

In 2016 there was a fall in project finance volumes globally, but you need to go deeper to find out what is going on. The headline numbers show that EMEA has over a 60% share of the global project finance market. However, there is one deal which skews the data and that is the Yamal LNG deal in Russia, which was $15.9 billion provided by Chinese and Russian institutions only. If you strip that deal out as a one-off, EMEA still showed growth, although modest, driven primarily by ongoing renewables and core infrastructure activity across Western Europe and ongoing transactions in the Middle East market. In other global regions, such as Asia and US, there were slight declines.

> **Renewables remains very active across all regions, particularly offshore wind and solar**

In terms of sectors, renewables remains very active across all regions, particularly offshore wind and solar. Infrastructure shows core deals continuing in Western Europe, for example in UK, Germany and the Netherlands, across both economic infrastructure, such as rail and airports, and social infrastructure, including traditional PPPs. Yamal LNG makes oil and gas look like a very strong sector but in practice there is a slowdown as sponsors delay investment decisions on projects due to the low oil and gas price environment and uncertainties on global growth due to a variety of political and economic reasons. Sponsors will look for a sustained commodity price recovery before pressing the button on new projects. However, this does not mean that there is no development work being undertaken on these projects in the background, as these will need to be prepared and in a position to make investment decisions when the price environment recovers.

What were the most influential factors driving lending volumes and financing structures?

The most interesting development over the last 12 months has been a differentiation in appetite depending on the currency of the financing in the project. The European Central Bank (ECB) stimulus measures implemented over the past 12 months have provided significant euro liquidity. This means any euro-denominated transaction has access to a strong pool of liquidity from banks so funding is competitive. That includes longer-dated project finance. There is now ample liquidity of euros and therefore significant appetite from both European and non-European banks.

A good example of this is offshore wind – an area where MUFG has been particularly active including recent advisory roles in UK and Germany such as the £2 billion ($2.49 billion) Beatrice project for Scottish and Southern Electricity (SSE), Copenhagen Infrastructure Partners (CIP) and State De-

velopment and Investments Corporation of China (SDIC). This is a sector that was previously seen as relatively risky compared to other project finance sectors. But as banks have increased access to euro liquidity, the number of banks willing to look at such projects has increased and consequently the debt margins on deals has also reduced. In part, this is because the risk is now better understood: there have been more projects, a longer track record of technology, improved contractor experience and technical solutions have been identified for some of the initial problems experienced. Newer projects are increasingly coming in on budget and on time but, at the same time, one of the major drivers for the reduced debt pricing is increased bank appetite because there is a lot of euro liquidity.

Looking at other currencies, there is marginally less liquidity in sterling. Therefore, we see an incremental cost of debt increase for sterling transactions. These are still comfortably manageable from a finance perspective as the pipeline is relatively modest in the UK, so that when a good deal comes along there is still plenty of appetite to lend but still at a marginal price increase over an equivalent euro transaction.

In US dollar-denominated transactions, which in the EMEA market are transactions primarily in the Middle East, Africa and Caspian region, you will see a significant pricing premium, so much so that for long-dated US dollars there is a smaller subset of banks that are still able to provide longer dated US dollar funding.

> **We are now seeing euro pricing bottoming out and sterling and US dollar pricing increasing**

In summary, compared to two years ago, where we saw liquidity return to long-dated project finance market with debt pricing falling, we are now seeing euro pricing bottoming out and sterling and US dollar pricing increasing. If you have a euro project, you are going to have good access to bank funding and competitive terms; for sterling, probably good appetite but with a marginal price increase; and for US dollars, if you have a project of any serious quantum and tenor, maybe $750 million to $1 billion plus with tenor greater than ten years, there will be a limited appetite and a price premium.

What has been your experience of regulatory developments and their impact on project financing?

Regulation is increasing, without question. The consequence is that banks are being required to reserve more capital on their balance sheets and ensure they have sufficient liquidity buffers. This applies to all debt, and from a project finance perspective as tenors tend to be longer-dated (over five years and potentially up to 30 years) there will potentially need to be incrementally higher capital than some other types of shorter-dated debt. However, this needs to be balanced by the benefits of project finance such as robust debt structures that benefit from security; ring-fence and protective covenant packages, which has resulted in a long track record of low probability of defaults; and low losses upon default. These strengths also need to be reflected in the capital allocated to project finance loans.

In general, capital is going to increase for all types of debt finance and that is no bad thing from a systemic banking perspective. At the same time, the benefit of the financing structures for projects, and given that such infrastructure projects are generally strategic and to the long term benefit of the host country, is acknowledged as part of the consultation processes when determining new regulation. I think it is recognised that secured lending has many positive attributes and therefore capital increases should not be punitive but balanced, and this is the general direction we are seeing discussions going.

Once the regulatory environment becomes clearer, then banks will also need to adapt accordingly. If more capital is required to put aside, then pricing may need to increase to compensate. But we need to also make sure that infrastructure and projects retain the ability to raise long term, affordable funding to ensure they get built.

However let me revert back to liquidity. There is significant euro liquidity so it is still a very competitive market despite the possibility of additional capital being required against project finance loans. Compare that to US dollars where there is less appetite, but broadly the same capital regulation applies. At this moment in time, it is not necessarily the capital which is driving pricing but liquidity for any given currency, as well as a host of other factors including sector, geography, sponsor identity, deal flow and of course, specific project risk.

Have there been any concrete legislative developments of note in 2016?

There are various consultations ongoing, for example the Basel Committee on specialised lending. People have fed into that process and it is these processes where you are striking the balance between ensuring more capital to strengthen the banking system against systemic shocks versus ensuring that any capital increases are balanced by not being prohibitive from an economic perspective.

From your perspective, what are most promising areas for project finance?

MUFG has appetite in all regions but most of our EMEA business is core Europe and the Middle East in terms of the GCC [the Cooperation Council for the Arab States of the Gulf includes all Arab states of the Persian Gulf except Iraq]. We see developments in Africa as very interesting and we are keen to work with ECAs and DFIs on the right projects there to bring those forward.

In emerging markets, we tend to see a focus on natural resource and power transactions in the first instance as countries develop their economies. This in turn allows them to subsequently develop social and economic infrastructure projects. Eastern Europe, the Caspian region and Russia also have a lot of natural resources and if countries have access to natural resources, projects will get developed in time. They may be slightly on hold at the moment while the commodity price cycle is low but at some point we will see more projects requiring finance.

In terms of infrastructure I think an interesting place we continue to see activity is in the broader definition of infrastructure increasingly referred to as infrastructure plus. Not just traditional PPPs but in transactions such as airports, ports, telecoms and rail. These financings may have shorter tenors in terms of financing structures but underlying this, there is still an assessment of the business on a long term basis. We also have an aviation business which is growing at the moment in terms of financing airlines and operating lessors. That said, traditional PPP structures are also increasingly being considered by countries that have not considered them previously, such as the GCC (where the need to fund infrastructure continues to grow and they are assessing alternatives to state balance sheet funding). We have a strong track record in advising and lending on such structures, so believe we are well placed to assist in those processes.

Looking ahead to 2017, what do you think will be the key challenges and most interesting prospects?

Clearly commodities pricing is going to be key because that will determine whether people make investment decisions on natural resource projects. On the power side, an interesting area is in renewables where we now have auction processes for subsidies, rather than being awarded feed-in tariffs or contract for differences at fixed levels as was historically the case. This has

introduced increased competition which in turn is reducing the tariffs awarded and the level of subsidies required. The recent Borssele offshore wind deal in the Netherlands is a prime example of an auction resulting in a tariff which was lower than most of the industry expected. Renewables will therefore have a focus on cost reduction and it is going to be very interesting to see how this plays out and who succeeds in those auctions.

If more capital is required to put aside, then pricing may need to increase to compensate

There is also a changing type of client. There are a lot of equity infrastructure funds seeking assets, whether Canadian, Australian, European or Chinese. They are typically more financial investors compared to traditional utility or industrial or construction clients but many seek to put in place management teams to operate and optimise their businesses for the long term. There are a significant number of investors with funds to put to work and they are actively looking at opportunities to deploy that capital.

Emerging markets, including Africa, will face their challenges but clearly there is a need for infrastructure to be put in place and investments will be made together with support from the host government. Greater visibility on regulation will also become clearer in the next 12 to 18 months and institutions will need to adapt to those changes. Finally, as central bank stimulus programmes start to ease, liquidity may not be as plentiful as it is at the moment. We will then see structures and pricing adjust in response, so the timing of those macro-economic decisions will also impact upon the project finance market.

Philip Roberts
Co-head of structured finance for EMEA, Mitsubishi UFJ Financial Group (MUFG)

London, UK
T: +44 (0) 20 7577 1000
E: philip.roberts@uk.mufg.jp

About the author

Philip Roberts is co-head of structured finance for Europe, Middle East and Africa within Mitsubishi UFJ Financial Group (MUFG) with responsibility for energy and natural resources having joined in 2011. MUFG is a global leader in project finance with a team of 270 professionals of which 80 are based in London. His primary focus is on project and structured finance debt origination and portfolio management for a broad range of greenfield and acquisition opportunities across a broad spectrum of transactions including conventional power, renewables, oil and gas and mining and metals.

MUFG origination products for projects include debt, advisory, bonds, private placements, ratings analysis and derivatives. Roberts also has responsibility for the energy and natural resources project finance portfolio that consists of over 120 transactions, including 30 agency roles. Before MUFG, Roberts spent ten years in project finance and structured capital markets at RBS and five years at International Power as a chartered chemical engineer.

Botswana

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Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?
Project finance in Botswana has been largely associated with the mining and energy sectors in the past few years, with specific coal mining and power projects responsible for this increase in activity. As a developing market we are yet to see new project finance trends and developments make their mark in Botswana. There is certainly room for project bonds and these could be structured appropriately to allow for increased investor confidence.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.
We have seen increased interest from export credit agencies (ECAs), multilateral agencies and international financial institutions (IFIs) in the project finance sector in Botswana. To date, apart from a World Bank office in Gaborone (which tends to focus more on technical assistance and capacity building), none of these agencies and institutions are domiciled in Botswana. Interest tends to come from larger regional offices or from the home countries of these institutions.

The commercial banks have until recently been at the forefront of local project finance initiatives.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?
There is no legislation directly concerning public-private partnerships (PPPs), but they are permitted both in respect of greenfield and brownfield projects, although more often seen in respect of brownfield projects.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?
Yes, a security interest may be granted by a concessionaire in the project. Where such security interest is passed over a mining concession, the approval of the minister is required.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?
There are no restrictions, fees or taxes that are specific to foreign investment or ownership of a project. In general local and foreign investors are treated equally, save that there are different withholding tax rates on the remittance of dividends and interest payments to residents versus non-residents. The rates that apply to foreign remittances of dividends and interest payments are subject to a growing network of double taxation avoidance agreements.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?
No and there is no precedent for this. The rule of law is upheld in Botswana and contractual agreements that have been entered into and concluded having obtained any existing licensing or regulatory approvals that may apply are not then subsequently undone or blocked.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
In operation there are no exchange controls in Botswana. There is still legislation on exchange control in the statute books, which has not been repealed. However, it has not been operative since 1998 when the Minister of Finance declared that exchange controls would be abolished in the budget speech. The fact that the legislation has not been repealed is treated as a technicality. As such there are no restrictions on the repatriation of funds.

There is a withholding tax on the remittance of dividends and interest payments to a foreign entity. In general, and where there is no Double Taxation Avoidance Agreement in place, payments of interest to non-residents are subject to a 15% withholding tax. There is a 7.5 % withholding tax on all payments of dividends to residents and non-residents.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
Yes, project companies may establish and maintain onshore foreign currency accounts and offshore accounts in other jurisdictions.

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
In terms of the Insurance Industry Act and Regulations CAP 46:01 at section 104, all classes of insurance effected by Botswana resident companies shall be placed with Botswana licensed Insurers. Only where a class of insurance required to be placed with a Botswana insurer is not available to a person seeking insurance, such person may place such insurance with a non-resident insurer provided that-

(a) The person obtains the prior approval of the Non-Bank Financial Institutions Regulatory Authority (NBFIRA); and

(b) The person complies with the provisions of section 105 of the Insurance Industry Act on compulsory local brokerage.

Section 105 of the Insurance Industry Act, states that any general insurance business policy effected by Botswana resident company other than an insurer licensed under this Act, with any non-resident insurer shall be effected through the offices of a Botswana licensed broker.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurance is subject to the same restrictions as noted above, however it has been seen in the international market in this context. There is no legislation preventing cut –through clauses and no reason to believe that these would not be upheld before the courts given the general freedom to contract.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
Yes parties are free to submit to a foreign jurisdiction. A waiver of immunity is effective and enforceable.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
Both are recognised as valid choices of law to govern agreements.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
In respect of arbitral awards, the Recognition of Foreign Arbitral Awards Act CAP 06:02 of the Laws of Botswana, which gives effect to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, provides that an arbitral award made in any country which is a party to the Convention shall be binding and may be enforced in Botswana in accordance with the Convention and in such manner as an award may be enforced under the provisions of the Arbitration Act. This means that on application to the High Court, a foreign arbitral award (as with a local award) maybe made an order of the Court.

Botswana is a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (which it ratified in March 1972).

In respect of court judgments, the Judgements (International Enforcement) Act CAP 11:04 of the Laws of Botswana allows for the enforcement of foreign judgments in Botswana where reciprocal treatment is given to Botswana judgments in that country. The president must declare by statutory instrument in the Gazette, the countries, which are deemed to give reciprocal treatment to Botswana judgments.

However, there are no Orders made pursuant to this Act that have been published in the Laws of Botswana in recent years, as to which countries are recognised as giving reciprocal treatment to orders of the Botswana courts. However, the Act also recognises those countries that were recognised as affording reciprocal treatment under the United Kingdom Judgments Act that was in force in 1981, prior to commencement of the Botswana Act.

There is, in addition, a procedure at common law whereby a fresh application for summary judgment is brought before the High Court. The foreign judgement is then submitted as evidence in a hearing that hears the matter afresh before the High Court of Botswana. Certain conditions must, however, be satisfied by a litigant who proposes to take advantage of that procedure. The main points to be satisfied are that the judgment must be final and conclusive. In addition all documents necessary to prove the judgment must be in order and the judgment relied upon as a cause of action should be annexed to the application. A Botswana court order is thus obtained and can be executed.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
The main types of security in Botswana law are as follows:

- A mortgage bond (passed over immovable property and mining concessions);
- A deed of hypothecation (a form of statutory pledge and first ranking security that can be passed over tangible and intangible moveables including book debts and receivables);
- A pledge, which is granted in respect of tangible moveables and requires possession or delivery for its perfection. The fact of delivery, and the nature of the possession must be demonstrated to any third party which may have a competing interest.
- The cession in security is concluded on the understanding that the intangible property or right will be retained by the cessionary until such time when the debt secured by the cession has been extinguished. Again the cession requires delivery to be effective. The incorporeal property will then revert back to the cedent. There is no statutory provision, nor is there Botswana precedent as to what constitutes delivery of an intangible right
- A general notarial bond is a mortgage by a borrower of all of its tangible movable property in favour of a lender as security for a debt or other obligation. However, a general notarial bond does not (in the absence of attachment of the property before insolvency) make the lender a secured creditor of the borrower; it only offers a limited statutory preference above the claims of concurrent creditors in respect of the free residue of the estate on insolvency.

There are no assets that cannot be secured.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Yes, deeds of subordination are known and used in this jurisdiction.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
A mortgage bond grants a real right of security in insolvency and bankruptcy. A mortgage bond may be ceded as between creditors, provided that the cause of debt and amount of debt necessary remains the same. Mortgage bonds are generally enforceable in accordance with their terms. A mortgage bond is perfected by registration at the Deeds Registry Office must be prepared by conveyancer and is subject to prescribed conveyancing fees.

A deed of hypothecation requires registration at the Deeds Registry Office to be perfected. The deed of hypothecation must be prepared by a conveyancer or notary public and is subject to prescribed notarial fees.

A general notarial bond is required to be registered with the Deeds Registry. It must be prepared by a notary public and is subject to prescribed notarial fees.

A pledge is granted in respect of tangible moveables and requires possession or delivery for its perfection. The fact of delivery and the nature of the possession must be demonstrated to any third party that may have a competing interest. (In respect of a private company therefore, the pre-emptive right of other shareholders must be considered and if possible, waived on entry into the pledge.) Delivery is effected by delivery of the original share certificates, notation of the pledge on the share register (as the share register represents prima facie evidence of title) and delivery of share transfer forms signed by the transferor and left blank as to the transferee. A pledge requires a court order for enforcement. There are no registration fees associated with a pledge.

A cession does not require registration and is not subject to conveyancing or notarial fees. The cessionary would not be free to collect the receivables in the absence of a default with a cession in *securitatem debiti*. A cession in *securitatem debiti* which is granted in respect of receivables (book debts or rentals for example) does not require registration but does require delivery for its perfection. A cession in *securitatem debiti* requires a court order for enforcement.

Priority is given to the first registered or first effected security, unless subsequently subordinated.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

In respect of registered securities, which are prepared by a conveyancer and notary public, the fees are prescribed by tariff and it is not lawful to depart from the prescribed tariff.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?

The use of a security trustee or agent to enforce security is problematic. Botswana law recognises the concept of a trust; however, where the security to be held is mortgage bonds over immoveable property, or notarial bonds, the security trustee arrangement is prevented by statute in that the Deeds Registry Act, CAP 32:02 of the Laws of Botswana provides that: "no bond shall be passed in favour of any person as the agent of a principal". In respect of other types of security such as a pledge or cession in security, in terms of common law these require an underlying legally valid and primary obligation owed by the grantor of the security to the recipient. The security trustee would not have this nexus with the grantor of the security. As an alternative, parallel debt obligations and the security special purpose vehicle (SPV) structure have been used in jurisdictions with similar laws to Botswana and there is precedent for the security SPV structure being used in Botswana.

Section 10. Bankruptcy proceedings and enforcement

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

Once winding up or judicial management proceedings have commenced, a secured creditor cannot commence enforcement or attachment proceedings and a creditor holding moveable or immoveable property as security cannot realise that security itself, but must deliver it to the liquidator for realisation. Secured creditors are paid out before other creditors and will be paid in respect of the realisation proceeds of the sale of the asset that is the subject of the security, after the deduction of liquidation costs. The creditor is responsible for those costs, which represent the costs of maintaining, conserving and realising the property. Where secured creditors have security over the same asset, the creditor granted security earlier in time has a higher-ranking claim in respect of that asset. Secured creditors include holders of a mortgage bond, deed of hypothecation, cession in security and pledge. A notarial bond does not afford secured creditor status, merely a preference in respect of the free residue.

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

Botswana law does not recognise self-help when it comes to enforcement of security and all real security must be enforced through the courts, outside of the context of insolvency proceedings, where an order for a public auction will be sought. This procedure can result in delay and the value of the asset that is being secured may differ significantly upon a forced sale.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

Please see above, all real security must be enforced through the courts.

Shakila Khan
Managing partner, Khan Corporate Law

Gaborone, Botswana
T: +267 391 1694
F: +267 391 1690
E: shakilakhan@kcl.co.bw
W: www.kcl.co.bw

About the author

Shakila Khan is a corporate attorney and managing partner of a specialist corporate law firm in Botswana. She has been ranked as a leading lawyer in Chambers Global Guide since 2013 to date.

Khan is a citizen of Botswana and was called to the bar in England and Wales in 2004, and admitted as an attorney of the High Court of Botswana in 2007. She has an LLM in legal theory and history with a special emphasis on law and development from the University of London.

Khan's areas of practice include the following sectors: M&A; debt and equity capital markets; structured finance; banking and financial services regulation; financial regulation; securities and derivatives advice (particularly enforcement opinions); competition law; and general corporate law (ranging from the establishment of foreign companies in Botswana and International Financial Services Centre (IFSC) advice to private equity and restructuring deals, as well as general compliance advice for a number of listed entities). She also practises in the energy and natural resources sectors, where she has completed key mandates.

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China

Jihong Wang, Zhong Lun Law Firm

Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

The current main project financing trend in China is the widespread promotion of public-private partnerships (PPP) within the infrastructure sector, as well as utilisation by PPP projects of various private investment methods such as industrial investment funds, private equity funds, introduction of strategic investors and financial leasing.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

Related institutions such as credit agencies, multilateral agencies and financial institutions primarily support Chinese company participation in project financing through providing security, credit and financing. The Asian Infrastructure Investment Bank is the main institution providing financial support for infrastructure projects in Asia, while the China Export & Credit Insurance Corporation (Sinosure) provides insurance to Chinese companies financing outbound projects.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

China at present does not have a national PPP law. Over the past several years, relevant government institutions including the Ministry of Finance and National Development and Reform Commission (NDRC) have issued a series of policies and normative documents on PPP projects. However, grey areas exist for PPP projects due to the relatively low role of normative documents within the legal hierarchy and conflicts with related systems such as for land, guarantees and government procurement.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

Yes. However, government or contracting authority consent is often required.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

Pursuant to the *Catalogue for the Guidance of Foreign Investment Industries* jointly issued by the NDRC and Ministry of Commerce, foreign investment projects may be divided into four categories: encouraged, allowed, restricted and prohibited. The Catalogue lists industries that foreigners are prohibited from investing in and holding rights for as well as industries for which restrictions are imposed on foreign participation, such as requiring a Sino-foreign joint-venture or not allowing foreign equity ownership under specific circumstances.

Regarding taxes and fees, local Chinese entities of foreign companies currently enjoy the same treatment as other domestic companies and, in some industries, may also benefit from customs and import VAT exemptions. It is worth noting that to encourage foreign investment, starting from October 8 2016, foreign-invested company establishment procedures were greatly simplified from an examination and approval system to a filing system.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?

Yes. For example, the Ministry of Commerce can, on the grounds of national economic security, require the termination of a transaction or removal of the threat to national economic security through methods such as transferring related equity or assets.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

China exercises a strict foreign exchange policy. However, there are no restrictions on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties outside China if the investors and invested companies are in compliance with Chinese law. Companies can go to designated banks to process remittances provided that they submit documentation as required by the bank. For example, for profits, a bank would require a board resolution on profit distribution, a tax clearance certificate and an audit report. Banks charge fees for processing remittances.

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

Yes. Chinese project companies can establish and maintain onshore foreign currency accounts without prior approval from the foreign exchange authority. However, opening an offshore account in other jurisdictions would require prior foreign exchange authority approval.

Section 6. Insurance

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

Foreign insurance companies must obtain prior authorisations from the China Insurance Regulatory Commission (CIRC) to legally provide or guarantee policies in China. Insurance policies for project assets located in China are generally subject to CIRC control unless the insured has obtained policies outside of China under specific conditions.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?

Sensu stricto project finance (where financing of a project is entirely guaranteed by its revenue) is rare in China. Insurance companies that have provided policies for project finance transactions commonly seek reinsurance. Cut-through clauses are prohibited under Chinese law.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
Submission to a foreign jurisdiction is permitted when there is a foreign element. However, choice of jurisdiction is limited to: the residence of the defendant, where the contract is implemented or executed, where the object of the contract is located, or a place related to the dispute. However, related laws stipulate certain contracts for which Chinese law must apply, such as a joint-venture or labour contract.

Chinese law does not expressly provide for the effectiveness and enforceability of a waiver of immunity. There also has not been any precedent case that renders a clear conclusion on this matter.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
The parties may freely choose the governing law (including English or New York law) if the contract has a foreign element, even if the chosen governing law is not related at all to the disputed contract, with the exception of mandatory application of Chinese law for certain contracts (such as joint venture or labour contracts).

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
Foreign arbitral awards are well-recognised by Chinese courts and cannot be overturned except for on procedural and public interest grounds. Foreign court judgments, on the other hand, are subject to stricter scrutiny (including whether the judgment is against Chinese law principles), and can be recognised only if the country where the judgment is rendered and China have signed a bilateral or multilateral agreement, convention, etc. or have 'mutually beneficial relations'.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
Types of security include mortgages (such as on the land, house and minerals), share pledges, receivable pledges and guarantor joint liability. Assets that cannot be securitised include: assets involved in a dispute or where ownership and use rights are unknown; assets that have been frozen, seized or are under supervision; public and non-government institution educational facilities, medical and public health facilities and other facilities for the public benefit; land ownership rights, residential possession rights for rural collective land, etc.; and public institutions such as national government institutions, schools, child care centres, hospitals, etc. as well as branches and departments of non-government institutions and businesses cannot be guarantors.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Yes.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
Security interests may be protected and prioritised through mortgage and pledge registrations with the relevant authorities.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
There are related fees and taxes which may be contractually transferred to other parties or mitigated by agreement with the local government.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
Yes.

Section 10. Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
During bankruptcy proceedings, guarantors have priority rights over securitised assets superior to bankruptcy-related costs, debt related to the public benefit, wages, insurance, etc. However, guarantor rights are suspended during the reorganisation period. For bankruptcy reconciliation proceedings, guarantor rights are also suspended before the court issues its decision.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the security?
A project lender may also enforce its agreement with the debtor (the mortgagor) such as receive the mortgaged property for a discounted price or auction the property. If the debtor refuses to implement the agreement, the project lender may also file a lawsuit requesting the auction or sale of the mortgaged property as well as priority rights to proceeds.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
To control project company assets, one might enforce security rights such as chattel mortgages or liens as well as utilise objections to execution and property preservation procedures. Other than conciliation of execution, it presently is not feasible in China to use contractual enforcement.

Jihong Wang
Senior partner, Zhong Lun Law Firm

Beijing, China
T: + 86 10 5957 2288
E: wangjihong@zhonglun.com
W: www.zhonglun.com

About the author
Jihong Wang is a senior partner at Zhong Lun Law Firm where she co-chairs the infrastructure and real estate department. She is widely recognised as a project financing expert by national and local governments as well as state-owned and private construction companies and financing institutions. For over a decade, she has advised on infrastructure financing, including PPP financing, as well as energy and real estate projects throughout China and in over a dozen countries.

Wang provides comprehensive legal services for project financing relating to transactional structure design, contract negotiations, tendering, construction, transfers and operations, as well as project financing avenues including bond issuance, government sub-loans, financial leasing, collective trusts and loan schemes. She also participates in the post-construction phase such as by introducing and collaborating with strategic partners on capital increases, M&A and asset securitisation.

Indonesia

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Jardin Bahar and Gadis Dewi Sari, Hermawan Juniarto

Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?
Several projects reached financial close in 2016 using project financing.

The 2,000MW Central Java Power Plant Project finally reached financial close in the first semester of 2016, with co-financing from JBIC and several other banks, where JBIC provided political risk guarantee for the portion financed by private financial institutions.

Several infrastructure financing institutions, such as PT Sarana Multi Infrastructure (persero) and PT Indonesia Infrastructure Indonesia have also closed funding for several infrastructure projects. Some of the notable projects are the Fiber Optic Palapa Ring Projects, which are divided into three project packages covering the eastern, central and western package. The Palapa Ring project includes the newly introduced availability payment scheme.

Most of the financing techniques are still adopting the traditional project finance approach.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.
Several multilateral and international financial agencies such as International Finance Corporation, Asian Development Bank, and Japan International Cooperation Agreement have been very active in promoting foreign investment in large and strategic projects, with special attention to the energy, renewable and infrastructure sectors. The roles of these agencies are varied and include providing technical assistance to the government or contracting agency and making investments either by providing quasi-equity or senior debt funding.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?
PPP projects in Indonesia are generally regulated under Presidential Regulation 38 of 2015 on Cooperation between the Government and Business Entities in Infrastructure Provision. This regulation generally allows for greenfield and brownfield projects, although regulations for some sectors (such as ports, airports and railways) provide that brownfield projects are to be implemented through state-owned enterprises.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?
A concessionaire would generally be allowed to grant security interests in the project to its lenders (so long as the project assets are owned by the concessionaire), subject to consent from the government or relevant contracting authority. Security interests are not allowed to be created over state-owned assets or region-owned assets.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?
Foreign investment generally requires an approval from the Capital Investment Coordinating Board (BKPM) and the establishment of an Indonesian limited liability company. Investment in certain sectors such as upstream oil and gas, banking and construction services may also be made through the creation of a licensed permanent establishment.

The Negative List of Investment (most recently updated in 2016) identifies business sectors which are closed to foreign investment or open to foreign investment subject to conditions. These conditions may include participation of a domestic shareholder at a minimum ownership level, partnership requirements or special licensing requirements. Sectorial regulations may also stipulate restrictions on foreign investment.

Foreign investments may benefit from various fiscal incentives.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?
BKPM and other competent authorities may block a transaction that does not conform to applicable investment restrictions. The Commission for the Supervision of Business Competition (KPPU) may compel the unwinding of a transaction that has an anticompetitive effect. Indonesian courts are also able to invalidate transactions *ab initio* (as if they never occurred) on the basis that the terms of the transaction are contrary to the public order, although this is an exceptional remedy.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
Payment of income or revenue by an Indonesian tax resident to a non-Indonesian tax resident, including payment of interest or dividends, would be subject to withholding tax at a rate of 20%. A lower rate may be applicable if there is a double tax agreement between Indonesia and the country of domicile of the payee. The payee would need to present a pro forma certificate of domicile to apply for such lower rate.

For purposes of overseeing foreign currency transfers, a purchaser of foreign currency equal to $100,000 or its equivalent is required to provide the bank with which it is transacting with a copy of the underlying transaction documents, providing a basis for the foreign currency payment, and other administrative documents.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
A project company is generally allowed to open onshore and offshore foreign currency accounts. Bank Indonesia requires, however that any proceeds from export and loan withdrawals (some exceptions apply) must be received via onshore accounts in foreign exchange banks (*bank devisa*) appointed by Bank Indonesia.

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
Indonesia's Insurance Law generally requires that insurance businesses are only allowed to be performed by a licensed insurance company established under Indonesian law. A foreign insurance company could establish and operate an Indonesian insurance company subject to certain foreign investment restriction. The project company may procure insurance coverage from a foreign insurance company if the required insurance coverage is not available in the domestic insurance market.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurances by foreign reinsurance provider are quite common in the Indonesian market. Some reinsurance arrangements may have adopted the cut-through clauses; however the position of Indonesian law concerning this is not very clear.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
An Indonesian person or entity may submit to a foreign jurisdiction, but Indonesian courts do not enforce judgments from foreign courts. Foreign court judgments may be considered as evidence in a new court proceeding in Indonesia.

Indonesian law is unclear as to the authority to waive sovereign immunity but it is generally accepted that sovereign immunity does not apply to acts in a commercial transaction under a private (*jure gestionis*) capacity. Government assets are immune from any form of seizure or encumbrance.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
The choice of foreign laws (including English and New York law) could be recognised as a valid choice of law, as long as there there is a connection with the jurisdiction so chosen. This connection may be established in a number of ways, including the nationality of the parties to the contract, the object of the contract, or the place where the contract is to be performed.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
Any award rendered by foreign arbitral tribunals would be recognised and enforced by the competent courts of Indonesia on the conditions that:

- the award is rendered in a country with which the Republic of Indonesia is bound by a treaty, either bilateral or multilateral, concerning the recognition and enforcement of international (foreign) arbitration awards;
- the award arises out of a dispute which is commercial in nature;
- the award is not contrary to public order;
- the award is registered with the clerk of the Central Jakarta District Court; and
- an *exequatur* (certification) from the chairman of the Central Jakarta District Court is obtained.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
All the assets of the project company would be put as security. The types of security would depend on the types of assets. The typical security are likely to be:

- mortgage (*hak tanggungan*), which encumbers land, buildings, and other immovable properties;
- pledge (*gadai*), which encumbers movable property, which commonly include project company's bank accounts and each sponsor's shares in the project company (or intermediaries);
- fiducia security (*jaminan fidusia*), which encumbers movable property, certain immovable property, and intangible assets, which commonly include receivables, insurance proceeds, machinery and inventories; and
- hypothec (*hipotik*), which encumbers registered ships with a gross volume of 20 cubic metres or more.

In addition to the above, quasi-security may be provided in the form of powers of attorney or conditional assignments over the material contracts (for example power purchase agreements and any other project documents), among other arrangements.

In the context of project finance in infrastructure provision, the land would typically be owned by the government or the contracting party; in which case the land in question is not allowed to be encumbered.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Indonesian law does not provide a clear guidance on subordination of claims by contract. However, it has become an acceptable practice for sponsors and other junior creditors to enter into foreign law subordination deed or agreement with senior creditors.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
For a mortgage, the security interest will be created upon registration of the mortgage deed with the applicable national land agency office. Creation of a second ranking mortgage is possible.

For fiduciary security, the security interest will be created upon registration of the fiduciary security deed with the relevant fiduciary registration office. In addition, for fiduciary security over intangible assets, to make the fiduciary security binding against the account debtor (the payer of the receivable), the account debtor must be notified of, and acknowledge, the creation of the fiduciary security. A filing with the fiduciary registration office will be invalid if the relevant property is already encumbered by another fiduciary security interest.

For a pledge, the pledge will be created after the signing of an instrument agreeing to the terms of the pledge (a deed or an agreement) and: in the case of tangible movable property, delivery of the property from the pledger to the pledgee or its agent; in the case of a bank account, notification to, and acknowledgement by, the bank where the bank account is located; and in the case of shares of a company, annotation of the pledge in the share register of the company.

For each of the security interests, the secured creditor holds a priority claim over the proceeds from the sale of the encumbered assets, subject to costs associated with foreclosure and taxes.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
Fees, taxes and other charges include notarial fees, land deed officer's fees, nominal stamp duty and registration fees. Notarial fees are generally negotiable. For a mortgage, the land deed officer usually charges a percentage of the property value, although in some cases the fee may be negotiated.

Registration of fiduciary security interests and mortgages require the payment of registration fees based on the value of the security.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
Fiduciary security interests may be granted in favour of a lender's representative or proxy. The position with respect to mortgages and pledges is not expressly stipulated by law but the use of an agent or proxy acting on a lender's behalf as security agent is generally accepted practice. Trusts are generally not recognised under Indonesian law. In practice, international financings commonly utilise an onshore security agent (usually an Indonesian bank), with the terms of the appointment governed by foreign (non-Indonesian) law.

Section 10. Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
All creditors' claims will be subject to a stay of 90 days following a bankruptcy declaration (the day on which the commercial court declares that the company is bankrupt). A creditor is not allowed to exercise its rights against the company's assets during the stay. The stay does not apply to creditors' claims secured by cash collateral and creditors' set-off rights.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the security?
Legally, a project lender (secured party) would have the right to immediately sell the encumbered assets through a public auction by an authorised auction house, without a court order. In practice, however, an auction house may be reluctant to execute the auction without a court order. A project lender would normally be expected to file an application for writ of enforcement with the relevant district court.

The enforcement may also be done by way of a private sale with the consent of the debtor, provided that there are no objections from any third parties. Consent of the debtor must be granted after default has occurred. With respect to mortgages and fiduciary security, the intention to hold a private sale must be notified to the relevant parties and published in printed media one month prior to the date the private sale is to be carried out.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
Indonesia's Bankruptcy Law recognises the concept of curator (*kurator*) during bankruptcy proceedings. The role of receiver outside of bankruptcy proceedings (as is understood in commonwealth jurisdictions) is not recognised. Specifically for a mortgage, however, a mortgage deed may authorise the mortgagee to manage the encumbered assets based on court approval.

Jardin Bahar
Senior partner, Hermawan Juniarto

Jakarta, Indonesia
T: +62 21 2995 9057
E:jbahar@hermawanjuniarto.com
W: www.hermawanjuniarto.com

About the author
Jardin Bahar is an Indonesian qualified attorney, whose practice covers various corporate and transactional matters in Indonesia. He has strong capabilities in the area of project construction and finance. His in-depth knowledge of the Indonesian infrastructure regulatory framework (particularly relating to public-private partnerships) combined with his familiarity with international transaction practice has put him as the leading attorney in the infrastructure field in Indonesia. He has advised and been involved in several major infrastructure projects in Indonesia.

Gadis Dewi A Sari
Counsel, Hermawan Juniarto

Jakarta, Indonesia
T: +62 21 2995 9057
E: gdasari@hermawanjuniarto.com
W: www.hermawanjuniarto.com

About the author
Gadis Sari is involved in infrastructure and banking and finance works. She has advised wide range of clients from governmental authorities and state-owned enterprises to private entities including international financial institutions and banks. During her early years with the firm she focused on infrastructure projects and regulatory works, where she gained her understanding of Indonesia's legal framework and business climate. She specialises in general banking and has experience acting for both lenders and borrowers on finance transactions including corporate lending, restructuring and project finance. She is also familiar with equity and mezzanine financing transactions.

Her representative clients include Standard Chartered Bank Group, PT Sarana Multi Infrastruktur (Persero), PT Indonesia Infrastructure Finance and the International Finance Corporation (IFC).

Japan

渥美坂井法律事務所・外国法共同事業
Atsumi & Sakai
www.aplaw.jp

Michiaki Hosoi, Naoki Kanehisa and Takeshi Takahashi, Atsumi & Sakai

Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

As part of a growth strategy announced in 2013, the Japanese government was hoping to increase the value of privately-funded public infrastructure projects in the following ten years to around ¥10 to 12 trillion ($90 billion to $108 billion), compared to ¥4.1 trillion during the preceding 14 years. In 2016, the government announced an action plan with a total target amount for domestic public-private partnership (PPP) and private finance initiative (PFI) projects for the 10-year period from 2013 of ¥21 trillion, comprising ¥7 trillion of concession-style projects, ¥5 trillion of revenue-style projects, ¥4 trillion of publicly-owned real estate utilized projects and ¥5 trillion of other projects.

To stimulate private investment, in 2011 concessions were introduced under Japan's Act on Promotion of Private Finance Initiative (PFI Act). These concessions are expected to lead to more airport, water, sewage, road, school and public housing projects, while concession agreements for three major airports were signed in 2015.

Another interesting trend is in Japan's wind power market. Until recently, offshore wind farm projects have been virtually non-existent due to high construction and operating costs, not to mention some material gaps in the legal system and, as a result, wind farms have mostly been built onshore. However recent developments including the acceleration of environmental assessments for offshore wind farms, amendments to the Ports and Harbours Act and the strengthening of the legal regime and a fixed purchase price for offshore wind electricity set somewhat higher than for solar, onshore wind power and other renewable energy sources, have begun to spur the development of offshore wind farms. This trend is expected to accelerate.

In April 2015, the Tokyo Stock Exchange set up an infrastructure fund market as a focus for investments in infrastructure facilities, such as solar power plants. The first infrastructure fund was listed on the market in June 2016. It is expected that the fund will make more projects accessible to a greater number of investors.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

The main Japan-based institutions that have played a part in supporting project finance are the major commercial banks and the Japan Bank for International Cooperation (JBIC). The latter is an important source of funds for projects involving overseas developments and acquisitions. Nippon Export and Investment Insurance (Nexi) is also an important provider of credit support to cover external transaction risks that cannot be covered by regular insurance. In addition, there are many trading companies, construction companies and real estate companies involved in project finance transactions as sponsors.

In general, due to the fact that financial institutions are generally able to take credit risk in respect of project finance in Japan, the support of export credit agencies or multilateral agencies is rarely required. Foreign financial institutions are showing an increasing interest in participating in the kind of large-scale infrastructure investments in Japan touched upon in section 1.1.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

The typical PPP in Japan is a PFI project under the PFI Act. Though both greenfield and brownfield projects are permitted under the PFI Act, in practice most PFI projects in Japan to-date have been greenfield. Brownfield PFI projects might become more common in future with the 2011 introduction of concession rights: the right to operate and maintain a public facility and to collect usage fees for it under the PFI Act.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

A concessionaire can grant a security interest in a project to its lenders. The concessionaire can also, as the shareholder of a project company, have the project company grant security interests over several of its assets and rights and can grant a mortgage over its concession right.

Generally, consent from the government or contracting authority is not necessary for the creation of a security interest in a PFI project. However, when a project company enters into an agreement with the government, it is likely that the consent of the government would be required to create a security interest over the rights of the project company against the government under the agreement. When a project lender forecloses on a mortgage over a concession right, the permission of the relevant authority for assignment of the concession right pursuant to the mortgage is necessary.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

There are no specific fees or taxes applicable to foreign investment in, or ownership of, a project in Japan.

A foreign investor which controls 10% or more of the shares in an unlisted project company is required to report the holding to the relevant governmental agencies. In addition, when a foreign investor intends to invest in a Japanese company that is engaged in certain restricted industries (for example electricity, gas, oil, nuclear, water, and information and telecommunications), the investor must provide advance notice to the relevant governmental authorities. The authority may refuse to permit the investment for reasons of national security, including public safety or significant adverse effect on the Japanese economy, though it is very rare for authorities to restrict foreign investment.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?

Please see 4.1.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Under the Foreign Exchange and Foreign Trade Law, post-facto reporting is usually required for the remittance of investment returns or payment of prin-

cipal, interest or premiums on loans or bonds to parties outside Japan if the remittance is over a certain amount (currently ¥30 million).

Dividend and interest payments to parties outside Japan by Japanese entities are subject to withholding tax at 20.42% (including a special reconstruction income tax for the period from 2013 to 2037). However, some countries have tax treaties with Japan that in some cases reduce or provide exemptions from this withholding obligation.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
Yes.

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
Generally, if a foreign insurance company insures assets located in Japan, it needs to establish a branch office in Japan and obtain a licence from the relevant authority under the Insurance Business Act.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurance in the international market is not commonly used in project finance transactions in Japan. Cut-through clauses are not prohibited under Japanese law.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
The parties' written agreement for submission to a foreign jurisdiction is effective and enforceable unless the Japanese courts have exclusive jurisdiction over the action in question under Japanese law. A waiver of sovereign immunity is generally effective and enforceable.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
Generally, yes.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
Courts in Japan will generally recognise a final and binding foreign arbitral tribunal award if the content of the award does not contravene public policy in Japan.

They will also recognise a final and binding foreign court judgment where it meets the four requirements below.

- The jurisdiction of the foreign court is recognised under laws or treaties;
- The defendant has received a service (excluding a service by publication or any other similar type of service) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service;
- The content of the judgment and the court proceedings is not contrary to public policy in Japan; and
- Reciprocity of judgments is assured.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
The types of security created under Japanese law on assets in project finance are, broadly, (revolving) mortgages ((ne) teito-ken), pledges (shichi-ken) and security assignments (*joto tanpo-ken*).

- Mortgages are available for real property. When certain requirements are met, factory mortgages (*kojo teito-ken*) (for small factories) and factory foundation mortgages (*kojo zaidan teito-ken*) (for large factories) are also available. Factory mortgages and factory foundation mortgages can cover a factory's land and buildings, and machinery and equipment located in the factory.
- Pledges are available for receivables, bank accounts (though the effectiveness and validity of security interests on ordinary bank accounts without a fixed term or amount is unclear), insurance proceeds and shares of a project company.
- Security assignments are available for personal property (including shares), receivables and contractual rights.

It should be noted that a general security interest that would cover all or substantially all of the assets of a project is not available in Japan. In general, security needs to be granted on each asset, or specific group of assets, individually and the asset(s) sufficiently specified.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
An agreement made before the commencement of insolvency proceedings that a certain debt is subordinated to other claims is effective and enforceable both in and out of insolvency proceedings.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
Mortgages are perfected by registration at the applicable Legal Affairs Bureau; priority is determined by the order in which the mortgages are registered.

Pledges on, or security assignments of receivables, bank accounts and insurance proceeds are perfected in one of two ways. Firstly, by notice to, or acknowledgement of, the obligor. The notice or acknowledgement must be accompanied by an officially certified date (*kakutei-hizuke*) from a notary or post office. The security is perfected on the date of delivery of the notice to the obligor or the date on which the obligor acknowledges the pledge or security assignment in writing, as applicable (in either case, not the certified date). Alternatively, these security interests may be perfected by registration at the applicable Legal Affairs Bureau, though in order to assert the security interest against the obligor, it is necessary to send a separate notice of the security interest to the obligor in any event (failure to send the notice does not otherwise affect the date of perfection). Priority of such security interests is determined by the order in which they are perfected.

Security assignments of personal property may be perfected by delivery of the property to the secured party, or registration at the applicable Legal Affairs Bureau.

Assuming that a project company is an unlisted stock company, a share pledge over the shares in the company is perfected by the pledgee's continuous possession of share certificates representing the pledged shares. If the project company does not issue physical certificates, the pledge is perfected by registering the pledgee's name and address in the project company's shareholders' registry.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
With respect to mortgages, registration and licence taxes of 0.4 % or in the case of factory foundation mortgages, 0.25 %, of the amount secured by the mortgage (or in the case of a revolving mortgage, the maximum amount covered by the mortgage) are payable by the secured creditor. In order to minimise these taxes, it is possible to obtain provisional registration of a mortgage, in which case the registration and licence taxes are only ¥1,000 per item of col-

lateral, or in the case of factory foundation mortgages, ¥6,000 per factory foundation. However, if the creditor fails to pay the full registration and licenses taxes to complete the registration of the mortgage before another creditor enforces its rights on the same collateral, the first creditor may not assert its mortgage rights against the second creditor.

For registration of pledges or security assignments at the Legal Affairs Bureau, registration and licence taxes of ¥7,500 per registration are payable. An officially certified date from a notary costs ¥700.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
Under the Trust Law, a trustee may hold security interests on behalf of the secured party or parties, and the secured party will hold beneficial interests in the secured claims. However, such security trusts have not yet been widely adopted in the market due to some legal uncertainties with respect to the use of trusts for holding security interests.

Section 10. Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
In Japan, a stock company (*kabushiki kaisha* or KK) or a limited liability company (*godo kaisha* or GK) is generally used as a project company. There are a number of different insolvency proceedings in Japan; the most common in this context are bankruptcy proceedings (*hasan tetsuzuki*), rehabilitation proceedings (*saisei tetsuzuki*) and reorganisation proceedings (*kosei tetsuzuki*). All three can apply to a stock company but reorganisation proceedings do not apply to GKs.

Generally speaking, in bankruptcy proceedings or rehabilitation proceedings, a project lender can enforce its rights over collateral or security outside the proceedings. This is not the case in reorganisation proceedings.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the security?
Project lenders can enforce their rights over collateral or security outside bankruptcy proceedings in accordance with the Civil Execution Act, though usually transfer collateral or security in accordance with the relevant security agreements.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
Under Japanese law, contractual enforcement such as receivership is not recognised and seizure of collateral without a court order is not permitted.

Michiaki Hosoi
Partner, Atsumi & Sakai

Tokyo, Japan
T: +813 5501 2131
E: michiaki.hosoi@aplaw.jp
W: www.aplaw.jp

About the author
Michiaki Hosoi acts for a wide range of Japanese and international clients in the financial and energy sectors and has extensive experience in finance transactions, including representing banks and sponsors in project financings. He acted for lenders and other project companies on more than 20 renewable energy project financings in 2014 and most recently has advised project companies on a solar power project (43.5MW) in Japan and a lender on a LNG project in Australia.

Hosoi is qualified as an attorney (*Bengoshi*) in Japan (2002) and holds a law degree from Tokyo University (1999). He has been a partner at Atsumi & Sakai since 2009.

Naoki Kanehisa
Senior associate, Atsumi & Sakai

Tokyo, Japan
T: +813 5501 2298
E: naoki.kanehisa@aplaw.jp
W: www.aplaw.jp

About the author
Naoki Kanehisa is a senior associate at Atsumi & Sakai. He has experience in various types of finance transactions, including project finance, structured finance, capital markets, syndicated lending, investment fund, cross-border finance, and financial regulation, including securities law and banking regulation.

Kanehisa is qualified as an attorney (Bengoshi) in Japan (2007) and holds a law degree from Tokyo University (2004), a JD from Keio University (2006) and an LLM from Columbia University (2012).

Takeshi Takahashi
Partner, Atsumi & Sakai

Tokyo, Japan
T: +813 5501 2129
E: takeshi.takahashi@aplaw.jp
W: www.aplaw.jp

About the author
Takeshi Takahashi is a partner of Atsumi & Sakai specialising in energy law. He is a New York qualified lawyer and has twenty years' experience dealing with projects and project finance globally. He is particularly strong in LNG related matters.

His clients include financial institutions, electric and gas utilities and shipping companies in Japan, as well as energy related companies outside Japan. In addition, he has experience in M&A transactions involving energy related businesses representing Japanese clients acquiring interests in foreign target companies.

Mozambique

www.hrlegalcircle.com

Paula Duarte Rocha, Henriques Rocha & Associados

Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

Mozambique's ability to attract large investment projects in natural resources is expected to sustain high growth rates in coming years. The country is however under international scrutiny given recent events involving over $2 billion in secret loans. The International Monetary Fund (IMF), World Bank and several other donors have suspended much needed assistance to the state and demanded that an independent audit be conducted to investigate the loans.

The devaluation of the metical (MZN) is a major macroeconomic concern. Since late 2015 the metical has seen its value progressively eroded, arriving at 77:1 levels (October 2016). The Bank of Mozambique's measures to control inflation are putting a strain in the economy and have considerably reduced access to local funding. Reserves of foreign currency continue to drop and high interest rates are discouraging borrowing.

ENI's final investment decision on Mozambique's deep-water Coral South floating liquefied natural gas, expected by December 2016, is believed to be a triggering point for further large investments into the country.

Section 2. ECAs and Multilateral

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

In the current economic outlook, export credit agencies (ECAs) are continuing to play a leading role in bringing energy and infrastructure projects to completion. The African Development Bank (AfDB), International Finance Corporation (IFC), German Investment and Development Corporation (DEG), Dutch development bank (FMO) and the Chinese Import-Export Bank (C-Exim), remain involved in supporting investments in the private sector and in bolstering investor confidence by backing projects seen as high risk due to the country's political, social and economic instability.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

Mozambique has approved and implemented a piece of mega-projects legislation: a cross sectorial or horizontal legislation, ruling on any sectors and activities that fall under its scope and provisions. This legislation establishes the guiding rules for the process of contracting, implementing and monitoring undertakings of public-private partnerships (PPPs), large-scale projects and business concessions. Both greenfield and brownfield projects are permitted within this legal framework, with contracts lengths depending on the type of infrastructure to be developed.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

Public domain assets (such as the land granted for exploration of the project activity) may not be granted as security by concessionaires to the lenders. Also, the total or partial transfer of the rights or assets covered by the concession, sub-concession, sale, encumbrance or any form of disposition of the concession are subject to prior approval by the relevant authority.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

The mega-projects legislation and the petroleum and mining laws impose new restrictions on foreign equity participation for foreign investments, establishing provisions accommodating not only a mandatory and progressive increase of the State participation but also mandatory mechanisms and conditions for the involvement of local companies and individual entrepreneurs in projects.

The Petroleum Law even accommodates a transparency mechanism, whereby foreign entities participating in petroleum operations must be incorporated in jurisdictions transparent to the government, for instance jurisdictions where the government may independently verify the ownership, management, control and fiscal situation of the foreign entity interested in participating in petroleum operations. Private security services, public construction works and media activities also include express national content restrictions.

The competition legislation must also be taken into account when it comes to assessing actual or potential restrictions to foreign investments. Although the implementation of this law is expected to be gradual, the public interests being enforced go beyond the protection of a competition process, such as the promotion of national products and services, the competitiveness of small medium companies and the consolidation of the national economy (incidentally these are objectives that can justify restrictive agreements).

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?

Blocking or unwinding of transactions involving foreign investors does not easily or often occur but there are laws and regulations expressly allowing the state or governmental authorities to expropriate companies and nationalise assets or compulsorily acquire assets in the private sector for strategic, national security or other reasons (pertaining to situations in which public interest must prevail over private interest). These laws and regulations also establish the right to compensation.

Notwithstanding the above, it is worth stressing that Mozambique is a party to several bilateral investment treaties (BIT) with: South Africa, Germany, Algeria, Belgium, China, Cuba, Denmark, Egypt, USA, USA (OPIC), Finland, France, Indonesia, Italy, Mauritius, Netherlands, Portugal, Sweden, United Kingdom, Vietnam, India, Switzerland, Spain and Zimbabwe. All BITs generally aim to foster foreign direct investment into Mozambique, provide investors with guarantees and protection measures (security and protection of property rights, access to foreign loans and loan repayment, remittance of dividends, arbitration by the International Commercial Court (ICC) or International Centre for Settlement of Investment Disputes (ICSID) for dispute resolution) and liberalised banking rates.

Section 5. Foreign Exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
The Bank of Mozambique controls all transfers of direct investments and inward and outward payments. In general, remittance of profits and repatriation of proceeds from the sale or liquidation of an investment in Mozambique is permitted for duly approved foreign investment projects.

Foreign investors with approved investments are entitled to transfer abroad up to the whole amount of the profits accruing each financial year, provided tax obligations have been satisfied. Remittances may only be affected through the local banking system upon presentation of tax clearance from the ministry of finance. The payment of interest and any other charges flowing from loans is regarded as a current transaction, not subject to prior authorisation.

As Mozambique has a number of double tax treaties in force, the withholding tax rate may be considerably reduced. For example, under the double tax treaty between Mozambique and South Africa interest paid to and beneficially owned by a bank in South Africa, is subject to 0% withholding tax; payment of dividends, interest or royalties made to an entity resident in Macau is subject to a withholding tax rate of 10%.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
In accordance with Mozambican foreign exchange control rules the opening and operation of foreign bank accounts by a Mozambique resident entity and any transfer of funds from foreign bank accounts to Mozambican bank accounts and from Mozambican bank accounts to foreign bank accounts is subject to the prior authorisation by the central bank.

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
As a rule, pursuant to Mozambican Insurance Law and the Insurance Regulations, only Mozambican insurance and reinsurance companies, and Mozambican branches of insurance and reinsurance companies with registered offices abroad, are allowed to carry out the insurance and reinsurance business in the country, provided that they are authorised by the ministry of finance and registered with the Mozambique Insurance Supervision Institute (ISSM).

Taking out insurance abroad may be authorized by ISSM when it is evidenced that the local authorised insurers have refused to subscribe the policy, or that the foreign insurers offered better conditions than local insurers.

Contracts with the government may include insurance clauses pertaining to insurance policies placed internationally and in accordance with international good practices. On the basis that the lender or the political risk insurer or guarantor participating in project financing transactions is a foreign entity, the advance of any loan and the provision of any risk insurance or guarantee to a domestic borrower is subject to prior authorisation and registration with the central bank.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
N/A

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
Submission to a foreign jurisdiction and a waiver of immunity are effective and enforceable contract provisions in Mozambique, to the extent permitted by law. Under the Mozambican Civil Procedural Code, as a rule, the Mozambican courts cannot be deprived of their jurisdiction (irrespective of contractual provisions providing otherwise) if, in accordance with the Mozambican mandatory procedural rules, the Mozambican courts are deemed as having jurisdiction to decide on any matter arising from an agreement.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
The choice of English or New York law with respect to contracts entered into with or by Mozambican entities and rights and assets related to the Mozambican jurisdiction have to be analysed on a case-by-case basis.

Pursuant to the Mozambican Civil Code, contracts are governed by the law chosen by the parties, provided that such election has a connection (*nexus*) with a relevant element of the contract or is otherwise supported by an interest in good faith, (a *bona fide* interest) of the parties. However, a foreign law elected in accordance with those rules will not be acceptable if it involves a violation of a fundamental principle of Mozambican public policy; also there are certain Mozambican principles and rules that are mandatory, even if a foreign law is validly chosen.

The capacity, powers and authority to enter into an agreement and bind the Mozambican parties, as well as any related mandatory approvals, authorisations and permits, are subject to Mozambican law. Mozambican conflict of law rules also determine that the creation, assignment and cancellation of rights of possession, ownership and other related rights, including guarantees, over movable or immovable property, are governed by the *lex rei sitae*.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
Any foreign judgment can be recognized and enforced by a Mozambican court without re-litigation and re-examination of the merits of such judgment, provided that the following requirements are previously met:

- the foreign judgment must be legible and genuine;
- the foreign judgment must be final, non-appealable and conclusive in accordance with relevant laws;
- Mozambican courts must have no jurisdiction to hear the dispute, and the foreign court which rendered the judgment must have such jurisdiction;
- the foreign proceedings were conducted in accordance with the applicable procedures and the parties to the dispute had been duly notified and properly represented in the proceedings;
- no concurrent proceedings are pending in a Mozambican court;
- the foreign judgment does not conflict with a prior Mozambican or foreign judgment in the same matter; and
- the foreign judgment is not contrary to public policy of Mozambique or to the Mozambican conflict of laws rules.

Mozambique is signatory to the Washington Convention of March 15 1965 on the Settlement of Investment Disputes between States and Nationals of Other States and the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID); and is also signatory to the Additional Facility Rules of ICSID. Mozambique is also signatory to the New York Convention on the recognition and execution of foreign arbitral decisions, however on the basis of reciprocity.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
Mortgages and pledges are preferred securities; being the subject of rights *in rem* generally entitle creditors the right to be repaid from the proceeds of the sale of certain assets with preference over other creditors of the debtor (except for privileged creditors and in circumstances where a first ranking similar security is already in place). As a general rule, the creditor right *in rem* determines the type of security being created. Immovable or real estate property and moveable assets subject to registration such as vehicles, vessels and aircrafts are mortgaged, whilst movable assets that cannot be mortgaged and rights (such as shareholding) are pledged.

Other available instruments include the surety, the debt confession, the right of retention, the novation, the cession of receivables and the assignment of rights (contractual position, debts, credits, insurance).

The assets that cannot be used as security are listed in the Mozambican Civil Procedural Code, as follows: assets which garnishment would constitute an offence to the public ethical standards or those which garnishment has no economic justification; assets used in religious ceremonies; graveyards; railways, locomotives and trains; military equipment and public uniforms; essential assets of the household; and essential clothes and bedroom accessories.

In addition, as there is no private ownership of land – it belongs to the state by virtue of the law and Constitution – land, as such, cannot be used as security.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Arrangements whereby debt is subordinated by way of a contractual agreement are allowed. Note however that creditors are paid with the proceeds of the sale in the following order: employment credits; secured credits; tax credits; ordinary credits; contractual and tax penalties; and subordinated credits.

Contractual agreements relating to subordinated debt often relate to shareholders' loans or intercompany related loans.

Shareholders' loans have a specific regime Mozambique and some elements must be considered. Furthermore, the creation of securities to guarantee payments under shareholder loans is not allowed.

Intercompany and related company loans, in general, are subject to the following rules:

- the interest rate, shall be below the market rate, and preferably be zero;
- whether the entity's proposed activity is able to generate income in a foreign currency through its normal business to support the debt.

In addition, the deduction of intercompany interest may be limited where the indebtedness to a non-resident related party is twice the equity; for instance thin capitalisation rules are applied when the debt to equity ratio exceeds 2:1.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
The majority of the securities available under the Mozambican legislation are created and perfected through a written agreement between the debtor and creditor, with the respective signatures certified by notary public.

For mortgages, however, the debtor and creditor are required to sign a deed in the presence of a notary public, which deed must be subsequently registered with the applicable Registrar, depending on the asset being mortgaged (immovable or real estate property, vehicle, vessel or aircraft).

For pledges, specifically where shareholding rights are concerned, the rules for creation and perfection of the security depend on the manner of materialization of the shareholding.

In case of different securities granted over the same asset, the *prior in tempor, potior in iure* principle applies, and the first (holder) creditor shall be paid first, except in the case of the right of retention - the right retention prevails over common credits and credits secured by pledges or mortgages even if the latter were already created. Where the security is subject to registration, the *prior in tempor, potior in iure* principle is assessed by reference to the date of registration.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
The enforcement of securities would not, in general terms, trigger any taxes. However, this must be analysed on a case-by-case basis since the enforcement of a mortgage, with the subsequent transfer of ownership of real estate, could trigger a two percent property transfer tax (SISA).

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
Securities may be held and enforced by corporate entities, in the capacity of agent or trustee and intercreditor arrangements to accommodate recognition of this role are common in Mozambique.

Section 10. Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
Under the Mozambique bankruptcy and recovery regime a debtor's declaration of insolvency triggers the automatic maturity of all the debts of the debtor and involves both an automatic stay on assets (for example secured creditors cannot gain possession of a secured asset or sell such asset separately in order to be paid); the inability of the debtor to carry out any business activities and to administer and dispose of its assets; and the unenforceability of certain transactions related to the debtor carried out immediately prior to the declaration of insolvency.

All security over the debtor's assets must be enforced within the bankruptcy proceedings: judicial recovery proceedings or extra-judicial recovery proceedings.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the security?
Outside the context of the bankruptcy and recovery proceedings above, Mozambique law generally grants the creditor the right to be paid for the sale of the secured assets with preference over other creditors in an event of default.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
Secured parties rights over collateral/security must be enforced by means of judicial or court proceedings.

Paula Duarte Rocha
Partner, Henriques Rocha & Associados

Maputo, Mozambique
T: +258 21 344 000
E: pdrocha@hrlegalcircle.co.mz
W: www.hrlegalcircle.com

About the author

Paula Duarte Rocha is a partner at Henriques Rocha & Associados (HRA Advogados). Even before finishing her degree in law, Duarte Rocha started a career as a legal assistant in the development finance institution Gapi and then as a legal assistant to Maria João Dionísio Santos, formerly a partner at the law firm Pimenta Dionísio & Associados. Later she provided multidisciplinary legal consultancy at the tax and legal services department of PricewaterhouseCoopers, cooperating with national and foreign investors. She was also an associate lawyer and senior legal advisor at the law firm MGA Advogados & Consultores. More recently, Duarte Rocha was managing partner and lawyer at Ferreira Rocha & Associados. During this professional experience she was involved in all areas of practice: advising national and foreign private companies with respect to public sector laws, public tenders and contracts; as well as advising foreign entities on compliance with all Mozambican tax, labour and commercial obligations.

Myanmar

MHM YANGON

Takeshi Mukawa and Ben Swift, MHM Yangon

Section 1 – National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

Project financing is a relatively new phenomenon in Myanmar, which has been rapidly developing as the country has opened up to foreign investment and updated its laws relating to foreign investment and financing. Recent high profile project finance transactions include the Myingyan IPP.

In general, the Myanmar legal system has a lack of precedents to confirm the legal position. This is particularly true in relation to project financing, and the answers given to these questions must be understood in this context.

Section 2 – ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

Many export credit agencies provide trade financing for exporters to Myanmar including the Japan Bank for International Cooperation (JBIC), Nippon Export and Investment Insurance (Nexi), Export-Import Bank of Korea and ExIm Bank. Significant international financial institutions present in Myanmar include the International Finance Corporation (IFC), Asian Development Bank (ADB), World Bank and Asian Infrastructure Investment Bank.

These institutions have also helped support legal reform in Myanmar. The ADB is supporting the development of Myanmar's new companies and insolvency laws, while the IFC supported the development of the Myanmar Investment Law (which was passed in 2016) and the regulations under that law, as well as providing trade financing and loans to businesses in Myanmar.

Section 3 – Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

No. PPPs are negotiated individually and there are no standardised bidding processes or documents, and therefore no standardised approach. Each ministry has its own approach and rules.

The Japan International Cooperation Agency (JICA) and Myanmar's Directorate of Investment and Company Administration (DICA) have been discussing the standardisation of English language bidding and PPP documents.

3.2 May a concessionaire grant security interest in the project to its lenders and if so is the consent of the government or contracting authority required?

In practice, the Myanmar government sometimes enters into concessions or PPP agreements in the context of PPP projects. In general, consent is required to create security over those contracts or shares of the project company.

Section 4 – Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

Under the Myanmar Investment Law, certain large-scale projects require approval in the form of a permit from the Myanmar Investment Commission (MIC); in addition, projects which may have a significant impact on the security, economic conditions, environment or social benefit of Myanmar or its citizens will be referred by the MIC to the Myanmar parliament for approval. These large-scale projects include investments that are strategically important, large capital intensive investment projects, investments which have a large potential impact on the natural environment or the local community, investments which use state-owned land and also designated investments. It is likely that many if not all future project financed developments in Myanmar will require MIC approval, and the specific sectors where approval will be required will be published in a notification by the MIC (publication is expected prior to April 2017).

In relation to land, foreign investors face two main restrictions in Myanmar. First, the Transfer of Immovable Property Restriction Act of 1987 prohibits the transfer of immovable property to, and the acquisition of immovable property by, a foreign citizen or a company with foreign shareholding, including creation of and transfer following enforcement of a mortgage (refer to questions 8.1 and 9.3 in relation to mortgages). Note also that Section 228(b) of the draft Myanmar Companies Law, which is expected to come into force by April 2017, provides that neither the grant of a mortgage or charge or its execution shall be restricted by the Transfer of Immovable Property Restrictions Act or any other law – however this provision has not yet become law and its effect is therefore untested in practice.

Second, it also prohibits a foreign person from leasing land for more than one year.

However, a foreign investor who obtains a permit or endorsement under the Myanmar Investment Law may obtain a lease over immovable property with an initial term of up to 50 years. In addition, the Myanmar government has proposed to liberalise the definition of a Myanmar company under the draft Myanmar Companies Law to include a company with up to the prescribed level of foreign shareholding (expected to be 35%, but this has not been officially confirmed and can only be considered as a possibility at this stage). Such a company would not face any restrictions in leasing or owning land.

In terms of fees and taxes, stamp duty is payable under the Burma Stamp Act of 1899 on execution of instruments, including lease agreements. As of October 1 2016, following the amendments to stamp duty under Notification 146/2016, the stamp duty payable on a share transfer is 0.1% of the value of the shares, a loan agreement is 0.5% of the loan amount, and the stamp duty payable on a lease agreement with a term greater than three years is two per cent of the average annual rent.

4.2 Can a government authority block or unwind a transaction after closing for strategic, national security or other reasons?

Section 52 of the Myanmar Investment Law provides that the Myanmar Government may expropriate investments if:

- it is necessary for Myanmar and its citizens;
- the measures are non-discriminatory;
- the measures are in accordance with existing law; and
- there is payment of prompt, fair and adequate compensation.

However, expropriation without compensation is possible in the case of non-discriminatory measures of general application which governments normally take for the purposes of regulating economic or social activity, as set out in Chapter 21 (broadly, regulations applicable to the economy as a whole) and Chapter 22 (broadly, measures relating to national security) of the Myanmar Investment Law.

However, section 91 of the Myanmar Investment Law provides that Myanmar's international treaties prevail over that law if they are inconsistent, and some of those treaties give foreign investors additional rights in relation to expropriation.

Section 5 – Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees or taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Although the right of foreign investors to transfer funds within certain categories is guaranteed under the Myanmar Investment Law, it is generally understood in practice that all remittances of funds from outside Myanmar to inside Myanmar (and vice versa) are governed by the Foreign Exchange Management Law of 2012 (FEML) and prior approval from the Central Bank of Myanmar (CBM) must be obtained if required under the FEML.

Under the FEML, fund remittances are classified into ordinary transactions and capital transactions. As a general rule, prior approval must be obtained from the CBM for any capital transaction but approval is not required for an ordinary transaction. However, the definitions of both categories in the FEML are unclear and the practice of the CBM is inconsistent, so in practice it is necessary to confirm with the CBM how to deal with each foreign remittance on a case-by-case basis.

With respect to the foreign exchange remittances in connection with a loan from outside Myanmar, it has been expressly provided in the rules under the FEML that the CBM's approval is required prior to the disbursement and, after obtaining such prior approval from the CBM, it is not necessary to obtain the CBM's approval for each remittance for repayment of principal and interest. Based on the announcement issued by the CBM in July 2016, it has been understood that, in relation to such approval, the CBM will take into consideration matters relevant to the borrower including the capital amount already brought into Myanmar, the terms of the loan agreement and the debt/equity ratio.

Withholding tax will apply for remittances. Subject to the applicability of a double tax treaty, the withholding tax on a non-resident foreigner for interest income is 15% and it is zero per cent for dividend income.

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

Under the FEML and Notification 7/2014, Myanmar residents (including Myanmar incorporated companies) can open offshore foreign currency accounts with the approval of the CBM, provided they file monthly bank statements with the CBM. In practice, we understand the CBM has recently been willing to approve Myanmar companies using offshore foreign currency accounts for the purpose of obtaining foreign currency-denominated loans for project financing. The funds from these loans are then transferred into Myanmar by the Myanmar company itself.

Myanmar residents can open onshore foreign currency accounts without permission, and non-residents (for example foreign corporations) may open such accounts with the CBM's permission.

Section 6 – Insurance

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

No foreign insurer has been awarded a licence under the Insurance Business Law of 1996 to undertake an insurance business in Myanmar and may conduct such business through Myanma Insurance, the state-owned insurer. The Special Economic Zones Law of 2014 provides that a foreign insurance business may operate an insurance business within a special economic zone (SEZ) with a permit, and a few insurers have received licences to operate an insurance business in the Thilawa SEZ.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?

Only Myanma Insurance (which is guaranteed by the Myanmar government) is permitted to offer reinsurance within Myanmar under the Myanma Insurance Law of 1993. According to the Ministry of Finance, Myanma Insurance has taken out reinsurance outside Myanmar with foreign insurers in relation to a number of insurance policies. Cut-through clauses are permitted in Myanmar and we are aware of at least one occasion on which Myanma Insurance has agreed to such a clause in a contract for re-insurance of insurance it provided to a business in Myanmar.

Section 7 – Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Under the Code of Civil Procedure, the judgment of a foreign court is binding on parties that submit to its jurisdiction. A waiver of sovereign immunity clause is generally taken by market participants (including in the context of project finance) to be effective in Myanmar.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?

By law parties are free in principle to choose any foreign law as the governing law, subject to the operation of any applicable mandatory rules. In practice, state-owned enterprises and Myanmar government agencies will rarely agree to a foreign choice of governing law.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?

Myanmar is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Arbitration Law of 2016 provides for the enforcement of foreign arbitral awards in the same manner as court judgments.

A party seeking to enforce a foreign arbitral award must present to the court the original or duly authenticated copy of the award and the original or duly certified copy of the agreement for arbitration together with evidence that the award is a foreign arbitral award.

An arbitral award may be refused recognition only for certain prescribed procedural flaws (these grounds for refusal are broadly speaking in line with the UNCITRAL model law):

- a party was under an incapacity;
- the arbitration agreement was invalid;
- proper notice of arbitration was not given;
- the arbitral award was ultra vires;
- the arbitral tribunal was not properly constituted; or
- arbitral award is not final.

Enforcement may be refused only if the subject matter was not capable of arbitration under Myanmar law or for public policy reasons.

A foreign judgment can be enforced in Myanmar by presenting the pleading set out in the Code of Civil Procedure of 1909, unless one of the exceptions set out in section 13 of the Code of Civil Procedure apply (these exceptions are similar to those relating to the enforcement of arbitration awards, but also include that the court made an error of international law or refused to recognise Myanmar law when it was applicable, or that the claim was based on a breach of Myanmar law).

Section 8 – Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
Security can be created through a mortgage or charge over a project company's immovable property or a pledge can be created over its movable property, including its shares. A sponsor of a project company may grant a security interest over its shares under Myanmar law. If the project company is a company with an MIC permit or endorsement, it must give the MIC notice of a mortgage or a transfer of shares. In addition, equitable mortgages have been created as part of the security package for some loans.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Subordination agreements can be made and enforced in Myanmar. In theory, subordination trusts would also be recognised in the context of bankruptcy or insolvency proceedings. Note, however, that neither of these conclusions has been confirmed in practice.

Section 9 – Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
For mortgages of immovable property, other than a mortgage by deposit of title documents, a written instrument signed by the mortgagor and attested by at least two witnesses must be executed. For movable property, a pledge requires possession of the property in question by the creditor.

Any security instrument must be registered under the Myanmar Companies Act within 21 days with DICA if it relates to a security over company assets or it will not be enforceable if the company becomes insolvent (the draft Myanmar Companies Law contains similar provisions, and also does in relation to all other provisions of the Myanmar Companies Act discussed in this note). Mortgages over immovable property must be registered with the Registration Office under the Registration Act 1909 in order to be enforceable.

As noted above, notice must be given to the MIC of mortgages or transfers of shares in a company with an MIC permit or endorsement.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
Stamp duty must be paid prior to registration. The stamp duty payable on a mortgage over immovable property is 0.5% of the loan amount. For a pledge, the stamp duty is an amount in Myanmar kyats set out in paragraph 6 of Schedule 1 of the Burma Stamp Act, and is calculated based on the duration of the loan and its value.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
Yes. There are examples of offshore lenders using onshore security agents to hold security on their behalf. This has been used in a few transactions to attempt to circumvent the restriction in the Transfer of Immovable Property Restriction Act on transfer of immovable property, but appears to be untested in practice.

Section 10 – Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
The effect of the bankruptcy of a project company on the lender's enforcement of its rights as a secured party is unclear. Based on common law principles, we would expect that the powers of any receiver appointed by the lenders would be suspended, but in general the rights of secured creditors to take priority over those of unsecured creditors. However, under Section 230 of the Myanmar Companies Act, debts relating to preferential payments (which include tax liabilities and certain salaries payable to employees) take priority over all other debts.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the security?
For security over immovable property, under the Transfer of Property Act of 1882, a security may be enforced by foreclosure by the mortgagee and sale of the collateral property. Foreclosures and sales of collateral property can be effected by court decree.

A pledge can be enforced through sale of the goods over which the pledge acts as security.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
A receiver can be appointed under Section 69A of the Transfer of Property Act. Under Section 118 of the Myanmar Companies Act any receiver appointed in relation to a company must be registered with DICA.

Section 129 of the Myanmar Companies Act also provides that when a receiver is appointed under a floating charge, if the company is not being wound up at that time, debts relating to preferential payments should be paid by the receiver in priority to any claim under the charge.

Takeshi Mukawa
Co-representative partner, MHM Yangon

Yangon and Singapore
T:+95-1-255135 (Yangon)
E: takeshi.mukawa@mhmjapan.com
W: mhmjapan.com

About the author

Takeshi Mukawa is the co-representative partner of MHM Yangon. He is qualified in Japan and California. He has advised on many finance and corporate transactions, including the first aircraft financing in Myanmar, which created a mortgage over aircraft operating in Myanmar, the acquisition by Kirin of Myanmar Brewery (which is the biggest M&A transaction to date in Myanmar) and the establishment of the Yangon Stock Exchange. He has also assisted the Myanmar government in making new laws and regulations, including the Securities and Exchange Law and the amendment of the Special Economic Zone Law.

Ben Swift
Senior legal adviser, MHM Yangon

Yangon
T:+95-1-255147
E:ben.swift@mhmjapan.com
W: mhmjapan.com

About the author

Ben Swift qualified as an English lawyer in 1999 and has over 15 years of post-qualification experience in cross-border transactions and projects. He has worked in China, Singapore, London, Dubai and Qatar. He has a wide range of knowledge and experience relating to international corporate transactions, particularly in relation to acquisitions and disposals, shareholder agreements, long-term offtake agreements and oil trading contracts and project financing and development.

Russia

LATHAM & WATKINS LLP

www.lw.com

Mikhail Turetsky, Ragnar Johannesen and Ksenia Koroleva, Latham & Watkins

Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

The financial sanctions imposed on certain Russian individuals and companies following the Ukrainian crisis in 2014 restrict some Russian borrowers from accessing long-term debt financing in the western markets. As a result, the Russian market is currently dominated by Russian and Asian (particularly Chinese) banks, whilst most western banks have reduced their Russian focus significantly.

The decline in the oil price and in the Russian ruble has also had an adverse effect, particularly on dollar-denominated project financings.

However, project finance, specifically for toll roads, bridges, airports and power facilities remains a hot topic given the government's commitment to modernise Russia's infrastructure. Furthermore, the Russian legal framework for project financings has improved significantly over the past few years and, as a result, the arsenal of instruments and structures available to project finance lenders has expanded significantly. Accordingly, notwithstanding the numerous headwinds, project finance activity in Russia remains moderately high.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

Export credit agencies, multilateral agencies and international financial institutions play a significant role in the Russian market by providing debt finance, guarantees and insurances. The main Russian institutions include the principal development bank *Vnesheconombank* (Bank for Development and Foreign Economic Affairs – VEB) and the Russian Agency for Export Credit and Investment Insurance (Exiar), which provides insurance support and issues guarantees to counterparties of Russian export-oriented companies. In 2006, Russia and Kazakhstan established the Eurasian Development Bank (EDB), which has subsequently been joined by certain other former CIS countries as shareholders and which has financed a number of projects in Russia. In addition, the New Development Bank BRICs, founded by Brazil, Russia, India, China and South Africa, is expected to be an important player in the Russian project finance market. The European Bank for Reconstruction and Development (EBRD) and International Finance Corporation (IFC) have also historically been amongst the largest market players in Russian project finance. However, following the adoption of the Ukraine-related sanctions, they have either decreased their Russian operations or ceased them altogether.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

A number of laws relating to public-private partnerships (PPPs) are effective in Russia, including the recently adopted federal law on PPP. Only a Russian legal entity may be a private partner. The law does not impose any restriction on foreign shareholding of a private partner and, therefore, a foreign investor may participate in PPP projects through a Russian subsidiary.

Both greenfield and brownfield projects are permitted. The PPP law contains an exhaustive list of facilities that may be the subject of a PPP agreement. Certain facilities (which may not be owned by the private sector under Russian law) may only be subject to concession agreements, and natural resources may be subject to production sharing agreements.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

A concessionaire may not pledge the subject of a concession agreement.

A concessionaire may only pledge its rights under the concession agreement to the extent permitted by the concession agreement itself (including, if applicable, the consent of the relevant government or contracting authority) and provided that such pledge is in favour of the banks financing the concession. A person, which becomes the assignee as a result of the pledge enforcement, shall satisfy the criteria set out by the relevant concession agreement.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

Foreign investors are generally entitled to make investments in the form of debt or equity. The general taxation regime applies to foreign investors in terms of payment of taxes and other fees (subject to the provisions of international tax treaties).

Pursuant to the Russian law on strategic investments, any direct or indirect acquisition by a foreign investor of control over a Russian company engaged in certain strategic activities requires prior governmental approval.

Control over a strategic enterprise may be triggered by:

- a direct or indirect acquisition of a certain percentage of shares or participatory interests;
- an acquisition of a certain percentage of fixed assets; or
- the appointment of a certain percentage of the overall members of the relevant management bodies.

The applicable thresholds depend on the type of strategic enterprise and the type of investor (foreign, state-owned or private) and range from 5% to 50%.

In addition, anti-trust clearance procedures may apply under Russian competition protection law in connection with investments.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?
If all the necessary anti-trust and strategic approvals have been duly received, Russian governmental authorities cannot block or unwind a transaction. If a clearance should have but has not been obtained, the authorities may challenge (unwind) the transaction in court.

Russian law provides for the nationalisation or (in case of an emergency) the requisition of assets (subject to compensation in favour of the injured party).

Russia is a party to a number of international treaties on protection of foreign investment, which give additional comfort to foreign investors from certain jurisdictions.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
Income received by a foreign legal entity may be subject to withholding taxes in Russia at the following rates:
- 15% on dividends from shareholdings Russian entities; and
- 20% on income received from sources in Russia.

Double tax treaties may reduce these tax rates or exempt foreign legal entities from taxes in Russia subject to confirmation of their tax residency.

Russia also has a set of thin capitalisation rules and rules which oblige entities controlled by Russian tax residents to pay taxes in Russia.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
Russian currency residents are allowed to open:
- onshore foreign currency accounts with authorised banks which have a license for currency operations;
- offshore foreign currency accounts with branches of authorised banks; and
- offshore foreign currency accounts with foreign banks provided that Russian currency residents:
- notify the Russian authorities of opening the account and all movements of funds on such accounts; and
- may only receive funds on their offshore accounts as a result of a limited number of operations, such as receipt of loans from foreign banks residents in Financial Action Task Force (FATF) or Organisation for Economic Co-operation and Development (OECD) member states for a term exceeding two years to accounts in banks which are residents in FATF or OECD member states.

Russian currency residents shall repatriate the proceeds they receive from foreign trade. The exceptions to this rule include use of such proceeds for the repayment of the loans referred to item c (2) above or set-off of such proceeds for reinsurance purposes.

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
Insurance in Russia is subject to licensing and licences are only issued to Russian legal entities. Russian subsidiaries of foreign insurers may only provide certain types of insurance in Russia. Foreign insurers are not allowed to engage in any insurance business (subject to exceptions, such as merchant shipping insurance). Insurance proceeds paid by the project lenders can be subject to withholding tax under the Tax Code.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurance may be provided by foreign reinsurers which have a licence abroad without a local licence. Reinsurance is a common instrument and Russian insurance companies often seek reinsurance from foreign reinsurers, which is typically provided under English law and may include cut-through clauses.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
The submission to foreign state courts is not prohibited. However, Russian courts may refuse to recognise or enforce a judgment of a foreign court unless there is an international treaty between Russia and relevant foreign state or there is reciprocity in relation to judgments of Russian courts in the relevant foreign jurisdiction. Russia has a number of international treaties with CIS countries, however, notably, no such agreements have been concluded between Russia and the UK or Russia and the US.

Russian law is based on the principle of immunity of foreign states. However, a foreign state is considered to have waived its immunity where such foreign state has filed a claim or a counterclaim with a Russian court for a particular case. Some international treaties concluded by Russia (for example, with the US) provide for limited immunity of foreign states which implies that immunity of a foreign state does not apply in a purely commercial matter.

Russian law allows waivers of immunity by international organisations, provided that such waiver is granted in accordance with the rules and procedures of the relevant organisation.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
Russian courts generally recognise and give effect to the choice of English or New York law as the governing law.

However, as a general rule, foreign law is only permitted in circumstances where there is a foreign element (for example, where one of the parties is a foreign person).

The application of a foreign law to a legal relationship involving a Russian counterparty may not contradict:
- Russian public policy;
- mandatory provisions of Russian law or a foreign law if the relevant jurisdiction has a close connection with the legal relationship; or
- a statute which makes the application of foreign law subject to reciprocity.

If the choice of foreign law is upheld by the Russian court in a particular case, the party seeking to rely on the foreign law provisions shall demonstrate their contents and meaning. As regards foreign law, a Russian court would only rely on the advice and the interpretation by foreign law experts.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
The Russian Federation is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and, subject to its conditions and applicable Russian law rules and procedures, a Russian court would recognise and enforce a foreign arbitral award. Arbitration is commonly used as a dispute resolution mechanism in cross-border transactions involving Russian entities, including project finance transactions.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?

The following types of security are available in Russia:

- Mortgages (including over real estate objects, land plots and lease rights); and
- Pledges over:
  1) shares (in joint stock companies) and participatory interests (in limited liability companies);
  2) movable property (including equipment, goods in circulation, all assets pledge and other property);
  3) intellectual property rights; and
  4) contractual rights (including receivables, bank accounts etc.).

A construction-in-progress may be subject to a mortgage, if such construction-in-progress is registered with the Russian real property registry. However, it is possible to mortgage all future real estate objects under construction by way of mortgage of the underlying land plot.

Security assignments under Russian law are not expressly recognised as security interest for the purposes of the Russian bankruptcy legislation. Therefore, it is advisable to obtain pledges of contractual rights instead.

A pledge over rights to bank accounts is a new concept under Russian law which remains, to some extent, untested. Therefore, lenders still prefer to obtain direct debit rights with respect to the borrower's bank account.

Suretyships (accessory to the secured obligations), independent guarantees (by corporate entities) and bank guarantees (by credit institutions and insurance companies) are also available in Russia.

Security cannot be established over rights under subsoil licences, other licenses and permits issued by governmental authorities and a limited number of other assets (such as concession objects).

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?

The concept of contractual subordination or similar intercreditor arrangements is not recognised under the Russian bankruptcy legislation. Accordingly, Russian courts or bankruptcy officials would not give effect to a subordination agreement entered into by a Russian debtor.

Onshore indebtedness is commonly subordinated either structurally (for instance at different corporate levels) or by way of pledge in favour of the lender of promissory notes issued by an onshore debtor as payor to group companies (whereby such group companies are prohibited from demanding payment under such promissory notes until the pledge is released).

The Civil Code amendments introduced the concept of an intercreditor agreement, which may:

- be concluded between different creditors of one borrower;
- restrict the ability of some or all creditors to enforce claims or security on an individual basis;
- set out rules on priority and subordination of claims; and/or
- provide for non-proportional allocation of proceeds.

As mentioned above, no such concept has been introduced into the bankruptcy legislation and in insolvency each lender would have a separate and independent claim against the borrower, regardless of the provisions of any intercreditor agreement.

However, the (senior) lenders would have a contractual claim for damages against a (junior) creditor which files a claim against a project company in breach of the relevant intercreditor agreement and receives proceeds therefrom.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?

- Mortgages are perfected by registration with the Russian real property registry;
- Pledges of shares are perfected by registration with the relevant depositary or registrar;
- Pledges of participatory interests are subject to mandatory notarisation and are perfected by registration with the Russian company's registrar;
- Pledges over rights to bank accounts are effective following their due execution;
- The perfection requirements applicable to pledges over intellectual property rights depend on the type of pledged right; and
- Pledges of other movables (including movable property, receivables and contract rights) are effective following their execution but should be recorded with the Russian pledge notification register maintained by the Russian notaries.

The pledge priority can be set out in the underlying pledge agreement (first ranking, second ranking etc.) and, in relation to mortgages and pledge of shares, must also be recorded in the relevant public register.

As regards pledges of movables (in circumstances where the priority is not set out in the pledge agreement itself), priority is determined in accordance with the Russian pledge notification register on the basis of the date of registration.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?

Other than in respect of pledges over participatory interests (see the paragraph below), no state duty or registration or similar tax or duty is mandatory in Russia in connection with perfection of security over movable assets.

Registration of a pledge over participatory interests or a mortgage over immovable assets will be subject to the Russian state duty tax and registration fees.

Notarisation of pledge agreements (including a pledge over participatory interests) is subject to a notary fee. The amount of the notary fee depends on whether the notarisation is mandatory or voluntary and the amount of the secured obligations. The notary fees are determined by law (in respect of mandatory notarisation) or by notaries in accordance with general guidelines adopted by the notarial community (in respect of voluntary notarisation). Although voluntary notarisation is not required at law to ensure the validity of the underlying document, lenders often choose to voluntarily notarise security documents to facilitate out-of-court enforcement or ensure the correct priority.

Neither state duties nor notary fees can typically be reduced or deferred.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?

Russian law does not recognise trusts. However, the recent amendments to the Civil Code introduced the concept of a pledge manager. A pledge manager is a person that can be appointed for the purposes of executing and exercising the pledgee's rights under the security documents on behalf of the lenders. The lenders can appoint a bank (either a lender or a third party), a commercial entity or a sole proprietor to act as pledge manager.

The concept of a pledge manager has a number of disadvantages compared with traditional project finance security structures (such as trustee, joint and several creditor or parallel debt). For example, notwithstanding the appointment of a pledge manager, each lender should still be registered as pledgee in the relevant public registers.

Historically, two structures have been used to enable one of the parties to an English law governed facility agreement to act as a pledgee under Russian law security documents. These structures are joint and several creditorship and parallel debt. Both of them are extra-statutory. Accordingly, these could now be deemed by a Russian court not to comply with the pledge manager provisions of the Civil Code. That said, in English law documentation, it remains common in the market to employ these structures.

Section 10. Bankruptcy proceedings and enforcement

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

Under bankruptcy law, following the commencement of bankruptcy proceedings, there is a general moratorium on acceleration and enforcement over the assets of the company, meaning that the claims of all creditors shall be satisfied in accordance with the order of priority established at law.

Claims, which have arisen after the bankruptcy proceedings commenced (including certain mandatory claims, such as taxes, salaries or fees), have super-priority.

Other claims are divided into three groups. First-priority claims include those arising from the debtor's liabilities to individuals for harm to life or health. Second-priority claims arise out of the debtor's obligation to pay wages and similar amounts in the ordinary course of business, or pay fees or royalties. Other claims included into the ranking list constitute third-priority claims.

Claims secured by pledge or mortgage over the debtor's assets are settled out of the proceeds from the sale of such collateral ahead of all other claims. 70% to 80% of such proceeds are allocated to the relevant secured lenders, with the remaining 20% to 30% being divided between creditors of claims of higher priority.

Specialised project finance organisations:

The Russian securities law features the concept of a specialised project finance special purpose vehicle (SPV), which is bankruptcy remote. The bankruptcy remoteness is achieved by limiting the ability of the creditors of the SPV to file a bankruptcy claim against the company (if so provided under the relevant contract). This type of SPV can solely be used for the purposes of being a project finance investment vehicle. An additional (non-bankruptcy remote) company with a broader capacity would need to be the owner of the relevant assets and the counterparty to the relevant project-related contracts.

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

A secured creditor may enforce its security in the event of the debtor's failure to duly perform the secured obligations. Unless the security documents provide for out-of-court enforcement, the secured creditor needs to file a claim to court to enforce the security.

Russian law sets out detailed procedures for out-of-court enforcement by way of notary endorsement. In order to be eligible for out-of-court enforcement by way of notary endorsement, the underlying pledge agreement must be notarised. Enforcement by the pledgee (but not a mortgagee) without a notary is also possible but is not regulated in detail.

In certain cases, in order to exercise its rights the secured creditor needs to obtain prior anti-trust or strategic clearance approvals or comply with mandatory tender offer requirements.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

Under Russian law, contractual enforcement is possible only in relation to assets that are pledged under a pledge or mortgage agreement.

To enable out-of-court enforcement, the secured creditor and the security provider need to expressly agree not only that such approach shall apply but also which specific method shall apply.

Out-of-court enforcement is generally allowed by way of one of such pre-agreed permitted enforcement methods, which may include public or private auction, retention (for example, by way of transfer of title to a secured property to a secured creditor) or private sale without an auction (the latter is not possible in case of enforcement of mortgage).

Mikhail Turetsky
Partner, Latham & Watkins

Moscow, Russia
T: +7 495 644 1910
E: mikhail.turetsky@lw.com
W: www.lw.com

About the author

Mikhail Turetsky is the office managing partner of the Moscow office of Latham & Watkins. His practice focuses on finance and capital markets and he has extensive experience advising banks and corporate clients on all aspects of transactions in Russia and the CIS. Turetsky's primary areas of expertise include debt and equity capital markets as well as a broad range of finance transactions, including project finance, structured finance and financial restructuring.

Ragnar Johannesen
Counsel, Latham & Watkins

Moscow, Russia
T: +7 495 644 1831
E: ragnar.johannesen@lw.com
W: www.lw.com

About the author

Ragnar Johannesen is an English law qualified, Moscow-based counsel specialising in banking and corporate finance, with a particular focus on event-driven transactions, restructurings, and structured and limited recourse financings (including structured trade and export financings). Johannesen has experience in transactions involving multilateral financial institutions, development banks and export credit agencies. His sector experience covers oil and gas, mining and commodities, financial services, real estate, retail, transport and TMT.

Ksenia Koroleva
Associate, Latham & Watkins

Moscow, Russia
T: +7 495 644 1943
E: ksenia.koroleva@lw.com
W: www.lw.com

About the author

Ksenia Koroleva is a Russian law qualified associate in Latham & Watkins' Moscow office. Koroleva has experience advising large Russian and international banks and corporate clients on all aspects of transactions in Russia and the CIS. Her practice primarily focuses on banking and corporate finance across multiple industries on the Russian market, including real estate, oil and gas, financial services and TMT.

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Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

In April 2016, the government of the Kingdom of Saudi Arabia (the Government) announced Vision 2030, a comprehensive agenda of socio-economic reforms with the aim of achieving fundamental economic, social and structural changes in Saudi Arabia by the year 2030.

The economic reforms envisaged by Vision 2030 are expected to stimulate significant demand for project financing. In addition to a number of new large-scale infrastructure projects, Vision 2030 reaffirms the Government's commitment to an extensive privatisation programme that has already been initiated in a number of sectors, including telecommunications, oil and gas, petrochemicals, mining, aviation, housing real estate, logistics, and electricity and water.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

Export credit agencies from the US, Europe and Asia Pacific regions have traditionally been very active in Saudi Arabia, principally supporting suppliers from their home jurisdictions seeking to participate in major oil and gas and power sector projects.

In addition, the Government has established five specialised credit institutions (SCIs) which provide medium- to long-term loans to SMEs and the industrial, real estate and agricultural sectors. The SCIs comprise the Agricultural Development Fund, the Saudi Credit and Saving Bank, the Public Investment Fund (PIF), the Saudi Industrial Development Fund and the Real Estate Development Fund. The total assets of the SCIs reached SAR635.3 billion ($169 billion) as at December 31 2015 and total loans outstanding reached 55.3% of the SCIs' total assets as at that date. While the PIF has historically been a significant source of loans for strategically important projects, In 2016 as part of Vision 2030 it underwent a restructuring with regard to its future role in Saudi Arabia's economy.

The Islamic Development Bank, an international Islamic financial institution that supports economic development and social progress in its member states, is also headquartered in the city of Jeddah, Saudi Arabia.

Further, the Ministry of Housing has recently established a real estate refinancing company owned 100% by the PIF to help inject SAR50 billion during the coming five years in the real estate sectors (housing in particular).

Section 3. Public-Private Partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

There is no general public-private partnership (PPP) law in Saudi Arabia and individual PPP projects are governed by the terms of their own concession arrangements.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

The right of the concessionaire to grant security in project assets to its lenders will be governed by the terms of its concession. Furthermore, even if the terms of the concession permit a concessionaire to pledge its shares in the project company, minimum ownership requirements and other similar provisions in the concession may restrict the ability of the lenders to enforce their pledge over the concessionaire's shares in the project company without the consent of the Government or contracting authority.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

The Investment Law requires that any company with foreign shareholders (with certain exceptions for Gulf Cooperation Council (GCC) entities) be required to obtain a foreign capital investment licence issued by the Saudi Arabian General Investment Authority.

Once appropriately licensed, a company with foreign shareholders generally enjoys all privileges and incentives offered to wholly Saudi-owned companies, such as ownership of freehold property that is necessary to carry out the licensed activity, privileges granted by the double tax treaties to which the Kingdom of Saudi Arabia is a party and rights to repatriate profits. It should be noted, however, that pursuant to the Investment Law, the Council of Economic and Development Affairs (a newly established government body reports to the Council of Ministers) issues a list of certain industrial and service sectors in which foreign investment is prohibited. This list is regularly reviewed and amended.

Non-Saudi citizens (other than GCC nationals) must obtain a residency permit to reside in Saudi Arabia. Companies are required to register their employees' contracts with the Ministry of Interior before residency permits can be issued. Each company is permitted a certain quota of residency permits. Employees cannot work for anyone other than their sponsor company and sponsorship cannot be transferred until the employee has worked for their original sponsor company for at least two years.

The Government has a strategic goal to increase the proportion of Saudi employees in both the public and private sectors. This policy is known as Saudisation and is effected by requiring companies, through Nitagat (a program established by the Ministry of Labour), to employ Saudi citizens.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?
Once a company has been appropriately licensed, it would be unusual for the Government to seek to unwind a lawful private transaction entered into by that company. There are of course specific exceptions – for example, under the Expropriation Law, a Government entity may expropriate private real property to undertake a public interest project if certain conditions are satisfied and equitable compensation is provided to the private sector owner of such property.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
Saudi Arabian tax laws provide for actual withholding tax at different rates on payments made to non-resident parties (including those located in the GCC) by a Saudi resident from a source of income in Saudi Arabia. Services are defined to mean anything done for consideration other than the purchase and sale of goods and other property. Interest or loan charges paid to non-residents generally attract five percent withholding tax in Saudi Arabia, unless such withholding tax is reduced or eliminated pursuant to the terms of an applicable double tax treaty.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
There are no general restrictions on the holding of foreign exchange or the making of payments in foreign currency.

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
The insurance and reinsurance industry in Saudi Arabia is governed by the Law On Supervision of Co-operative Insurance Companies and regulated by the Saudi Arabian Monetary Agency. Both foreign and domestic companies undertaking insurance or reinsurance business in Saudi Arabia are subject to a number of additional restrictions, controls and fees arising out of such regulations.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurance requirements remain a very common element of large-scale project financing transactions in Saudi Arabia.

Under Saudi Arabian law, there is no general right for an insured party to cut-through to claim directly against a reinsurer. Such a right would have to be provided for specifically in the reinsurance contract by way of a cut-through clause or by way of assignment in favour of the insured party of the insurer's right to claim against the reinsurer under the reinsurance contract. If a cut-through clause were included and the insured party were able to identify the relevant reinsurer, a Saudi Arabian adjudicatory authority may permit the reinsurer to be added to any proceedings relating to the insured party's claim.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
A Saudi Arabian adjudicatory body would not be bound by a submission to the jurisdiction of foreign courts or a submission of disputes for resolution by arbitration, as the case may be. Saudi Arabian law also does not recognise the doctrine of sovereign immunity.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
A Saudi Arabian adjudicatory body would not be bound by the choice of English or New York law as the law governing a specified contract and would apply Saudi Arabian law, which does not recognise the doctrine of conflict of laws.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
The recognition and enforcement of a judgment obtained in a court outside the Kingdom of Saudi Arabia requires the submission of that judgment to an enforcement judge, who would be responsible for enforcing foreign judgments and orders, subject to:

- the provisions of any bilateral or multilateral treaties and conventions for the reciprocal enforcement of judgments;
- verification by the enforcement judge that, pursuant to an official confirmation by the Ministry of Justice, the country or state in which the foreign judgment was rendered would recognise and enforce a Saudi Arabian judgment in the same manner as a domestic judgment; and
- satisfaction of certain conditions contained in the Enforcement Law, including (among other things) that: the foreign judgment does not conflict with any decision issued in relation to the same subject matter by a Saudi Arabian adjudicatory body; the subject matter of the foreign judgment is not a matter over which the Saudi Arabian adjudicatory bodies have exclusive jurisdiction; and the foreign judgment contains nothing that contravenes the Shari'ah or public policy of Saudi Arabia.

In the event that a foreign judgment is not enforced in whole or in part under the aforementioned procedure, the judgment creditor could proceed by way of a new proceeding instituted in the Kingdom of Saudi Arabia before the appropriate Saudi Arabian adjudicatory body.

With respect to the enforcement of foreign arbitral awards, we note that Saudi Arabia has acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). As a result, an arbitral award obtained against a Saudi Arabian person in an arbitral proceeding held in a New York Convention member state should be recognised and enforced in conformity with the New York Convention, though we note that, in reliance on the public policy exception under the New York Convention, the Saudi Arabian adjudicatory bodies may enforce only those portions of the award which, in the view of the Saudi Arabian adjudicatory bodies, do not contravene the principles of Shari'ah or Saudi Arabian public policy (such as the award of interest).

We also note that arbitral awards within the Arab League would be subject to the Convention on Enforcement of Judgments and Awards dated September 14 1952 and that Saudi Arabia has acceded to the Gulf Cooperation Council Convention on the Enforcement of Judgments and Judicial Representation and Notices among members of the Gulf Cooperation Council.

Section 8. Security

8.1What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
Under the general principles of Saudi Arabian law, it is permissible to create a security interest known as a *rahn*, which terms means mortgage as well as pledge, in respect of collateral, from which it is possible to obtain payment or satisfaction of a debt. In addition to such principles, the Commercial Pledge Law Implementing Regulations address mortgages of movable property which can be validly or properly sold.

Project finance transactions usually feature pledges over facilities, equipment, onshore accounts and shares and assignments of contracts.

Although it is in principle possible to grant security over real property by way of pledge, it is uncommon to do so in favour of commercial banks. This is because, in practice, such a pledge is unlikely to be enforceable against third parties without notarisation and public notaries in Saudi Arabia typically refuse to record pledges on real property other than in limited circumstances in which Governmental funds are financing a real estate development.

In addition, it should be noted that a pledge would not be effective in respect of assets acquired by the pledgor after the effective date of the pledge and, as a result, it is not possible under Saudi Arabian law to create security over a class of assets including future assets. Such future assets may, however, be made part of the collateral by providing that the relevant pledge is amended and restated periodically and by taking other action to ensure the pledgee has the necessary possession and control of such future assets.

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Contractual subordination is not generally precluded as a matter of Saudi Arabian law. However, subordination provisions that purport to give effect to a ranking or priority in right of payment that differs from the ranking prescribed by law is unlikely to be upheld in an insolvency of the relevant debtor.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of collateral perfected and how is its priority established?
Under Saudi Arabian Law, a mortgage or pledge is validly created only upon the pledgor delivering to the pledgee actual possession and control of the collateral. If a Saudi Arabian adjudicatory body determines that the pledgee failed to obtain, or ceased to have, possession and control of the collateral, the pledgee will be treated as an ordinary creditor and his claims will rank *pari passu* with all other unsecured claims against the pledgor.

In the case of an assignment of contractual rights, the consent of the contractual counterparty is generally required in order for the assignment to be effective as against that counterparty.

A pledge or assignment of bank accounts presents a particular challenge as regards perfection under Saudi Arabian law. As funds flow through such bank accounts over time, it is difficult to establish indicators of possession over the cash balance at any one point in time and to deal with the issue that security may only be taken over existing collateral (as opposed to a future flow of funds through a bank account which is the subject of collateral).

Pledges over assets (other than real estate) are also required to be registered with the Unified Centre for Lien Registration (UCLR). The UCLR implementing regulations are silent on whether the failure to register a pledge with the UCLR would make the pledge unenforceable so, as a matter of best practice, pledges are typically registered at the UCLR whenever possible.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
Notarisation and registration fees will apply in connection with entry into pledges of certain assets; however, these are typically not significant costs in the context of a project financing transaction.

9.3 May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?
The pledgor and pledgee may agree to appoint a third party collateral agent, or *adl*, to hold collateral on the pledgee's behalf. If the collateral agent takes possession of the collateral, such possession is equivalent to possession by the pledgee.

Section 10. Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
As a general matter, the commencement of insolvency proceedings does not itself affect a secured party's rights to enforce its security in accordance with available enforcement procedures – please see the responses to questions 10.2 and 10.3 below.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the security?
As a general matter, a Saudi Arabian adjudicatory body will permit a secured party to enforce its security if there has been a failure by the debtor to pay or repay an amount of principal in accordance with the relevant procedures stated in the Enforcement Law. It is unclear whether a Saudi Arabian adjudicatory body would permit a secured party to take enforcement action in respect of any other event of default and, under Saudi Arabian law, security cannot be enforced because of a failure by the debtor to pay interest (howsoever described).

The specific enforcement procedure will depend on the nature of the assets in respect of which enforcement action is to be taken. In the case of enforcement in respect of personal property, a petition may be filed with the Board of Grievances to sell the pledged personal property by way of a court-supervised public auction.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
Self-help remedies are not available under Saudi Arabian law, even if contractually provided for in the terms of a security arrangement.

Chirag Sanghrajka
Associate, Latham & Watkins

London, UK
T: +44 20 7710 4670
T: +971 4 704 6377
E: chirag.sanghrajka@lw.com
W: www.lw.com

About the author
Chirag Sanghrajka is an associate in the London and Dubai offices of Latham & Watkins, and is a member of the Project Finance and Development Practice Group. Sanghrajka focuses on project finance and banking (including Islamic finance) transactions in the energy, infrastructure and natural resources sectors.

Abdullah Al-Hoqail
Associate, Latham & Watkins

T: +966.11.207.2522
E: abdullah.al-hoqail@lw.com
W: www.lw.com

About the author
Abdullah Al-Hoqail is an associate in the Riyadh office of Latham & Watkins. Al-Hoqail regularly assists government agencies, regional and international financial institutions, public and private companies on a range of matters, including banking and finance, debt and equity capital markets, regulatory, in addition to general corporate matters.

Zaid Nael Shalhoub
Associate, Latham & Watkins

London, UK
T: +44 20 7710 4669
E: zaid.shalhoub@lw.com
W: www.lw.com

About the author
Zaid Shalhoub is an associate in the London office of Latham & Watkins, and is a member of the firm's Finance Department. Shalhoub's practice focuses on the representation of sponsors, borrowers and developers as well as credit agencies, commercial and investment banks, and other financial institutions in connection with the development and financing of projects.

Tanzania

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Nicholas Zervos, Geoffrey Gasper and Edmund Temu, VELMA Law

Section 1: National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

Specific legislation to encourage and enable investment in projects involving both the public and private sectors was passed in 2010 (Public-Private Partnership – PPP – Act) and regulations were further amended in 2015. Revised PPP legislation has been drafted but by November 2016 there has been no progress with regards to its enactment. General procurement laws and regulations no longer apply directly to PPP projects following changes in 2014. Both solicited and unsolicited PPP proposals are envisaged but in each case competition is now clearly required.

Local content requirements are an increasing area of development and are set out in detail in recent legislation for oil and gas. The government tends to prefer public ownership of assets, so limited recourse projects are being developed alongside on-balance-sheet government projects. A draft bill of new legislation has recently been circulated for comment, seeking to clearly permit under existing legislation the ability of the government to give guarantees of contractual obligations of public entities. However, the draft does not yet clearly enable this, so it is hoped the final Act will be appropriately amended.

Section 2: ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

There are many international agencies operating in Tanzania, including export credit agencies (among them the African Export-Import Bank, Nordic Development Fund and OPEC Fund for International Development), multilateral finance institutions (for example the International Finance Corporation and African Development Bank), and other finance agencies (including KfW, USAID, Canadian CIDA and Swedish SIDA). Most projects in Tanzania require and benefit from support from such agencies and it is unlikely that a project will be developed without support from such agencies at some stage, ranging from finance for an initial inception feasibility study, to funding for project capital costs to supplement commercial bank finance.

Section 3: Public private partnerships

3.1 Is there a public private partnership act or similar statute authorising PPPs and are both greenfield and brownfield projects permitted?

PPPs are authorised under the Public Private Partnership Act 2010 (PPP Act) and the regulations of 2015.

Under the Act, sectors that have been expressly identified for implementation in partnership with the private sector include agriculture, industry and manufacturing, exploration and mining, energy, ICT, health and education, trading and marketing, natural resources and tourism.

The PPP laws do not differentiate between greenfield and brownfield projects but the provision of assets by the government can include existing assets of the relevant contracting authority or new assets to be acquired for the purpose of entering into a PPP agreement.

3.2 May a concessionaire grant a security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

A concessionaire may grant a security interest over the project assets to its lenders. Consent of the relevant government department or contracting authority will be required where a security interest is granted over a concession agreement or licence. Generally, the rights, obligations and controlling interests of a concessionaire in a PPP project cannot be transferred or assigned to a third party without prior written consent of the relevant contracting authority.

In the mining sector, under the Mining Development Agreement (MDA) with the government in relation to the special mining licence for large-scale mining, the investor is permitted to grant banks all security over its assets for loans incurred in pursuit of the development of the project.

In the petroleum sector, under the production sharing agreement (PSA) the contractor may not transfer its rights or obligations under the PSA to any third party without the prior written consent of the Minister for Energy and Minerals.

In the power sector, transmission, generation and distribution licences granted to a concessionaire may not be assigned or transferred to another party without the approval of the regulator.

In the telecoms sector, a concessionaire may not transfer, pledge or otherwise dispose of its licence without the prior written consent of the Tanzania Communications Regulatory Authority.

In addition, prior written approval of the Tanzania Investment Centre is also required, if the concessionaire creates a mortgage over any derivative title that it has over project land.

Section 4: Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

Generally, there is no restriction of foreign ownership or management of companies established in Tanzania. However, there are restrictions on foreign investment in certain sectors, such as mining, telecommunications and shipping, which require some local ownership.

Recent 2016 legislation requires large scale Special Mining Licence (SML, being a mine project more than $100 million) holders to issue shares to the public and list on the Dar es Salaam Stock Exchange within one year of the SML, and to have a minimum 30% local shareholding. It is not clear how this interacts with any government free carried interest which will be required under the MDA for the SML.

Restrictions to 60% foreign investor equity participation in Tanzanian companies listed on the Dar stock exchange were lifted in September 2014; however, foreign investor participation in government securities is still subject to conditions.

Foreign ownership of title to land is not permitted unless the foreign-owned company has a certificate of incentives from the Tanzania Investment Centre, which has approved the project for investment purposes.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?
All title to land is usually held subject to the President's right to revoke the title for "good cause and in the public interest". Land also can be compulsorily acquired by the President if the land is required for public purposes, which includes developments of a port or harbour or mining for minerals or oil. The President can by order in the Gazette deem any work to be for public purpose.

Generally, for strategic, national security or other reasons, a government authority can block or unwind a transaction involving foreign investors after it has closed, subject to payment of compensation.

Under the Tanzania Investment Act there is express protection against expropriation without "fair adequate and prompt compensation", with a right of access to a court or arbitration to determine the compensation.

Under the standard MDA, there is express provision for no nationalisation or compulsory acquisition without compensation "in an amount and manner that is prompt, adequate and effective".

Generally, under the PPP legislation there is a requirement to fairly compensate the investor in the event that it suffers loss due to unforeseen events beyond its control or if the contracting authority is in default under the PPP agreement. However, note there is an equivalent requirement for the investor to compensate the contracting authority for loss suffered if the project is terminated due to the failure of the investor to meet its obligations.

Section 5: Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
Generally, there are no major restrictions on remittances of investment returns or loan payments to parties in other jurisdictions, but there are certain foreign currency exchange restrictions for payments in Tanzanian shillings to or for the credit of a person resident outside Tanzania.

Withholding tax applies on dividend payments and to interest, except the government may agree to an exemption on withholding tax on interest paid to a registered financial institution or on interest paid to a non-resident bank by a strategic investor.

Payments relating to repatriation of capital and income to foreign shareholders in respect of direct investments are allowed. However, financial institutions making payments are required to demand audited accounts and tax clearance certification from the Tanzania Revenue Authority confirming up to date payment of taxes.

Foreign exchange laws require that interest rates in loan agreements reflect the prevailing market conditions for the relevant currency of borrowing and that the repayment period is tied to the ability of the project to generate enough funds to service the loans in a progressive manner. The loan agreements should not include conditions requiring opening of foreign currency accounts with banks not registered in Tanzania, unless Bank of Tanzania consent has been obtained.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
Generally, there is no restriction on a project company to establish and maintain an onshore foreign currency account in Tanzania, since any person may hold any amount of foreign currency and may open and maintain a foreign currency account with a bank which is an authorised dealer in Tanzania.

However, a company can only establish an offshore foreign currency account in another jurisdiction with approval from the Bank of Tanzania. The Bank monitors offshore foreign currency accounts to ensure that they are not used to facilitate unauthorised outward capital transfers.

Section 6: Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
Insurance policies generally are required to be placed with Tanzanian insurers. Where a class of insurance policy cannot be provided by local insurers, it can be provided instead by foreign insurance companies, provided that prior approval of the commissioner of insurance is obtained. Types of insurance provided by Tanzanian insurers over project assets include insurance over ships, aircraft, goods in transit, fire, damage to property, legal expenses, accidents, credit surety-ship and motor vehicle insurance.

Withholding tax applies on insurance premium payments to non-residents.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurance is not commonly seen in project finance transactions in this jurisdiction, although there are certain mandatory reinsurance cessions in insurance legislation.

Section 7: Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
The submission by parties to a foreign jurisdiction will be effective and enforceable if submission is non-exclusive. Recognition of a foreign jurisdiction may be refused where a dispute relates to a matter that is exclusively governed by Tanzanian law

As regards sovereign immunity, where the government of Tanzania is a party to a contract, it is deemed to have waived its immunity, and will be subject to all liabilities that arise in the contract, as if it were a private person. Any claim arising under the contract can be enforced against the government. However, enforcement is restricted to payment by the treasury department of amounts due and no other form of execution or attachment may be used to enforce payment.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
Generally, parties have a right in a contract to choose which law will govern the contract. If the contract is silent then *Lex loci contractus* will determine that the governing law will be the law of the place where the contract was made.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
Tanzania law will recognise a foreign court judgment where there is a reciprocal enforcement of judgments agreement in place with that foreign country. In order for a foreign judgment to be recognised in Tanzania, the judgment must be filed, by way of an application to the High Court. The court will then recognise the foreign judgment, unless the judgment is challenged on the basis of jurisdiction, illegality or would be contrary to public policy.

Further, Tanzania has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, a foreign arbitral award is enforceable in Tanzania using the mechanism provided under the New York Convention.

Generally, according to the Arbitration Act, a foreign arbitration award is enforceable in the High Court of Tanzania. It is treated as binding for all purposes on the persons between whom it was made, and may be relied on by any of those persons by way of defence, set–off or otherwise, in any legal proceedings.

For a foreign arbitral award to be enforceable it must fulfil certain specified conditions, such as: having been made under a valid arbitration agreement, in conformity with the law, become final in the country in which it was made and may have been lawfully referred to arbitration under Tanzanian law.

A foreign arbitration award cannot generally be enforceable if the High Court is satisfied that, for instance, the award has been annulled in the country in which it was made or does not deal with the relevant questions, or goes beyond the scope of the agreement.

Section 8: Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
Collateral available in Tanzania includes mortgages over land, fixed charges over assets (including cash at bank), share charges and pledges, assignment by way of security, (including the benefit of contracts and receivables) liens and floating charges (together with security interests) and guarantees.

There are certain classes of assets which cannot be attached, which should be checked depending on the facts of the project security package (for instance land or buildings belonging to an agriculturalist and immediately appurtenant land).

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Generally, inter-creditor agreements are commonly used by local banks in Tanzania to subordinate debts and to adjust the ranking of secured creditors by way of contractual agreement. The enforceability and operation of these inter-creditor agreements have not to our knowledge been challenged in the courts in Tanzania.

In the case of a company insolvency, preferential debts will be paid as a priority. Preferential debts include specified taxes, specified government rents and specified wages or salaries.

Tanzanian law recognises that any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors will be binding on the company if sanctioned by the shareholders and creditors, subject to the right of appeal to the court by any aggrieved creditor for the court to amend, vary or confirm the arrangement as it thinks just.

Section 9: Perfection, priority and enforcement

9.1 How is a security interest in each type of collateral perfected and how is its priority established?
Generally, a security interest is perfected by registration at the Business Licensing Regulatory Authority (Brela) within 42 days of the date of its creation, otherwise it will be void on the insolvency of the company against the liquidator or administrator, or any creditor of the company.

Mortgages must also be registered at the relevant land registry and some documents should also be registered at the registry of documents.

The priority of security interests is generally determined by the date of the document and the priority of mortgages is generally determined by the date of registration at the relevant land registry, in each case provided it is registered in time and there is not an agreement otherwise.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
Nominal registration fees are payable for the registration of a security interest at Brela the land registry or the registry of documents. Security interests are also liable to nominal stamp duty.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
Yes, a corporate entity can act as a security agent or trustee on behalf of the project lenders and this has been done in Tanzania. However, the enforceability and operation of such an arrangement has not to our knowledge been challenged in the courts in Tanzania.

Section 10: Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
Winding up proceedings will affect a lender's right to enforce any security interest. Any attachment or execution against a company's assets after the commencement of winding up proceedings by the court will be void. Any disposal of the company's property, including things in action, any transfer of shares or any alteration in the status of the shareholders of the company without the court's consent will also be void.

10.2 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral/security?
A project lender may take enforcement steps, such as dealing with any assets charged to the lender, by giving reasonable notice of the sale to the borrower, or completing the blank share transfer forms and proceeding with the transfer where shares have been charged.

The lender can similarly take possession of any land it has a security interest over after service of a notice of default on the borrower and either lease the land or sell it 30 days after the date of the notice.

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?
A receiver may be appointed without court proceedings, subject to the terms of appointment set out in the relevant security interest. An administrative receiver appointed under the security interest also has the power to seize and dispose of any property subject to that interest.

Nicholas Zervos
Founder partner, VELMA Law

Dar es Salaam, Tanzania
T: +255 752 66 77 66
E: nzervos@velmalaw.com
skype: nzervos.velmalaw
W: www.velmalaw.com

About the author

Nicholas Zervos is a partner at VELMA Law and a senior commercial transactional lawyer with expertise in international corporate matters and project and structured finance, particularly in East Africa, the UK and central and eastern Europe.

Zervos has lived and worked as a lawyer in Dar es Salaam since November 2006. Before then he was a senior partner with a major firm in London (and Hong Kong), advising sponsors and banks on commercial and financing agreements for infrastructure projects in developed and emerging markets. His areas of specialism include commercial law, project finance, finance and corporate law. He has a law degree from the University of Nottingham, and is admitted to the English, Tanzanian and Hong Kong bars.

Zervos is a member of the Law Society of Tanganyika and the Law Society of England and Wales.

Geoffrey Gasper
Junior associate lawyer, VELMA Law

Dar es Salaam, Tanzania
T: +255 765 87 26 74
E: ggasper@velmalaw.com
skype: ggasper.velmalaw
W: www.velmalaw.com

About the author

Geoffrey Gasper is a junior associate lawyer at VELMA Law in Dar es Salaam, with expertise in corporate, commercial, banking, energy and PPP law.

Gasper has a degree from Tumaini Makumira University, Arusha, Tanzania and has previously worked with an international corporate and investment bank on regulatory compliance, corporate and commercial matters, facility agreements and security documentations.

Edmund Temu
Junior associate lawyer, VELMA Law

Dar es Salaam, Tanzania
T: +255 657 159 311
E: etemu@velmalaw.com
W: www.velmalaw.com

About the author

Edmund Temu is a junior associate lawyer at VELMA Law in Dar es Salaam with expertise in corporate/commercial, banking, energy, intellectual property and public private partnership law.

Temu has a degree from Cardiff University, United Kingdom and has experience advising both domestic and international clients across his engaged areas and conducting research and due diligence.

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LATHAM & WATKINS LLP

www.lw.com

Amy Maloney, Warren Lilien and Kelann Stirling, Latham & Watkins

Section 1. National update

1.1 What are the main project finance trends and developments (for example, increased use of project bonds) recently seen in your jurisdiction?

During 2016, the US project finance market has been impacted by depressed commodity prices and a tighter bank market, but sponsors have been able to move forward with increased investment from private equity funds, legislative support for renewables projects and bespoke financing structures (for example merchant financings backed by revenue puts).

Legislative support for renewable energy at both the federal and state levels (in particular the extension of the Inland Revenue Service (IRS) production and investment tax credit programs) and an increasingly hostile attitude towards coal plants (the Clean Power Plan (CPP), together with historically low natural gas prices), have led to:

- Increase in renewable energy projects. We expect this trend to continue, particularly if the CPP survives current legal challenges. As this market matures, deal structures also are evolving. Increasingly, projects are contracting to sell power to large corporates instead of traditional utilities, resulting in offtake contracts with shorter tenors and some power pricing risk being left with project owners. A proliferation of products to hedge power price and volume have become more commonplace, particularly in the ERCOT (Texas), SPP (Southwest Power Pool) and PJM regional transmission organisation markets. Community solar projects are becoming a viable alternative to larger-scale industrial projects, warehouse facilities are being used increasingly for the development of renewables projects and sponsors are combining tax equity with a range of back-leverage financing structures. We also observe a significant pickup in renewable energy sponsors tapping the private placement markets in an effort to secure long-term fixed rate financing before anticipated rate increases.
- Gas buildout in the northeast, particularly in the PJM market, though there is speculation about how much additional capital is available for merchant gas power plants in PJM.

In those areas experiencing the most, and the most rapid, growth of renewable energy projects, grid operators are facing increasing intermittency challenges. Energy storage projects likely will increase in the near term as a means to address this challenge.

Public-private partnership (PPP) deal flow in the US has increased significantly in recent years and is widely expected to continue to increase, given infrastructure needs.

Section 2. ECAs and Multilaterals

2.1 What role have export credit agencies, multilateral agencies and international financial institutions played in supporting project finance transactions in your jurisdiction? Please include an overview of the main institutions domiciled in your jurisdiction.

Historically, such institutions have not played a significant role in financing projects within the US. However, following the US shale gas revolution, export credit agencies, particularly those in Asia that are able to provide untied funding to advance strategic national interests, have recently become more active.

The US official export credit agency is the Export-Import Bank of the United States, which is focused on facilitating the export of US goods and services by providing various financial products to companies within the US that are exporting products abroad, or to projects around the world that support the growth of jobs within the US. The US also has established a development finance institution: the Overseas Private Investment Corporation (OPIC), which provides various financial products to projects that have a meaningful connection to the US private sector and meet the agency's ultimate goal of advancing US foreign policy and national security priorities.

Section 3. Public-private partnerships

3.1 Is there a public-private partnership (PPP) act or similar statute authorising PPPs, and are both greenfield and brownfield PPP projects permitted?

Due to the federal system of development and implementation of transportation infrastructure maintenance and improvements in the US, there are dozens of different state statutes authorising PPPs. As of April 2016, it has been reported that 34 US states and the District of Columbia have authorised PPPs by statute. Such authorisations vary broadly from state to state and in some cases permit both greenfield and brownfield PPP projects. President-elect Donald Trump has been quoted as stating that he will use PPPs and private investments through tax-incentives to spur $1 trillion in infrastructure investment over the next ten years, with up to $550 billion focused on transportation. However, while Trump has indicated that he staunchly supports PPPs, there is a possibility of congressional resistance to major increases in infrastructure investment. This, coupled with the need for state action to implement PPP projects, makes it difficult to predict the timing or scope of any significant increases in PPPs.

3.2 May a concessionaire grant security interest in the project to its lenders and, if so, is consent of the government or contracting authority required?

While this depends on the terms of the relevant concession agreement, recent P3 concessions financed in the US have vested title to the physical assets comprising the project and all improvements with the contracting authority. The lenders have obtained a security interest only in the rights of the concessionaire under the applicable concession agreement, together with an express acknowledgment from the contracting authority of such assignment and certain rights to cure non-performance by the concessionaire.

Section 4. Foreign investment and ownership restrictions

4.1 What restrictions, fees and taxes exist on foreign investment in or ownership of a project?

The Committee on Foreign Investment in the United States (Cfius), a US federal interagency group, has jurisdiction over transactions in which a foreign investor acquires control over a US business. More specifically, Cfius reviews such transactions for their impact on US national security and can recommend that the US president block or suspend any transaction that impairs US national security (or negotiate mitigation conditions with the parties to avoid that result).

Foreign investment in a US business also may trigger federal agency review based on the particular industry in which the target US business operates. For example, the US Department of Defense has established procedures to review and mitigate potential foreign ownership, control, and influence over US businesses that hold security clearances issued by the US

government. In addition, there are limitations on the ability of foreign persons to acquire rights in natural resources depending on the type and location of the resource (including, a federal law prohibition on direct foreign ownership of federal mineral leases).

The US tax consequences of a non-US person investing in a project within the US can be complex and would vary, depending on, among other things, the status of the investor, the entity status of the project entity, the assets and operations of the project entity and its capital structure.

4.2 Can a government authority block or unwind a transaction involving foreign investors after it has closed for strategic, national security or other reasons?
To the extent that parties have not obtained Cfius clearance prior to closing, Cfius can initiate review of a covered transaction even after closing has occurred. That review can result in the US president's imposition of adverse conditions on the operation of the acquired US business or, in the extreme, an order that the foreign investor divest its interest in that business.

Other US agency review processes can also result in adverse post-closing consequences. For example, the Department of Defense can move to invalidate security clearances post-closing where it is not comfortable that foreign ownership, control, and influence has been appropriately mitigated.

Section 5. Foreign exchange, remittances and repatriation

5.1 What, if any, are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?
A foreign investor may be subject to US federal withholding tax at a rate of 30% on dividends and interest, unless a lower income tax treaty rate applies. In the case of interest payments, the portfolio interest exemption may provide a complete exemption from US federal withholding tax on such interest payments to the foreign investor, provided that, *inter alia*, the foreign investor is not a bank making a loan in its ordinary course of business.

In addition, certain provisions of the US Internal Revenue Code of 1986, as amended (commonly known as Fatca) may impose a US federal withholding tax of 30% on withholdable payments to certain foreign financial institutions and non-financial foreign entities unless certain conditions are satisfied or exemptions are applicable. Under the US Department of the Treasury regulations, withholding under Fatca generally applies to: payments of US-source interest and dividend income made on or after July 1 2014; and gross proceeds from the disposition of assets producing US-source interest or dividend income on or after January 1 2019. However, under grandfathering rules, withholding under Fatca generally will not apply to any payment under, or to gross proceeds from the disposition of, a debt obligation outstanding on July 1 2014.

5.2 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?
While there is no prohibition on a US person's ability to hold foreign currency accounts locally or in other jurisdictions, where such accounts are located outside the US, such persons may be subject to the IRS requirements to file a Report of Foreign Bank and Financial Accounts (FBAR) or a Statement of Specified Foreign Financial Assets (Form 8938).

Section 6. Insurance

6.1 Are there any restrictions, controls, fees or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?
Insurance companies and contracts primarily are regulated by individual state law and therefore any controls, restrictions, fees and taxes applicable to insurance policies provided by foreign insurers will vary from state to state. The National Association of Insurance Commissioners, which is a voluntary association composed of state insurance regulators for all 50 states, publishes model laws and rules for the insurance industry, which indicates in its text which states have adopted each law or regulation.

Foreign insurers are permitted to (and often do) provide insurance over project assets located in the US, subject to compliance with applicable state and federal laws. Foreign insurers may either establish a branch within the US, which will subject the foreign insurer to regulations much like those applicable to domestic insurers, including state guaranty fund requirements, or rely on state law exemptions allowing non-admitted foreign insurers to place insurance over assets within the US. There are three main ways in which non-admitted foreign insurers may place insurance within the US: on a surplus lines basis; through a direct placement; or pursuant to other exemptions available under the relevant state's insurer licensing laws.

6.2 Is reinsurance in the international market commonly seen on project finance transactions in your jurisdiction and are cut-through clauses permitted?
Reinsurance in the international market is available but not commonly seen on US project financings. In US project financings, unlike in other jurisdictions, lenders typically do not require reinsurance because there are enough rated insurance companies in the US to provide the relevant cover and, where the US market does not have sufficient capacity, it may be possible to obtain direct insurance from foreign issuers. Although less relevant, given that reinsurance is not commonly used, we note that cut-through clauses generally are permitted under New York law, so long as the cut-through clause clearly manifests the parties' intent to allow a specific third-party (for example the original insured) to obtain an insurance recovery directly from the reinsurer. Such clauses may also be enforceable in other US jurisdictions, although there may be common law or statutory distinctions among such jurisdictions impacting their scope and enforceability.

Section 7. Choice of law and jurisdiction

7.1 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?
US federal and state courts generally consider the parties' agreement to submit a dispute to a foreign jurisdiction effective and enforceable, unless it is the result of overreaching or unfair use of unequal bargaining power, or if the foreign jurisdiction would be extremely inconvenient.

Under the Foreign Sovereign Immunities Act, a waiver of sovereign immunity is generally effective and enforceable in the context of government project development contracts of a commercial nature.

7.2 Is English or New York law recognised as a valid choice of law in your jurisdiction?
Generally, US federal and state courts respect the parties' choice of law. Section 187 of the Restatement (Second) of the Conflicts of Laws is widely followed and provides that a court will follow the law of the state chosen by the parties "to govern their contractual rights and duties . . . unless either (a) the chosen state has no substantial relationship to the parties or to the transaction or there is no other reasonable basis for the parties' choice; or (b) application of the law of the chosen state would be contrary to fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties."

Notably, however, the state of New York encourages the choice of New York law as the governing law of international commercial transactions by permitting parties to a transaction where the consideration or obligation is not less than $250,000 to choose New York law "whether or not such contract, agreement or undertaking bears a reasonable relation" to New York state.

7.3 Would courts recognise a foreign arbitral tribunal award or court judgment? If so, what are the conditions applicable to such recognition?
The recognition of foreign court judgements in the US is governed by state law (including in federal courts). Thirty-two of the US states have adopted the Foreign-Country Money Judgments Recognition Act. The other states consider the recognition of foreign court judgments based on common law principles of comity. Money judgments from a non-US court will not be recognised if the non-US court was not impartial or did not offer due process or did not have personal jurisdiction over the defendant (and in certain circumstances based on judicial discretion).

The US is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which applies to arbitration awards of a commercial nature when either at least one party is not a citizen of the US or all parties are citizens of the US, but there is a reasonable nexus with one or more foreign states. The Federal Arbitration Act, which applies to awards involving maritime disputes or disputes involving interstate commerce, sets out the procedures for the enforcement of arbitration agreements and arbitral awards in the US.

Section 8. Security

8.1 What types of security are usually seen in project finance transactions in your jurisdiction, and are there any notable exclusions, including assets which cannot be secured?
It is customary in a project financing of a project or portfolio of projects located within the US that, on the date of financial closing, secured parties receive security interests in substantially all personal and real property of the owner of the financed project or portfolio of projects and its subsidiaries (if any) (including, for example accounts, equipment, inventory, intellectual property, contracts, capital stock and cash), as well as security interests in all of the equity interests in such owner and subsidiaries. Note, however, that there are frequently limited exclusions from the collateral (or example contracts, licences and permits that are not assignable by their terms or under applicable law and assets for which security interest perfection is unduly cumbersome or expensive relative to asset value).

8.2 Would the law of your jurisdiction enforce arrangements whereby debt is subordinated by way of a contractual agreement (including in bankruptcy or insolvency proceedings)?
Debt subordination is far less common in the US than lien subordination but both debt subordination and lien subordination would be recognised in bankruptcy if agreed pursuant to an otherwise valid agreement.

Section 9. Perfection, priority and enforcement

9.1 How is a security interest in each type of security perfected and how is its priority established?
Perfection and priority of security interests in US project financings are primarily governed by, in the case of personal property, the Uniform Commercial Code in effect in the relevant US state (the UCC) and, in the case of real property, the law of the jurisdiction where the real property is located.

For personal property, Article 9 of the UCC permits several methods of perfection depending on the type of property, for example:

- Filing of UCC financing statements is available as a method of perfection for all personal property collateral that is subject to Article 9 of the UCC, other than deposit accounts, letter of credit rights and money. For most domestic debtors, financing statements are filed in the debtor's state of organisation and, for most non-US debtors, Washington DC.
- Possession is available as a method of perfection for certificated securities, instruments and tangible chattel paper (and also for goods and money, though uncommon) and is effected by the secured party taking physical possession of the collateral.
- Control is the only permitted method of perfection for deposit accounts and letter of credit rights and is the stronger method of perfection for securities accounts, commodity contracts, uncertificated securities and electronic chattel paper. It is typically effected by entering into an agreement that provides the secured party with control (for UCC purposes) over the collateral.

Perfection of security interests in certain types of personal property (for example insurance) is not addressed in the UCC, and other personal property (for example goods covered by certificates of title or intellectual property) may require compliance with other laws.

Security interests in real property are perfected by recording a mortgage or deed of trust in proper form in the jurisdiction where the real property is located.

Absent a contractual intercreditor arrangement to the contrary, the first to properly perfect a security interest generally has priority, with the caveat that certain methods of perfection (for example possession or control of investment property) will take priority over earlier security interests perfected solely by filing of UCC financing statements. Additionally certain types of creditors such as purchase money secured parties and certain lien creditors may be able to obtain priority over prior perfected security interests.

9.2 Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise or defer them?
The taxes and fees payable to perfect a security interest vary depending on the type and location of collateral. Fees are commonly payable upon the filing or recording of security documentation, and in the case of personal property such fees are usually nominal. In the case of real property, while this also varies depending on the jurisdiction, substantial mortgage recording fees are not uncommon.

9.3 May a corporate entity, in the capacity of agent or trustee, hold security on behalf of the project lenders as the secured party?
A corporate entity, as agent or trustee for secured parties, may be the grantee of security interests in collateral and, if necessary, hold physical collateral.

Section 10. Bankruptcy proceedings and enforcement

10.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral/security?
Chapters 7 and 11 of the United States Bankruptcy Code govern liquidation and reorganisation proceedings, respectively. Immediately upon the commencement of a bankruptcy proceeding by a project company, the Automatic Stay goes into effect, which prevents creditors and other parties in interest from taking most contractual enforcement, collection and foreclosure actions against a debtor or its property.

Creditors are able to protect their interests in a debtor project company through the US bankruptcy process. A creditor may request relief from the automatic stay to take limited specific action against a debtor or its property during bankruptcy, subject to court approval. The Bankruptcy Code also provides for a right of secured creditors to obtain adequate protection from diminution in value of collateral due to the conduct of a debtor, depreciation, dissipation or otherwise.

Secured creditors should be aware that the Bankruptcy Code also permits a debtor, under certain circumstances, to grant a security interest that has priority over pre-bankruptcy secured creditors to lenders that provide financing to the debtor during bankruptcy.

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

Security documents in US project financings commonly provide that, upon the occurrence of an event (often an event of default under the financing documents), the secured parties may exercise remedies specified therein (for example direct application of cash in accounts and foreclose on and sell collateral) and remedies available at law or in equity and under the UCC (coupled with the right to terminate outstanding financing commitments and accelerate outstanding indebtedness).

10.3 What processes, other than court proceedings, are available to seize the assets of the project company in an enforcement? For instance, is contractual enforcement (such as receivership) recognised?

See 10.2 above.

Amy Maloney
Partner, Latham & Watkins

New York, US
T: +1 212 906 2994
E: amy.maloney@lw.com
W: www.lw.com

About the author

Amy Maloney is a partner in the New York office of Latham & Watkins where she is a member of the Project Finance Practice in the Finance Department. Maloney represents commercial and investment banks, insurance companies, investment firms and other financial institutions as well as sponsors and developers in connection with the development, construction, operation and financing of domestic and cross-border energy and infrastructure projects.

Warren Lilien
Partner, Latham & Watkins

New York, US
T: +1 212 906 1787
E: warren.lilien@lw.com
W: www.lw.com

About the author

Warren Lilien is a partner in the New York office of Latham & Watkins. Lilien represents financial institutions and private equity sponsors in connection with all phases of the development and financing of power projects (including gas, coal, wind, solar, biomass and geothermal-fired plants), refineries, roads, bridges tunnels and other infrastructure projects. Lilien's experience includes the structuring and negotiation of financing arrangements, project contracts, secured commodity hedge agreements, and extensive experience in acquisitions and dispositions of power projects.

Kelann Stirling
Associate, Latham & Watkins

New York, US
T: +1 212 906 1784
E: kelann.stirling@lw.com
W: www.lw.com

About the author

Kelann Stirling is an associate in the New York office of Latham & Watkins, practicing principally in the Project Development and Finance practice group. Stirling has represented sponsors, lenders and governmental entities in connection with financings of the following types of projects: oil and gas; LNG; wind energy; solar power; ethanol and infrastructure.