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# GLOBAL PROJECT FINANCE GUIDE

2023

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# GLOBAL PROJECT FINANCE GUIDE 2023

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# Foreword

Over the past years, there has been a significant rise in the number of players in the global project finance markets, as lenders and sponsors from diverse regions across the globe have entered the fray, and such trend rendered the knowledge about the global practices of project finance more crucial than ever.

With this motivation, we are delighted to present the Global Project Finance Guide 2023, which includes a standardized questionnaire prepared by the editors and answered by highly experienced project finance lawyers worldwide.

The Guide aims to offer its readers a practical summary of the laws and practices governing project finance in several jurisdictions across the globe. It provides an overview of the legislation and international treaties governing the project finance and highlights the security interests, incentives and restrictions related to project finance in each jurisdiction. The Guide also addresses certain technical areas related to project finance, such as taxation, environment and insurance, sheds light on financing Public-Private Partnership (PPP) projects, and discusses issues related to jurisdiction, immunity waivers, trends and projections in the field of project finance.

We extend our appreciation to all the authors of this Guide, who were chosen for their acknowledged expertise in this field.

Dr. Çağdaş Evrim Ergün
Ankara, May 2023

# ARGENTINA

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The main legal framework is the Argentine Civil and Commercial Code ("**CCC**"), which regulates, among others, the law on property, real estate, obligations, contracts, trust and tort. In addition to the CCC, there are certain special laws that are relevant for structuring a project financing, such as the Public-Private Partnership (Law N° 27,328), Bankruptcy Law (Law N° 24,522), Capital Markets (Law N° 26, 831) and the Registered Pledge Law (Decree 897/95).

In structuring the project financing it is also important to consider the specific regulations on the industry and sector in which the project will be carried out. Laws regulating industries and sectors of interest for project financing includes, among others, Hydrocarbon Law (Law N° 17,319), Natural Gas Law (Law N° 24,076), Energy Law (Law N° 24,065), Renewable Energy Law (Law N° 26,190) and Information Technology and Communications (Law N° 27,078), among other.

Argentina entered into more than 50 Bilateral Investment Treaties ("**BIT**") and signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Argentina's BITs typically grant foreign investors different guarantees, including fair and equitable treatment, treatment no less favorable than that offered to nationals (national treatment), protection against expropriation unless it is for a public purpose and with prior compensation; most-favored-nation treatment, obligation to comply with state engagements (umbrella clauses, or similar engagements to grant the best local or BIT treatment, etc.).

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Project finance market in Argentina was affected by the country's macroeconomic recent instability, which included a restructuring of the sovereign debt. However, some projects have been developed and it is likely that once the macroeconomic situation improves there would be an increase in the development of projects, especially in certain strategic sectors such as mining, oil and gas, renewables and infrastructure. The most significant project financings closed during the last 12 months have been related to green projects and renewable energy (e.g., Pan American Energy green projects and energy security, YPF Green bond issuance to finance a solar park in San Juan, and 360 Energy Solar issuance of bonds to finance a solar power project).

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most common security structure in project financings is the trust. The assets in the trust form an estate which is segregated from the assets of the trustor, the trustee and the beneficiaries. Therefore, the assets in the trust cannot be attached by the creditors of the trustee or the trustor, other than for fraud or fraudulent conveyance actions. On the other hand, the creditors of the beneficiary can subrogate on the actions of the beneficiary. This level of segregation isolates the assets of the project financing from the risk of the business of the developer, constructor and owner of the project.

The trust structure also allows the creditors to take over the project in case of insolvency or failure to perform by the developer or constructor of the project. The trust agreements and the engineering, procurement and construction contracts entered into by the trustee on behalf of the trust, typically provide that, in case of default by the company carrying out the project, the financing providers, as beneficiaries of the trust, will be able to instruct the Trustee to enforce the agreements entered into by the defaulting party and to replace the defaulting party for a new contractor who can complete the project.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

The Argentine Companies Law No. 19,550, as amended, (the "**Companies Law**") provides that the shares of a corporation can be pledged. The rights on the shares pledged continue to belong to the owner of the shares and the pledgee must allow the exercise of the rights by the pledgor. The pledge of the shares must be agreed in written by the owner of the shares, as pledgor, and the secured creditor, as pledgee. The agreement must specify the secured obligation and the maximum amount secured by the pledge. As the pledge is a *in rem* right, the delivery (*traditio*) of the shares to the creditor is necessary to perfect the pledge. The manner in which this delivery is made will depend on the type of shares that the company has issued. In case the company has issued stock certificates, the delivery of the certificates to the creditor is necessary. In case the company has issued book-entry shares, the pledge will be perfected by the annotation in the stock ledger.

In all cases, the pledge of the shares has to be notified to the company. The shareholder pledging the shares must send a notice to the company informing the pledge of the shares and the board of directors should leave on record

the existence of the pledge, reflecting such situation in the stock ledger and if the company issued stock certificates, a notation on the back of the share certificate.

In case the shares are deposited with Caja de Valores S.A. ("**Caja de Valores**"), as collective depository, the pledgor must send a notice to Caja de Valores notifying the pledge.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

The private sale of the pledged shares is an enforcement method authorized by the CCC. The CCC provides that the parties may agree at the time of the creation of the pledge that the sale will be carried out by a special procedure determined by the parties, which may include the private sale by the creditor of the asset or its sale in a certain market[1]. The share pledge agreements typically provide for the private sale by the creditor in case of enforcement. In the case of securities, including shares, the sale can be carried out in a stock market at market price.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

The pledge can be created on any credit which is documented and can be assigned. The pledge can be on account receivables and on future rights to the extent the agreement from which they will arise exists at the time of the creation of the pledge. The commitment to create pledges over future assets is generally valid.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Generally, project financing is implemented using a trust structure. The trust will be the holder of the rights and obligations related to the project and the lenders will be the beneficiaries of the trust. In case the borrower who is carrying out the project becomes insolvent and/or commences a composition process, the trust agreement will generally provide that the trustee will replace the borrower in the operation of the project and will use the proceeds of the project to repay the lenders. The trustee will typically also be the beneficiary of any pledge created to secure the financing and will enforce such pledges in case of default.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The CCC regulates trusts, which includes guarantee trusts. The CCC provides that if the trust is a guarantee trust, the trustee can apply to the money in the trust, including those amounts resulting from the enforcement of the credits in the trust, to the payment of the secured credits. In connection with other assets in the trust, the trustee can dispose them in accordance with the terms of the trust. In case the agreement is silent, it can sell them privately or in a court auction, applying a mechanism that secures the highest possible value for the goods.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The government of Argentine offers a

1 Section 2229 of the CCC.

number of investment promotion programs at the federal, provincial, and municipal levels to attract investment to specific economic sectors such as capital assets and infrastructure, innovation and technological development, and mining and energy, with no discrimination between national or foreign-owned enterprises. Some of the investment promotion programs require investments within a specific region, industry, or economic activity. The incentives and exemptions offered include refunds on value-added tax ("**VAT**") or other tax incentives for local production of capital goods.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

There are no incentives or exemptions specifically applicable to foreign investors other than those that may result from BITs.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions for borrowing bank or shareholder loans from abroad or in a foreign currency. However, Argentina has a strict foreign exchange control regime and certain requirements must be met in order to repay the financing through the foreign exchange market. These requirements include the obligation of entering to Argentina and selling for domestic currency the disbursements received. Also, foreign exchange regulation prohibits the pre-cancelling of the debt.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Argentina does not have a regime for the authorization or licensing of foreign investment other than for certain specific investments and regulated activities (rural and frontier lands[2], media and cultural activities, etc.). Therefore, in general, there is no need in this case to make any filing under a foreign investment regime. However, under Argentine companies' law (Law 19,550 as amended), foreign companies who participate in the share capital of local companies must be registered with the Public Register. This registration is for publicity purposes only and it is complied with at the provincial level (not the federal level). It does not involve an authorization by the government, nor does it involve an application for a license from the government. Nonetheless, this registration may be burdensome and time consuming in certain jurisdictions.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no minimum equity requirement under Argentine legislation but in certain cases, thin capitalization rules may result in an unfavorable tax treatment. Additionally, bidding terms and conditions for large projects may include minimum equity requirements.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

The registration and filing requirements will depend on the legal structure used for the project finance, but generally trusts and liens on an asset will have to be registered.

2 According to Law 26,737 (Regime for Protection of National Domain over Ownership, Possession or Tenure of Rural Land), a foreigner cannot own land that allows for the extension of existing bodies of water or that are located near a Border Security Zone. Further, foreign individuals' or companies' ownership is limited to 1,000 hectares (2,470 acres) in the most productive farming areas.

Certain trust agreements must be registered with the Public Register of the City of Buenos Aires in order to be enforceable vis-a-vis third parties. For instance, if the trust will have title over real estate or hold a participation in a company domiciled in the City of Buenos Aries, the trust must be registered.

Also, pledges will generally require that the lien is registered. As mentioned before, pledges on shares must be registered in the corporate books of the company or with Caja de Valores. In case of a pledge on registered assets (such as vehicles), the pledge must be registered with the relevant property register. In case of registered pledges of assets which property is not kept by a register, the pledge must be registered with the pledge registry of the place where the assets are located. The mortgages must also be registered in the real estate registry of the jurisdiction in which the real estate is located.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Section 2 of Law 12,988 prohibits to insurance outside Argentina persons, goods or any other insurable interest located in Argentina. Therefore, the insurance of local risks must be contracted with an Argentine insurance company which will issue an insurance policy governed under Argentine law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

The insurance proceeds under the insurance and reinsurance policies can be assigned to the benefit of the lenders. However, we suggest analyzing on a case-by-case basis taking into consideration the jurisdiction of the entities involved.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Currently, due to foreign exchange control regulations, in case the foreign resident collects an indemnification under an insurance policy in Pesos in Argentina, it may not be able to purchase foreign currency and transfer it outside Argentina.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Public-Private Partnership ("**PPP**") is a permitted method of developing projects in the following sectors: infrastructure, housing, productive investment, and research and technological innovation. There have been public tenders to award PPP contracts for highways and high-voltage transmission lines. However, these projects were suspended due to the difficulties arising out of lack of financing.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

In principle, there would not be legal restrictions preventing direct agreements between the public authorities and lenders, but this would have to be analyzed on a case-by-case basis. Anyhow, this type of arrangement is unusual in government contracts.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Government supports include the treasury guarantees, assignment of tax revenues, and fiscal benefits (including tax reductions and fiscal stability guarantees).

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Political risk events are usually under the responsibility of the private party. However, this has to be analyzed on a case-by-case basis.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Laws and regulations can change provided they are not contrary to a contractual, bilateral or similar binding undertakings.

Investors' legitimate expectations might also be protected in certain circumstances. For example, foreign investors protected by a BIT could invoke that the change of the applicable law or regulations constitutes a breach of the fair and equitable treatment guaranteed under the relevant BIT.

However, as a rule, investors are not shielded from subsequent changes in laws or regulations unless stability has been expressly granted.

**23. Is force majeure specifically regulated under the local legislation?**

Argentine legislation requires the PPP agreements to provide an equitable and efficient distribution of contributions and risks between the parties. In particular, the consequences arising from force majeure events shall be borne by the parties according to the conditions of each party to prevent, assume, or mitigate such risks in order to minimize the cost of the project.

**24. What are the general environmental and social requirements in project financings?**

Environmental requirements are set forth by federal and local (provincial) laws and regulations. The federal regulation determines the minimum standards for protection and the provinces issue their own specific regulations complying with such minimum standards.

Generally, an Environmental Impact Assessment ("**EIA**") must be conducted before the beginning of any project or activity that may have a negative impact on the environment. As rule, the project cannot commence unless the EIA is approved by the relevant regulatory authority through an Environmental Impact Declaration ("**EID**").

Social requirements could be included within the process of conducting the EIA and obtaining the EID. Additionally, certain provinces have local employment regimes.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

The submission to foreign law is binding and enforceable. According to article 2651 of the CCC, the parties may choose the governing law of the relevant contract. However, the contract will still be subject to Argentine public policy laws.

The waiver of immunity provisions is also binding and enforceable. However, Argentina is a party to the Vienna Convention of 1961 (approved by Decree-Law N° 7672/63) and the Vienna Convention of 1963 (approved by Law N° 17,081) and to other international treaties that provide immunity from enforcement with respect to certain specific state-owned assets which cannot be waived. Thus,

waiver of immunity provisions may not be enforceable when the execution is aimed against assets or categories of assets used or destined to be used for public purposes.

In addition, local courts have limited the effectiveness of such waivers when the execution of foreign courts' or tribunal's decisions may affect local public policy principles.

**26. Can financing documents provide for arbitration clauses?**

Financing documents can provide for arbitration clauses. The arbitration clause must be in writing and may be included in the contract or in a separate agreement or regulation.

However, pursuant to sections 736 and 737 of the Federal Civil and Commercial Procedural Code and to section 1644 of the CCC, matters involving public policy cannot be resolved by arbitration. Case law and legal authors have traditionally held that certain governmental decisions of political nature must be deemed as non-justiciable issues concerning public policy (e.g., declaration of a state emergency and federal intervention in a province). Furthermore, section 1651 of the CCC, establishes that the provisions related to the arbitration clause included in the CCC are not applicable to disputes in which the national or local States are parties. Therefore, it could be argued that arbitration clauses may not be applicable to disputes to which the national or local governments are parties unless they are specifically authorized, which must be analyzed in each particular case.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

The risk premium on Argentine sovereign bonds is currently extremely high (around 20% per year) and there are strict limitations under foreign exchange regulations on the payment of dividends, repatriation of investment and payment of intercompany services. In addition, the import of goods is subject to a licensing process which is burdensome, and many cases limits the quantities a party may import. Under the foreign exchange regulations, many imports are subject to out of market minimum payment terms (in some cases up to 180 calendar days after clearance of customs). In addition, generally, the foreign exchange control regulations provide that the exporter must enter into and sell for pesos at an unfavorable exchange rate the proceeds of its exporters.

These factors have been restricting foreign financing in Argentina, including project financing.

**28. Are any significant development or change expected in the near future in the project finance market?**

Argentina has a large potential in the mining, oil and gas and green energy industries. Therefore, it is expected that once the macroeconomic hurdles mentioned before are removed, Argentina will be a very attractive place for project finance investing.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

The most common interest rate used as an alternative to the LIBOR is the Term SOFR.

# BANGLADESH

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Following are the major legislations:

- The Foreign Exchange Regulation Act, 1947, read with the Guideline for Foreign Exchange Transactions, 2018, regulates the foreign exchange aspects of foreign borrowing;
- The Transfer of Property Act regulates security creation and enforcement issues;
- The Registration Act relates to the perfection of security; and
- The Contract Act in general regulates the rights of the parties to a contract
- The Stamp Act relates to the stamp duty payable on all financial documents, including security.

Following are the relevant treaties to which Bangladesh is a party:

- The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States; and
- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The government of Bangladesh traditionally finances its projects through sovereign loans. However, where a project is implemented through a special project vehicle ("**SPV**"), it may also utilise non-recourse, semi-recourse or recourse financing, as it is allowed by regulation to issue sovereign guarantees to the extent of its shareholding in the SPV. A private finance initiative (PFI) model is adopted for most government projects.

The government has also started to encourage project implementation through the public-private partnership model, whereby the government transfers significant risk to a private company, which must secure recourse or semi-recourse project financing without the government committing to any sovereign obligation to repay the debt. In addition, in appropriate cases, the government also finances projects through either loans issued by government institutions, viability gap financing or transaction advisory assistance.

In the private sector, project finance takes the form of either recourse or non-recourse financing. However, in large projects, lenders will insist on recourse financing where they seek a guarantee from the sponsors.

The local project finance market remains underdeveloped. On a number of occasions, local banks and government institutions such as the Infrastructure Development Company Limited and the Bangladesh Infrastructure Finance Fund Limited have provided debt financing under syndication; but the amounts provided are modest, ranging between $100 million and $200 million.

However, several multilateral development banks, foreign export-import banks and international commercial banks are active in providing project finance in Bangladesh.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The followings are the most commonly used security types in project financings in Bangladesh:

- Mortgages: These are most commonly used for immovable assets such as land and buildings.
- Fixed and floating charges: Fixed charges grant control over the assets, whereas floating charges allow the charge creator to continue to deal with the assets until crystallisation. Floating charges may be created over a class of assets, including future receivables, inventories or bank accounts.
- Pledge: Movable items and especially shares of the company may be pledged by the shareholders in favour of the lenders.
- Corporate guarantees from shareholders and third parties: Approval from the central bank of Bangladesh is not required when these are issued against foreign borrowing approved by the Bangladesh Investment Development Authority.
- Bank guarantee: This requires separate approval from the central bank.
- Standby letter of credit: These are also issued as security in certain cases.
- Liens: Liens are *stricti juris* and are governed by relevant statutes and ratified conventions. A general lien comprises a property of the debtor in the possession or under the control of the service provider without the right to sell or dispose of that property.
- Demand promissory note: This is an unconditional payment obligation upon demand.
- Assignment of contractual rights: This is very common with the assignment of concession rights.

Mortgages, charges, pledge, sponsor guarantees and assignment of contractual rights are common types of security in project financings in Bangladesh. A second-ranking mortgage can be created under Bangladesh law. The concept of a security trustee is recognised and is commonly adopted in case of syndicated financing involving multiple lenders.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Shares of a company may be pledged as a security to the benefit of lenders as long as specific conditions, if any, incorporated in the Articles of the Company are complied with. There are no further perfection requirements but it is a practice in Bangladesh to obtain standby resolutions from the target company approving the transfer, executed and legalized share transfer instruments and sellers' affidavits along with the deposit of share transfer.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Private sale is recognized as a valid method for the enforcement of share pledge. Generally, the share transfer instrument is deposited without any endorsement but the pledge is recorded in the company statutory share books and a resolution acknowledging the pledge and future transfer upon event of default is issued.

**6. Can security interest be established over future assets, rights and receivables of the borrower**?

Security interest can be established over future assets, rights and receivables of the borrower by way of executing a floating charge over such future assets of the borrower.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Security agreements are required to be governed by Bangladesh law in order for such security to be eligible for self-help remedies, summary judgment, possession, foreclosure, sale, and priority on insolvency. Self-help remedies may be exercised in the following cases:

- The mortgagee (beneficiary) has the power to sell the mortgaged property where the mortgage is an English mortgage (i.e., where the title is transferred as security with a provision to buy back);
- A power of sale without court intervention is expressly conferred on the mortgagee by the mortgage deed and the mortgagee is the government or a scheduled bank; or
- A power of sale without court intervention is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property.

In addition, as a contingency plan, lenders obtain an irrevocable power of attorney from the borrower to take possession over the secured asset on default without court intervention. Some of these rights are granted to banks and thus banks are frequently engaged as security agents to enforce such securities. The mortgagee or chargee may, at a time after the mortgage money has become due, exercise a foreclosure right to obtain from the court a decree for foreclosure. In addition, the mortgagee may sue the mortgagor if:

- the mortgaged property is wholly or partially destroyed; or
- the security is rendered insufficient and the mortgagee has given the mortgagor a reasonable opportunity to provide further security sufficient to render the whole security sufficient, and the mortgagor has failed to do so.

As stated above, local law governed security agreements such as mortgages, assignment agreements and charges enable the creditor to possess and foreclose the secured asset on its own as far as those rights are granted in the security agreements. Notwithstanding the foregoing, for bank lenders and local financial institution lenders, such self-help remedies have been expressly conferred under the Money Loan Court Act 2003.

Alternatively, a summary procedure may be instituted for foreclosure under the Code of Civil Procedure and the Money Loans Court Act 2003 (only applicable for local banks / financial institutes, foreign banks and multilaterals). The Money Loans Court is a specialized court which deals with borrowers with defaults in repaying loans and the court provides for the summary procedure with otherwise prescribed time frames. In the case of insolvency, secured creditors would always have the first priority among creditors.

As long as there is a claim and such claim is secured, the creditor can exercise self-help remedies or go to courts to bring action under the Civil Procedure Court and / or Money Loan Court Act to enforce the security. If the debtor is a company, it is also possible to bring a winding up suit at the Original Company Jurisdiction of the High Court if the debtor is unable to settle the payment within twenty-one days of a statutory notice issued under the Companies Act 1994.

Guarantees are required to be filed before either the local courts or nominated arbitral tribunal and thereafter the judgement / award for enforcement is required to be filed with the District Court as the Court of First Instance. The initial lawsuit allows the attachment of assets in relevant cases and administers suit against the guarantor in such a way as if the guarantor is the principal debtor. If there is any underlying dispute, such dispute must be resolved first as per the dispute resolution clause.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Yes, the security trustee concept is enforceable in Bangladesh and such arrangement is frequently adopted.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

In addition, the Government has granted certain incentives and preferential policies to industries considered to be thrust sectors in Bangladesh in form of tax holidays and tax exemptions. Tax holidays are allowed for industrial undertakings and physical infrastructure facilities established between 1 July 2019 and 30 June 2024 in the thrust sector. The thrust sector refers to industries/ industrial sub-sectors that have been able to successfully contribute to the country's industrialisation. In Bangladesh, it is based on developed and underdeveloped areas (*see below*).

Thrust industrial sectors subject to exemption include active pharmaceuticals ingredient, radio pharmaceuticals, automobile manufacturing, barrier contraceptive, rubber latex, chemicals or dyes, basic ingredients of electronic, bi-cycle, bio-fertilizer, biotechnology, boilers, brick made of automatic hybrid Hoffmann kiln or Tunnel Kiln technology, compressors, computer hardware, energy efficient appliances, insecticide or pesticide, petrochemicals, pharmaceuticals, processing of locally produced fruits and vegetables, radio-active application, textile machinery, tissue grafting and tyre manufacturing industries.

Physical infrastructures subject to exemption include deep sea port, elevated expressway, export processing zone,

flyover, gas pipeline, Hi-tech park, ICT village or software technology zone, IT park, large water treatment plant and supply through pipeline, LNG terminal and transmission line, mono-rail, rapid transit, renewable energy, sea or river port, toll road or bridge, underground rail and waste treatment plant.

Industries set up in EPZs and other IPAs are also subject to certain tax holidays as follows:

For independent power plants ("**IPPs**") commencing production before 2023, a tax exemption on income tax is available for 15 years. For independent power plants achieving Commercial Operation Date ("**COD")** after 1 January 2023 (other than coal fired IPPs) there is a:

- 100% tax exemption during the first five years.
- 50% exemption during the next three years.
- 25% exemption during the next two years.

For coal fired IPPs contracting with the government before 30 June 2020 and achieving COD before 30 June 2023, there is a 100% tax exemption for the first 15 years. For power projects, no import duty is charged with regard to capital machinery and spares. Also, there is an exemption over

| Year | Thrust Industries (Developed Areas - Dhaka and Chittagong divisions, excluding Dhaka city, Narayanganj, Gazipur, Chittagong city, Rangamati, Bandarban and Khagrachari districts) | Thrust Industries (Underdeveloped Areas - Rajshahi, Khulna, Sylhet and Brisal and Rangpur divisons and Rangamati, Bandarban and Khagrachari districts) | Physical Infrastructure | Industries set up in EPZ (Dhaka and Chittagong Division excluding hill districts) | Industries set up in EPZ (Other areas) | Developers of Economic Zone (BEZA) and Hi-Tech Park | Industries in BEZA and Hi-Tech Park (subject to paragraph 2.2.4) |
|---|---|---|---|---|---|---|---|
| 1st | 90% | 90% | 90% | 100% | 100% | 100% | 100% |
| 2nd | 80% | 90% | 90% | 100% | 100% | 100% | 100% |
| 3rd | 60% | 80% | 80% | 50% | 100% | 100% | 100% |
| 4th | 40% | 70% | 70% | 50% | 50% | 100% | 80% |
| 5th | 20% | 60% | 60% | 25% | 50% | 100% | 70% |
| 6th | | 50% | 50% | | 50% | 100% | 60% |
| 7th | | 40% | 40% | | 25% | 100% | 50% |
| 8th | | 30% | 30% | | | 100% | 40% |
| 9thh | | 20% | 20% | | | 100% | 30% |
| 10th | | 10% | 10% | | | 100% | 30% |
| 11th | | | | | | 70% | |
| 12th | | | | | | 30% | |

registration fees and stamp duty required to be paid for the perfection of any security or immovable property title. Shareholders are exempted from paying capital gain tax from the divestment of their shares in power projects.

Effective from July 2017 the Government has declared a tax exemption for 10 years for PPP projects for the development of National Highways or Expressways and related Service Roads, Flyovers, Elevated and At-Grade Expressways, River Bridges, Tunnels, River port, Seaport, Airport, Subway, Monorail, Railway, Bus Terminals, Bus Depots, Elderly care home. For selected PPP projects, no import duty is charged in case of capital machinery and spares. Furthermore, all receivables by construction contractors, suppliers, legal service providers and consultancy / supervisory firms attributable to PPP projects have been exempted from paying any VAT. In addition to the above such physical industry is also eligible to the following tax exemptions:

- Tax exemption over tax on capital gain from transfer of shares in such projects for first ten years
- Tax exemption over royalties / technical assistance fees for first ten years
- Foreign technicians are entitled to get 50% income tax exemption from income tax for the three years until fifth anniversary of the **COD** of the project.

Other exemptions include the following:

- **Accelerated depreciation.** Industrial undertakings not enjoying a tax holiday benefit from an accelerated depreciation allowance.
- **Concessionary duty on imported capital machinery.** Import duty, at the rate of 3%, is payable on the value of capital machinery and spares imported for initial installation in the existing industries.
- **Incentives to export oriented industries.** These include:

- businesses exporting 80% or more of goods or services qualify for duty free import of capital machinery and spares, and bonded warehousing;
- bonded warehouse and back-to-back letter of credit facilities;
- 90% loans against letters of credit and funds for export promotion;
- they are allowed domestic market sales of up to 20%;
- cash incentives and export subsidies are granted on the free on-board value (this includes inland freight, export duty and other expenses, but not ocean freight, insurance and consular fees) in the form of drawbacks and rebates on import and excise duties paid on direct inputs and so on;
- for 100% export-oriented industries, no import duty is charged on raw materials.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

In general income tax over interest earning for foreign lenders is exempted for financing in any industrial project or public projects.

- Incentives to foreign investors include:

- 100% foreign ownership and repatriation of invested capital, profit, and dividends;
- re-investment of repatriable dividends as a new investment;
- royalties and technical know-how fees are tax exempted for thrust sectors (*see above, Tax holidays*);
- interest on foreign loans is tax exempted under certain conditions;

- double taxation can be avoided;
- foreign technicians in certain industries are exempted from tax for up to three years;
- private sector power generation companies are tax exempted for 15 years;
- capital gains from the transfer of shares of public limited companies are tax exempted;
- new investors are granted six-month multiple entry visas;
- citizenship by investing US$500,000 or by transferring US$1 million (non-repatriable);
- permanent residency by investing US$75,000 (non-repatriable).

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

All proposals for borrowing from abroad by private sector industrial enterprises (including the concessionaire or the project company) in Bangladesh (including supplier's credits, financial loans from institutions or individuals and debt issues in capital markets abroad) shall require prior authorisation of Bangladesh Investment Development Authority ("**BIDA**"). Accordingly, if the concessionaire or project company wishes to borrow from abroad, the prior authorization of BIDA will be required. In our experience, BIDA approval is always granted for major infrastructure projects supported by the Government and in practice takes about two months under normal circumstances.

Applications for foreign loan should comply with the Procedure and Guidelines for Approval of Foreign Private Borrowing ("**Foreign Private Borrowing Guidelines**") issued by Bangladesh Bank and BIDA which set out the eligibility criteria and procedure for obtaining foreign loan. Pursuant to the Foreign Private Borrowing Guidelines, industrial enterprises in the private sector incorporated under the Companies Act 1994 and registered with BIDA are eligible for obtaining foreign borrowing from recognized lenders subject to the approval of Foreign Borrowing Scrutiny Committee. Foreign borrowings refer to commercial loans including financial loans, bank loans, buyer's credit, supplier's credit from institutions or individuals and debt issues in the capital market abroad, etc. The Foreign Private Borrowing Guidelines provide that the borrowers can raise the foreign borrowings from internationally recognized sources

**12. Are there any restrictions for foreign investments in your jurisdiction?**

In general, there are no restrictions on foreign investors incorporating or acquiring the shares of a company in Bangladesh. The major policy related to foreign investment in Bangladesh is the Bangladesh industrial policy 2016. Foreign and domestic private entities can establish and own, operate, and dispose of interests in most types of business enterprises. Four sectors, however, are reserved for government investment:

- Arms and ammunition and other defense equipment and machinery;
- Forest plantation and mechanized extraction within the bounds of reserved forests;
- Production of nuclear energy; and
- Security printing.

In addition to the four sectors reserved for government investment, there are 17 controlled sectors that require prior clearance/ permission from the respective line ministries/authorities (by way of public procurement or licensing or public private partnership) and indirectly this is

being used for a few sectors to maintain Government monopoly such as power (electricity) transmission and distribution. These are:

- Fishing in the deep sea
- Bank/financial institutions in the private sector
- Insurance companies in the private sector
- Generation, supply, and distribution of power in the private sector
- Exploration, extraction, and supply of natural gas/oil
- Exploration, extraction, and supply of coal
- Exploration, extraction, and supply of other mineral resources
- Large-scale infrastructure projects (e.g., flyover, elevated expressway, monorail, economic zone, inland container depot/ container freight station)
- Crude oil refinery (recycling/refining of lube oil used as fuel)
- Medium and large industries using natural gas/condensate and other minerals as raw material
- Telecommunications service (mobile/ cellular and land phone)
- Satellite channels
- Cargo/passenger aviation
- Sea-bound ship transport
- Seaports/deep seaports
- VOIP/IP telephone
- Industries using heavy minerals accumulated from sea beaches

While discrimination against foreign investors is not widespread, the government frequently promotes local industries and some discriminatory policies and regulations exist. For example, the government requires majority or more than majority local ownership of new shipping, logistics, freight forwarding, banking and insurance etc. companies, albeit with exemptions for existing foreign-owned firms, following a prime ministerial directive.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

The debt-equity ratio of the borrowing enterprise should reflect sufficient equity stake of the entrepreneurs, with moderate rather than high leveraging and also that while relatively higher debt levels may be warranted for long gestation infrastructure projects, total debt including the proposed borrowing should not breach 70:30 debt equity ratio even for these projects (In some concession agreements it has been raised to 80:20 based on clearance from Bangladesh Bank).

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In the foreign borrowing approval provided by the issuing authorities such as BIDA, it is a precondition to file the executed finance documents with such authorities within 30 days of execution followed by regular reporting of the disbursements and repayment position to such authority and the central bank. In addition, below are the perfection requirements for the underlying securities:

| Security Name | Eligible Assets | Statutory requirements | Perfection |
|---|---|---|---|
| Mortgage | Real Assets | ▪ Created under Chapter IV of the Transfer of Property Act 1882 by way of executing a mortgage deed along with an Irrevocable General Power of Attorney ("IGPOA").<br>▪ Must be governed by Bangladesh law to be treated as security to have the right of foreclosure and statutory priority over company assets upon liquidation<br>▪ Self-help remedies available only if expressly provided in the mortgage deed | ▪ Payment of stamp duty[3]<br>▪ Payment of registration fees (0.1% of secured value) and registration with Office of Sub-Registrar within 90 days of execution<br>▪ In case of company mortgagor, perfection as a charge with Registrar of Joint Stock Companies and firms within 21 days by paying the applicable registration fees[4] |
| Hypothecation | Movable assets (present and future) (including bank accounts) | ▪ Created under Section 159 of the Companies Act 1994 by way of executing a deed of hypothecation (can be fixed or floating, or both) along with a IGPOA<br>▪ Must be governed by Bangladesh law to be treated as security to have the right of foreclosure and statutory priority over company assets upon liquidation<br>▪ Self-help remedies available only if expressly provided in the deed | ▪ Payment of stamp duty of BDT300,<br>▪ In case of a company mortgagor, perfection as a charge with Registrar of Joint Stock Companies and firms within 21 days by paying registration fees[5] |
| Assignment Agreement | Contractual rights / receivables | ▪ Created under Section 8 of the Transfer of Property Act 1882 by way of executing an Assignment Agreement with an IGPOA<br>▪ Must be governed by Bangladesh law to be treated as security to have the right of foreclosure and statutory priority over company assets upon liquidation<br>▪ Self-help remedies available only if expressly provided in the agreement | ▪ Payment of stamp duty [6]<br>▪ No other perfection formalities other than acknowledgment from the contract counterparty<br>▪ Registration is optional but recommended |

3 Five thousand Taka for the first One crore Taka and for the remainder of the loan amount an additional duty at the rate of 0.1% of the remainder amount but not exceeding 5 (Five) crore Taka.

4 Secured Amount up to BDT5,00,000.00 registration fee is BDT250.00, additional for every BDT5,00,000.00 or part after the first BDT5,00,000.00 up to 50,00,000.00 – BDT 200.00. Additional for every BDT5,00,000.00 or part after the first 50,00,000.00 – BDT100.

5 Secured Amount up to BDT5,00,000.00 registration fee is BDT250.00, additional for every BDT5,00,000.00 or part after the first BDT5,00,000.00 up to 50,00,000.00 – BDT 200.00. Additional for every BDT5,00,000.00 or part after the first 50,00,000.00 – BDT100.

6 Five thousand Taka for the first One crore Taka and for the remainder of the loan amount an additional duty at the rate of 0.1% of the remainder amount but not exceeding 5 (Five) crore Taka.

| Security Name | Eligible Assets | Statutory requirements | Perfection |
|---|---|---|---|
| Pledge<br><br>(bailment of goods can also be done in form of lien in favour of bankers, lawyers and so on) | Movables or valuables when possession is delivered | ▪ Created under Section 172 of the Contract Act 1872 by way of executing a pledge agreement along with an IGPOA<br>▪ Must be governed by Bangladesh law to be treated as security to have the right of foreclosure and statutory priority over company assets upon liquidation<br>▪ Self-help remedies available only if expressly provided in the deed | ▪ Payment of stamp duty<br>▪ Marketable Securities (shares / bonds / debentures etc.) – exempted<br>▪ Other title deeds and movable assets – 0.5% of secured value<br>▪ No other perfection formalities<br>▪ Registration is optional but recommended |
| Guarantee | Unconditional promise to pay | ▪ Created under Chapter VIII of the Contract Act 1872 by way of executing a guarantee agreement. | ▪ Payment of stamp duty of BDT300<br>▪ No other perfection formalities<br>▪ Registration is optional but recommended |
| Demand Promissory Note ("DPN") | Negotiable instrument | ▪ Created under Section 4 of the Negotiable Instruments Act 1881 by way of executing a DPN. | ▪ Payment of stamp duty of BDT50<br>▪ No other perfection formalities |

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Local insurance policies are required to be governed by Bangladesh laws.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Insurance proceeds under the insurance and reinsurance policies may be assigned to the benefit of the lenders as long as such borrowing is as per the borrowing guidelines and appropriate approval, as relevant.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Insurances must be obtained from local insurers as long as relevant insurance products are available in Bangladesh. However, for public properties insurance must be obtained from state owned insurance companies which is shared between state owned and other group of local insurers 50:50 basis.

The Insurance Corporations Act, 2019 defines "public property" as:

(a) any kind of moveable or immoveable property which belongs to direct control or protection of the Government and the legal responsibility of maintenance which is to the Government;

(b) property vested to the Government or any local authority;

(c) any company, firm, institution, organisation, enterprise or any other establishment which is managed or controlled by the Government or a local authority, or in which the Government,

by itself or jointly with a local authority or a company, holds a financial share or interest or any company guaranteed by the Government to finance;

(d) any project operated by the foreign loan or financial aid guaranteed by the Government; or

(e) any other property determined by the Government.

However, reinsurance by foreign insurers is allowed.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, PPP is a permitted method of developing projects in Bangladesh as per the PPP Act, 2015 and a number of PPP projects have been developed in energy, toll road, LNG terminal and port sector.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between the public authorities and the Lenders are permissible under the local law and are commonly seen in the project finance market in Bangladesh for large scale infrastructure projects.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Unless the project company is fully or partially owned by the government, no such government supports (including treasury guarantee, debt assumption etc.) are available in Bangladesh. Government only issues guarantee in favor of lenders in proportion to its shareholding in the project company.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Political risk events usually under the responsibility of the public party and the risk is shared between the public and private parties under the PPP agreements.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, PPP Agreements in Bangladesh include protection against change in laws passed subsequent to the signing of the relevant concession agreement.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not specifically regulated under the local legislation; however, it is somehow covered within the terms related to "impossibility to perform a contract" under the Contract Act, 1872. PPP Agreements in Bangladesh include protection against force majeure under relevant concession agreement.

**24. What are the general environmental and social requirements in project financings?**

There are no express general environmental and social requirements in project financings in Bangladesh. However, industries in Bangladesh need to obtain environmental clearances from Department of Environmental of Bangladesh. The environmental laws of Bangladesh consist of the Environmental Policy, 1992 and the Bangladesh Environment Conservation

Act, 1995 ("**ECA**") read in conjunction with the Environment Conservation Rules, 1997 (**ECR**). Department of Environment ("**DOE**") is empowered to (i) formulate the environmental quality standards and pollutant discharge standards of Bangladesh; and (ii) issue an environmental clearance certificate. The local government authorities have been empowered with the function to issue no objection certificates, based on their own evaluations, which are prerequisites to obtain the final environmental clearances from the DOE. The Environmental Policy, 1992 sets out policies for various sectors including the industrial sector. Under the ECA, an industrial unit or project cannot be established or undertaken without obtaining an Environmental Clearance Certificate ("**ECC**") from the DOE. Accordingly, any industrial project (including power projects) must obtain an ECC from the DOE prior to the commencement of construction of its project.

Acquisition & Requisition of Immovable Property Act, 2017 ("**ARIP**"). ARIP requires that compensation be paid for (i) land and assets permanently acquired (including standing crops, trees, houses); (ii) any other damages over property or earnings caused by such acquisition, (iii) any other damages due to partition of any property caused by such acquisition and (iv) reasonable cost to move residence or business. However, ARIP does not deal with social and economic impacts as a consequence of land acquisition directly. For instance, it does not cover project-displaced persons without titles such as informal settlers (squatters), occupiers, and informal tenants and leaseholders (without registration documents). However, ARIP without any express mechanism, allows for the resettlement of affected households and businesses or any assistance for restoration of livelihoods of the displaced persons.

Generally, the acquiring entity under such circumstances forms a Rehabilitation Action Plan (**RAP**) to work with local non-governmental organizations to perform such rehabilitation.

## F. Jurisdiction, Waiver of Immunity

### 25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

Bangladesh courts uphold a choice of foreign law and party autonomy as agreed between the parties when entering into the contract. It was decided in PLD 1964 Dacca 637, that when the intention of the parties to a contract is expressed in words, this express intention determines the proper law of the contract and overrides every presumption. A share purchase agreement can provide for a foreign governing law if the parties agree to it. In practice, if all the parties to the agreement are Bangladeshi, Bangladesh law is adopted as the governing law. Waiver of immunity provisions are enforceable in Bangladesh.

### 26. Can financing documents provide for arbitration clauses?

Yes, arbitration clauses are legally permissible and generally included in financing documents. Bangladesh arbitration law permits enforcement of foreign arbitral awards in Bangladesh. Parties can also agree to waive certain rights under the Arbitration Act.

## G. Trends and Projections

### 27. What are the main current trends in project financings in your jurisdiction?

Currently, most foreign direct investment is targeted at power and infrastructure projects. Infrastructure development is now at its peak as Bangladesh transitions towards becoming a developing economy.

This means that increasing numbers of investment and project finance opportunities should become available in the market.

The local regulatory regime is quite lender friendly and the trends show an increase in the number and value of transactions.

**28. Are any significant development or change expected in the near future in the project finance market?**

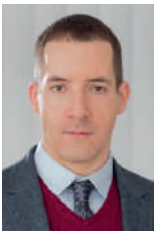
The project financing regime in Bangladesh seems stable and there have not been any recent changes or developments in project financing market. No new developments are anticipated in the next twelve months.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

The alternative reference interest rates which are being commonly used in Bangladesh during the LIBOR transition period is SOFR.

# BOSNIA AND HERZEGOVINA

## MARIĆ & CO



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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The main laws pertaining to the procedures of project financing are:

- The Law on Financing the Institutions of Bosnia and Herzegovina;
- Public Procurement Law of Bosnia and Herzegovina ("**BH**");
- The Law on the Political Aspects of Foreign Investments of BH;
- The Law on Foreign Investments of Republika Srpska ("**RS**");
- The Law on Foreign Investments of Federation of Bosnia and Herzegovina ("**FBH**")
- Company Law RS;
- Company Law FBH;

The said laws are compatible with the following EU directives: 77/62/EEC, 80/767/EEC, 88/295/EEC, 93/36/EEC, 71/305/EEC, 89/440/EEC, 93/37/EEC, 92/50/EEC, 89/665/EEC, 2007/66/EC, 90/531/EEC, 93/38/EEC, 98/4/EC, 2004/18/EC, 97/52/EC, 25/2014/EU, 24/2014/EU

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The finance market is growing and it attained a considerable degree of maturity. Some of the more prominent projects include: Wind Parks Slovinj of 130 MW and Dzeva of 46 MW and Railway Track Overhaul, with a joint value of almost 200 million EUR.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

There are three types of security used by financial institutions when financing a debtor: pledge, mortgage and bill of exchange.

a) A pledge is valid and enforceable if it has been duly registered with the electronic Pledge Register of Bosnia and Herzegovina, based on a valid pledge agreement defining the claim, and if the pledge debtor has been duly informed of the pledge establishment by delivery of the registration certificate within 8 days upon the pledge registration. The legal nature of the pledge is such that it serves well as an executive title for claim enforcement. Namely, the certificate of pledge registration issued by the Pledge Register is an executive title on its own, under the condition that it is accompanied with a valid pledge agreement, and evidence of the debtor's default, such as a simple statement of the creditor. Based on these documents, an executive proceeding can be initiated over the pledged assets.

b) Mortgage represents a classical security instrument in rem, establishing an enforcement title over a property, regardless of its owner. The first and foremost condition for the legal validity of a mortgage is its due registration with the locally competent land register, whereby the decision on mortgage registration is constitutive by its virtue. A mortgage does not legally exist before its entry into the burden section of the respective land register sheet. Such mortgage registration is possible only based on a mortgage agreement, processed in the form of a notarial deed by a Bosnia notary public or a lawyer, in local language. The sole exception to this formal rule is the so-called legal mortgage, i.e., a mortgage established in favour of the tax authorities, securing a tax or social contribution debt, based on an administrative decision of the respective taxing authority. The mortgage agreement, and the mortgage entry itself, must contain at least these three elements: the secured party (mortgagee), the amount of the secured claim (at least an indicative or maximum amount) and the legal basis of the secured claim (such as a loan agreement). Financial institutions usually also include the details of the charged interest (interest rate, calculation mechanism, etc.) as well as the maturity date. As a general rule, mortgages are registered by the temporal order of the submission of their respective registration applications, meaning that multiple mortgages may be registered on the same day, whereby their priority depends on the exact hour and minute of the application having been filed. However, parties are entitled to dispose with the mortgage ranking, whereby two creditors may agree to swap their ranking positions. If there are other creditors of lower ranking, their consent is required for such a swap. In any case, the consent of the debtor (mortgagor) is also required.

c) A bill of exchange is not a formal security instrument, but merely a payment instrument, constituting a payment order of the issuer in favour of the holder or recipient. However, in practice bills of exchange are commonly used as a de facto security instrument, usually in the form of a blank (bianco) bill of exchange. In this respect, there are two kinds of bill of exchange which are most often used in practice: the said blank bill of exchange and the common bill of exchange. Both types of bills of exchange are similar in content, because, in the end, they must have all the required elements in order to be legally valid as an instrument of insurance or payment.

The common, out-of-court collection of the bill of exchanges starts by submitting a request to the commercial bank for payment with whom the issuer has a bank account. If the issuer of the bill of exchange disposes with sufficient funds, the bank will perform the payment in accordance with the bill of exchange, and the collection process is successfully completed. However, if the issuer does not dispose with sufficient funds, which is more common, the issuer will be unable to effectuate the collection, and will have to submit a protest to the competent court. There is an obligation of the creditor to protest the bill of exchange with the competent court before starting the enforcement procedure, whereby this must be done within two working days from the maturity date.

A protested bill of exchange represents a direct enforcement title and the legal basis to initiate an enforcement proceeding against the issuer, over any and all of its assets.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

A debtor may pledge its shares in a limited liability company using the Pledge Register of Bosnia and Herzegovina, whereby it is recommendable to conclude such a share pledge agreement in the form of a notarial deed processed by a local notary public due to differing practice of Bosnian courts regarding the form of the share pledge agreement.

The procedure for establishing a pledge on shares in a limited liability company is possible and it is quite simplified considering that the Register of Pledges of Bosnia and Herzegovina has enabled online registration. According to the Framework Law on Pledges, a pledge on shares in a limited liability company occurs when the following conditions are met, regardless of the order in which they are met:

- that there is a registration in the Pledge Register that specifically refers to that pledge
- that the parties have concluded a pledge agreement
- that the pledgor is the owner of the thing pledged for the purpose of insurance
- that the pledgee, or third party in accordance with the pledge agreement, has given or is obliged to give credit to the pledgor

In terms of performing the registration of a pledge, this can be performed by any person with access to the electronic Pledge Register, while the fees related to the registration are charged immediately to the user account of the person performing the registration based on a fixed fee tariff of the Ministry of Justice of Bosnia and Herzegovina. The registration itself can be made for a limited period of time, such as 3 or 5 years, or without time limitation. Any and all potential changes to the pledge registration, including its erasure, can only be performed by the person who has performed the original registration in the first place.

If the pledge is being established over stocks in a joint stock company, such a pledge must be duly registered with the locally competent Securities Register, based on a stock pledge agreement executed in the form of a notarial deed processed by a local notary public, in local language.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

The share pledge does not grant the creditor (the pledgee) the right to directly take over the ownership over such share. Also, the private sale is not possible as a method of the enforcement of the share pledge. Instead, the sale of the pledged shares or stocks is performed through court, in an enforcement proceeding, and through either a public auction (for shares in an LLC) or a licensed stock market broker (for stocks in a JSC).

All restrictions over disposal and the rights pertaining to the shares are inscribed into the Book of Shares (for limited liability companies) or Securities Registry (for joint stock companies).

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

In addition to movable and immovable assets, the pledge can also be established on claims/receivables and rights of the borrower. In order to acquire a pledge on a receivable, the debtor must be notified in writing of the concluded pledge agreement, and the pledgor is obliged to hand over to the pledgee a document on the pledged receivable. In addition to receivables, other rights can also be pledged, such as copyright, patent rights, license rights, etc. These rights must have a property character, must be independent and transferable to a third party and therefore, personal property rights cannot be pledged.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Under the provisions of bankruptcy laws, upon the instituting of bankruptcy proceeding creditors are no longer authorized to request enforcement or security over the bankruptcy mass of the debtor, whereby all enforcement proceedings that have been ongoing at the moment of instituting bankruptcy shall be terminated. However, registered pledgees are entitled to request and/or continue the enforcement over pledged assets, which are separated from the rest of the bankruptcy mass.

It is also important to note that, under the aforementioned provisions, the court may suspend further enforcement even over pledged assets, if the bankruptcy administrator *"ensures the appropriate protection of the pledgee's claim"*, whereby the appropriate protection is defined as *"the protection recognized by the court, with the value of the guarantee being sufficient so that the suspension of enforcement does not create damage to the creditor in any way"*. The court practice in relation to this unclear legal provision is sometimes abusive, preventing the pledgees from collecting their claim, while at the same time not having any real use for the guarantee of the pledgor, as the bankruptcy proceedings usually take several years (sometimes more than 10) to complete.

One important consequence of a bankruptcy proceeding being instituted over the pledgor is that all pledges established over the assets of the company undergoing bankruptcy during the last 60 days (in FBH) or 90 days (in RS) prior to the application for bankruptcy, cease to exist, i.e., are void. Therefore, it is always recommendable to perform a legal and financial due diligence of the pledgor, prior to entering into the pledge agreement.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The concept of a security trustee is not regulated by the laws of Bosnia and

Herzegovina, however, in practice so far, we have encountered the above-mentioned concept, which did not cause any legal obstacles.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Please refer to the answer to question 10.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Incentives and exemptions are provided for in the context of foreign investments. The main incentives for foreign investors relate to tax exemptions. Therefore, foreign investment will be exempted from paying import taxes. Foreign investment also may be exempted from other tax dues in line with the principle of equal treatment of domestic and foreign investors and of stimulating foreign investments.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

The general restriction is that only local currency (BAM) can be used in internal payment transactions. Under B&H financial regulation, foreign currency shareholder loans are defined as credit agreements. Crediting in foreign currency is allowed in the B&H, but under the condition that the both payment and collection transactions are being made in local currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

There are certain sectors where foreign investments are restricted. In RS, those sectors include ammunition, weapons, explosives for military use and military equipment and media. Investments in the said sectors shall be carried out only with the consent of the competent ministries. Also, foreign investor's share in the companies that produce weapons, ammunition, explosives for military use, military equipment and provide media support must not exceed 49%. In FBH, only the latter restriction applies.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

The minimum equity requirement in a general sense is not prescribed (in laws or bylaws), but minimal financial requirements may be set on a case-by-case basis.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Registration and filing for finance documents follow the same procedure as all other types of documentation. The exact finance documents that ought to be submitted will be prescribed on a case-by-case basis.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Yes, under certain terms and conditions stipulated by the local insurance laws. The applicable law applicable to insurance contracts covering risks located in B&H is determined in accordance with the following legal provisions:

a. when the domicile or seat of the insured is in Bosnia and Herzegovina, the applicable law for insurance contracts is the law of Bosnia and Herzegovina. Exceptionally, when this law allows it, the parties will be able to choose the law of another country;

b. when the insured does not have a place of residence or registered office in B&H, the parties to the insurance contract may choose to apply the law of the country where the insured has a place of residence or registered office;

c. when the insured is engaged in a commercial or industrial activity or performs a professional activity independently and when the contract covers two or more risks related to those activities and located in B&H and other countries, the freedom to choose the law governing the contract extends to the rights of those countries, depending on where the insured has his residence or headquarters;

d. the fact that in the above-mentioned cases, the contracting parties have chosen a law that is not the law of B&H, does not exclude the application of the mandatory legal regulations of B&H or its entities when all other factors relevant to the situation at the time of choosing the applicable law are related to them;

e. the choice of applicable law must be expressed or shown with certainty in the terms of the contract or the circumstances of the case. If this is not the case or if no choice is made, the contract is applied by Bosnia and Herzegovina or the country with which the contract is most closely related, taking into account the above rules. Exceptionally, the law of that country can exceptionally be applied to a special part of the contract that is more closely related to another country. There is a rebuttable presumption that the contract is most closely related to the country in which the risk is located.

The choice of applicable law cannot limit the application in any way mandatory provisions of B&H law, regardless of the law applicable to the contract.

In the case of concluding an insurance contract for compulsory insurance provided for by B&H law, that contract is always subject to B&H law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes. When approving long-term loans, it can be used as collateral and binding of an insurance policy, i.e., automatically concluding an insurance contract with the loan agreement, where the borrower pays the insurance together with the loan instalment. This way of approving the loan has the result that the lender (e.g., bank), when concluding the loan agreement, ensures that the loan will be properly repaid even in the event of an unplanned adverse event.

The binding of the insurance policy is the assignment of the right to pay the insurance amount to the lender (e.g., bank), in the event of damage, that is, the insured event. This means that, if the insured event occurs, the insurance company will pay the insurance amount to the lender instead of the insured or policyholder. Binding of the insurance policy is done in the case when the insurance policy is an insurance instrument for loan collection.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

It is difficult to determine any complications, concerns or other issues in relation to the insurance provisions since they depend on the concrete project financing documentation. Since project financing documentation can be very complex, it is recommendable to review it prior to determination of the potential specific issues, if any.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, we have adopted Law on PPP on different administrative levels in Bosnia & Herzegovina. On entity level, Law on PPP is adopted in RS. In FBH, which is comprised of 10 cantons as separate administrative units, law on PPP is adopted separately on cantonal level. Lastly, there is a PPP Law for Brčko District, as a separate administrative unit from two entities in BH.

There are more than a few projects in the pipeline for realisation, but to our knowledge, there are no finished PPP projects in BH.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

It is not forbidden by the law and could be a valuable possibility for financing public authorities.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Two type of contracts under PPP in B&H legislation are:

- Contract on PPP which is based on financing private company from public funds, and
- Contract on PPP with the element of concession is based on financing private company from the final users by operating and managing the project after it's finished.

Public guaranties for Lenders should be negotiated and contracted with the public authorities in the best interest of the Lenders and the signing of such contract by the public authority is legally binding for repaying the loan.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Strictly by the letter of the law, this should not concern private party, but in practice, this could arise as an issue.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, retroactive application of the law is prohibited in Bosnia and Herzegovina

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is regulated by the Law on Obligations in BH.

**24. What are the general environmental and social requirements in project financings?**

Environmental and social requirements cannot be generalised, and will primarily depend on the location of the project, as requirements are differently regulated by different administrative authority's provisions.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

A submission to a foreign material law is enforceable, however, as a rule, a Bosnian court will always be using domestic

procedural law. However, there are mandatory principles of the local law which will apply even if another legal system has been (effectively) agreed between the parties (e.g., inscription in the Land Registry, enforcement proceedings on assets in Bosnia and Herzegovina, bankruptcy and liquidation proceedings etc.).

Judicial immunity is mentioned in the Article 25 of the Law on civil procedure and it is defined as the right or privilege of certain foreigners, foreign states and international organizations to be exempted so that civil proceedings cannot be conducted against them before a domestic court. Heads of diplomatic missions and other representatives of diplomatic status also have immunity, except in cases provided by the Vienna Convention on Diplomatic Relations. Immunity does not apply if the authorized representative waives it. Such waiver is irrevocable and enforceable.

**26. Can financing documents provide for arbitration clauses?**

The disputes will be resolved in a form of arbitration if the parties agreed to the jurisdiction in form of a written agreement /contract, in respect of a dispute, or in respect of future disputes that may arise from a contract concluded among them. The contract shall be deemed concluded also through an exchange of letters, telegrams and faxes, as well as when the arbitral jurisdiction clause is contained in the general conditions of the contract which are an integral part of the contract. Therefore, financing documents can provide for arbitration clauses, if all legally set conditions have been met.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

The fastest growing investment trend in Bosnia and Herzegovina is investment in renewable energy. Foreign investors are increasingly more interested in vast energy potential of B&H. This especially applies for wind and solar projects as investments in hydro projects are increasingly disillusioned by ecological concerns. Taking into consideration the energy crisis triggered by the war in Ukraine and the already existing trend in B&H of exporting electricity, this trend is likely to grow even further.

**28. Are any significant development or change expected in the near future in the project finance market?**

The post-covid economy is expanding, recovering, and growing to surpass the 2019 figures. However, there are no new legal reforms or amending procedures that could further benefit the project finance market.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

EURIBOR benchmark rates are already the most commonly used basis or reference rate in B&H. Some variable rate loans can use the official consumers' price index.

# BRASIL

## CESCON BARRIEU

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

There are no specific rules or international treaties on project financing in Brazil. Transactions rely on general rules affecting either project documents (construction, offtake, operation and maintenance, charter, etc.) or financing documents (security interests, loans, capital markets instruments and securities, etc.), either in the domestic or cross-border context (when private international law rules and principles become relevant).

Mostly, contracts, financial instruments and security interests will be governed by private law in general (like the Brazilian Civil Code – Law 10,406/2002 – or specific laws on certain types of security interests – such as Law 4,728/1965 for fiduciary transfer), while debt capital markets instruments will be governed by corporate and securities laws (like the Brazilian Corporations Law (Law 6,404/1976), the Brazilian Securities Act (Law 6,385/1976) and regulations from the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*), such as the recent Resolution 160/2022 on public offerings. Local infrastructure project bonds and green bonds or green securitization transactions enjoying tax benefits are governed by Law 12,431/2011 and related regulations, including specific rules from each applicable Ministry on considering certain projects a matter of public priority for enjoying tax benefits.

Cross-border transactions take into account conflicts of laws rules (such as Decree 4,657/1942 and international procedural aspects in the Civil Procedure Code), as well as laws governing foreign direct investment, registration of cross-border financing transactions, foreign exchange transactions and the ability to have USD-denominated contracts (especially Law 14,286/2021). Question 25 discusses

the ability to use non-Brazilian law in contracts. In the public international law context, Brazil has signed various bilateral investment treaties (BITs) and its own model of Agreements for Cooperation and Facilitation of Investments (ACFIs) but has not ratified most of them[7], this typically not being a relevant aspect for project financing in Brazil. Brazil is not a party to the treaty on ICSID – International Centre for Settlement of Investment Disputes, despite having signed and ratified all other World Bank treaties (IFC, MIGA, AID and IBRD).

Finally, a substantial portion of infrastructure projects financed through project financing structures are subject to governmental authorizations and/or involve public entities. Laws governing concessions (Law 8,987/1995), public-private partnerships – PPPs (Law 11,079/2004), public works and bids (Law 14,133/2021) and state-owned enterprises (Law 13,303/2016) are relevant in such contexts. Also, such projects need to consider the specific laws for the applicable sector and need to comply with regulations from the applicable agency, for example, National Telecommunications Agency (*Agência Nacional de Telecomunicações* – ANATEL), National Electricity Regulatory Agency (*Agência Nacional de Energia Elétrica* – ANEEL), National Agency of Petroleum, Natural Gas and Biofuels (*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis do Brasil* – ANP), National Land Transportation Agency (*Agência Nacional de Transportes Terrestres* – ANTT), National Waterway Transportation Agency (*Agência Nacional de Transportes Aquaviários* – ANTAQ), National Civil Aviation Agency (*Agência Nacional de Aviação Civil* – ANAC), National Water and Basic Sanitation Agency (*Agência Nacional de Águas e Saneamento Básico* – ANA), etc. Environmental licensing and regulations are a critical element in project development, governed by the National Environmental Policy Law (Law 6,938/1981) and regulations from the environmental authorities (the most important being the federal licensing authority IBAMA –*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis*).

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Project finance is consolidated in Brazil. This type of transaction has been used since the mid-1990s to finance investments in Brazilian infrastructure. Many infrastructure projects in place were only made possible by project finance structures, including oil and gas fields, energy power plants, energy transmission lines, toll road projects, ports, airports, etc.

Significant recent examples in Brazil include:

- *Toll Road – Eixo SP*. A 1,273 km road concession in the states of São Paulo and Mato Grosso do Sul, financed during the Covid-19 pandemic. The financial structure involved a R$ 2.65 billion loan from federal development bank BNDES (*Banco Nacional de Desenvolvimento Econômico e Social*) and a R$ 350 million local project bonds (infrastructure debentures) issuance.
- *Public Lighting in the Rio de Janeiro city – Smart Luz*. A 20-year public-private partnership for public lighting, was also granted during the Covid-19 pandemic. The project was based on a R$ 925 million issuance of local project bonds.

7 The list can be seen at UNCTAD: https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil

Besides the LED bulbs, the concession is composed of a smart city control center connected with 5,000 Wi-Fi access points, 6,000 traffic controllers, 10,000 cameras and 4,000 storm drains.

- *Buzios Field Acquisition Financing*. US$ 1.45 billion acquisition financing, structured as a project-based loan, of a portion of the Pre-Salt Búzios Field, by the local subsidiary of the Chinese oil company CNODC. Buzios is an area originally under the onerous assignment regime (*Cessão Onerosa*) and subject to equalization arrangements under a Co-Participation Agreement (CPA) with Brazilian oil company Petrobras.
- *Mataripe Refinery (RLAM) Acquisition Financing*. Acquisition financing, structured as project finance, of the Mataripe Refinery, acquired by Mubadala from Petrobras, with senior and mezzanine tranches, using both bank finance and foreign notes issuances as sources of debt.
- *Anemus wind farm*. A wind farm with installed capacity of 138.6 MW, developed by local power company 2W, backed by a R$ 475 million local project bonds issuance. It is the first power generation project in Brazil exclusively for the free market (i.e., not backed by regulated long-term PPAs obtained in energy auctions organized by the Brazilian Government) with a revolving portfolio of offtakers that are medium and small size consumers with short-term PPAs.
- *Line 6 of the São Paulo Subway*. A R$6.9 billion sustainable financing from BNDES to Acciona and other sponsors to develop the largest public-private infrastructure project in Latin America, to be followed by a R$500 million second tranche and R$ 7.85 billion contributions from the State of São Paulo during the construction period. The loan included R$3.31 billion in non-recourse bank guarantees from 10 banks, that partially covered the risk BNDES takes during construction.

## B. Security Interest

### 3. What are the most commonly used security types in project financings in your jurisdiction?

There are two main types of security interests available. On one hand, pledges (moveable assets) and mortgages (real estate, vessels and aircraft), in which title to the asset remains with the debtor and the creditor has an *in rem* lien over the asset. On the other hand, fiduciary transfers (fiduciary assignment in the case of rights, fiduciary property in the case of goods), in which title to the asset is transferred to the creditor while the debtor remains in possession of the asset for as long as a default has not occurred.

The main differences between these types of interest regard priority/rights in insolvency and remedies outside an insolvency scenario. Pledges and mortgages are fully subject to the stay in restructuring filings and enjoy priority as secured creditors in bankruptcy liquidations. As fiduciary transfers remove ownership rights from the debtor, these interests are only limitedly subject to the restructuring stay (they cannot be removed for a certain period of time if necessary for the continuation of the business/recovery of the company) and are not part of the bankrupt state, enjoying a *de facto* super-priority ability to seize the assets and use proceeds from the sale to repay the loan. As such creditors are not subject to the restructuring plan/bankruptcy liquidation priority rules they do not participate in the approval process of a restructuring plan. Outside of an insolvency scenario, fiduciary transfers enjoy quicker procedural remedies to repossess the relevant asset.

In certain cases, there are concerns that holding the fiduciary title to a certain asset might result in liabilities that would otherwise not affect a secured creditor, chiefly, environmental liabilities. Although there are no statutory safe havens for secured creditors in this regard, there are no precedents of such types of secured creditors being held liable for debtors' liabilities while they held a secured creditor role. Once seizure of the asset occurs, regardless of the type of security interest, then creditors must ensure compliance with applicable legal requirements to one holding the possession.

In the context of concessions of public services, usually developed by concessionaires that are specific purpose vehicles, the Brazilian Concession Law (Law 8,987/1995) and the PPP Law (Law 11,079/2004) provide for step-in-rights, which allows lenders to take temporary control over the concessionaire in case of non-payment, towards making its financial restructuring and ensuring the continuity of services. In this case, lenders are exempted from demonstrating technical and financial qualification requirements that would apply in an ordinary change of control. The Concession Law grants a safe haven for lenders in this scenario, explicitly protecting them from liabilities that could apply regarding taxes, penalties, and obligations with third parties (including the government and employees).

Security interests can be established over a variety of debtor's rights or assets, and common collateral includes: (i) concession interests, covering not only receivables but also allowing lenders to forcefully assign the concession (contractual position) to a third party, provided that the necessary regulatory approvals are obtained; (ii) equity interests (shares or quotas, depending on the type of corporate entity), which may also include temporary step-in rights as detailed above; (iii) receivables from third parties; (iv) bank accounts and its investments; (v) equipment and other physical goods, including the assets produced in an extractive project (such as oil, gas, minerals); (vi) real estate in which a project is developed, etc.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, equity interests can be granted as security to the benefit of lenders. Certain perfection requirements apply. The security document shall provide for: (i) the estimated or maximum credit value; (ii) the maturity date; (iii) the interest rate, if any; and (iv) the description and specifications of the equity interest. The lien must be annotated in the corporate share registry book (in the case of corporations). In the case of limited liability companies, it is common practice to amend the company's articles of association in order to annotate the lien. In the case of limited liability companies, the security document must be registered with the competent Registry of Titles and Documents for perfection purposes. In the case of corporations, it is common that the lien encompasses not only shares but also other rights and, thus, that it also must be registered with the competent Registry of Titles and Documents as a consequence.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, a share pledge may be enforced by means of a private sale (out-of-court sale), provided that (i) the agreement allows the private sale or (ii) the creditor obtains the

debtor's express consent. The sale must not be made at a price less than 50% of the asset's evaluation (*preço vil*). It is advisable that out-of-court enforcement processes adopt certain minimum publicity and/or sales effort procedures, to prevent any potential creditor's negligence claim from a debtor. The security contract may be drafted to address some of those concerns beforehand. *Pactum commissorium* is not allowed in Brazil and, thus, except in exceptional circumstances mentioned in question 7, sale of the collateral is mandatory after enforcement.

Transfer of shares title is done by annotating the new owner in the company's corporate books. Should the company resist, a court order may be obtained for this purpose.

Share certificates are unusual in Brazil, and typically only used in the context of units and depositary receipts markets. Brazilian companies cannot issue bearer shares.

A lien over shares may also establish restrictions on voting rights.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

A security interest can be established over future assets, rights and receivables, provided that these can be described – for instance, future receivables to arise from a contract. Brazilian Law No. 10,931/2004 (article 31) explicitly allows a lien over future assets to secure a Bank Credit Bill (*Cédula de Crédito Bancário* – CCB), which is a common financing instrument used by local financing institutions.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Foreclosure of security interests (other than real estate mortgages) may be judicial or extrajudicial (also known as out-of-court or private), provided that the debtor has authorized extrajudicial foreclosure. Security interests over real properties are enforced by means of judicial public auctions.

Foreclosure procedures vary by the type of collateral and security interest. In general, secured creditors may privately dispose of the assets if the debtor defaults on the secured obligation and the contract provides for that. It is advisable that out-of-court enforcement processes adopt certain minimum publicity and/or sales effort procedures, to prevent any potential creditor's negligence claim from a debtor. The security contract may be drafted to address some of those concerns beforehand. The sale proceeds must be applied against the secured obligation and excess proceeds returned to the debtor – *pactum commissorium* is not allowed in Brazil. There are limited circumstances, however, in which the lender may keep the collateral as payment, in particular: (i) when, after the default, debtor and creditor agree on the delivery of the asset as payment-in-kind of the debt, for the value of the asset; and (ii) in an executory proceeding, if no bids are placed at the auctions, in which the value of the asset will be applied against the outstanding balance.

If a debtor seeks insolvency protection by means of a restructuring filing, ongoing lawsuits against the debtor are suspended (automatic stay). Creditors may not initiate new claims and may not continue pending lawsuits. If successful, the restructuring will result in a plan establishing new terms of payment, novating the previous obligations. Security interests cannot be voided, as a result of a restructuring plan, without the secured creditor's consent.

Should a bankruptcy liquidation occur, only the trustee (no longer the debtor's

officers) may represent the debtor's estate. The trustee may not negotiate with the creditors to reduce outstanding debt or the order of payments.

Bankruptcy is undertaken to: (i) establish the general list of creditors; and (ii) liquidate the assets of the debtor in order to pay the creditors. Once the general list of creditors is established and the assets are sold, the creditors are paid in accordance with their classes.

Secured claims up to the value of the collateral are third in priority, after (i) super-priority or extra-bankruptcy claims (such as court costs and amounts owed to the bankruptcy trustee), and (ii) labor claims up to 150 times the Brazilian minimum monthly wage (currently R$196,800 or approximately US$ 38,000) per creditor. They have priority over, among others, tax claims, unsecured claims, labor and secured claims in excess of the limits mentioned before and subordinated claims.

The super-priority class also includes creditors secured by assets transferred to them on a fiduciary basis and financial institutions that have entered into certain forward foreign exchange transactions related to exports. Fiduciary creditors are not subject to the automatic stay during the restructuring, being able to repossess and sell the asset (save limited exceptions in which the assets are necessary for the continuation of the business).

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Brazil does not have a clear equivalent to the Anglo-Saxon trust model, using some other mechanisms to provide for separation of property in certain cases and/or protection of rights from groups of secured creditors.

Traditionally, Brazilian law did not allow a party to seek another person's right in court, unless expressly provided by law – such as in the case of local bonds (debentures) trustees. The current Code of Civil Procedure (in force since March 2016) has a broader language; most scholars understand that private contracts can now provide for an agent to act as representative of a group of lenders before courts. In restructurings and bankruptcies, it is not uncommon to have secured creditors groups listed by reference to a collateral agent.

Brazilian law contracts must provide specifically for such rights so that a collateral agent may pursue the secured creditors' rights. However, in a foreign-law contract, if the applicable law allows the trustee or agent to foreclose or otherwise take measures on behalf of the lenders, such power would be acceptable to Brazilian courts. Security agreements may empower the trustee to, acting in the name of the lenders, appoint legal counsel to represent the lenders in court procedures as well as to hold, receive and manage collateral and to carry out off-court procedures, such as the extrajudicial enforcement of the collateral.

If a parallel debt structure is valid under the laws governing the credit arrangements, it would, in principle, be acceptable to Brazilian courts.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Brazil has various tax incentives for investments in the infrastructure sector commonly financed by project finance, including, among others:

- REIDI, a special tax regime for infrastructure development. It benefits transportation, ports, energy, basic sanitation and irrigation projects. It

suspends and eliminates certain federal taxes levied on the importation and local purchase of fixed assets for such projects.

- REPORTO, a special tax regime applicable to investments in the modernization of ports. It suspends and eliminates certain federal taxes levied on the importation of fixed assets used in port activities, which will remain valid until December 31, 2023.
- REPETRO-SPED, a special customs regime applicable to the import of goods used in the oil and gas activities. It suspends all federal taxes and social contributions related to the importation of such equipment and allows reduction of state taxes due in the import.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Focusing on foreign investors/financiers, we highlight two relevant tax provisions:

- Brazilian Project Bonds Law (Law 12,431/2011) provides that foreign investors holding such bonds benefit from 0% withholding tax. Such tax-exempt bonds are a common mechanism in Brazil to use debt capital markets to finance infrastructure investments. Among other requirements, the bonds must have a weighted average duration of more than 4 years and the proceeds thereof must be used in certain investment projects.
- Brazilian Law No. 9,481/1997 provides that international charter payments are subject to a 0% withholding tax rate (except if the beneficiary is located in a tax haven jurisdiction). Most offshore oil assets and ship financing structures are designed to benefit from this advantage, coupled with REPETRO-SPED.

Other incentives may be available depending on the type and location of the project.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Cross-border financial transactions (both in local and foreign currency) are allowed in Brazil. Such transactions must be registered with the Central Bank, in accordance with Law No 14,286 of December 29, 2021 and Central Bank Resolution No. 278 of December 31, 2022. Registration ensures the ability to remit principal and interests pursuant to the underlying contract.

Based on the new regulatory framework, not all cross-border financial transactions are subject to registration with the Central Bank. Reporting is only mandatory if the transactions meet any of the following thresholds: (i) US$1,000,000 (or more), or the equivalent in other currencies, for cross-border credit transactions, anticipated receipt of exports and foreign financial leasing with payment terms exceeding 360 days; or (ii) US$500,000 (or more), or the equivalent in other currencies, for financing transactions for the import of goods or services with payment terms exceeding 180 days.

Cross-border financial transactions subject to registration are registered in the currency elected by the Parties under the agreement (either Brazilian Reais or any given foreign currency). The funds remitted to Brazil are always converted into Brazilian Reais when received by the local debtor unless funds are already parked on a non-resident account in Brazil owned by the borrower (in which case they would already be denominated in Brazilian Reais). Remittance of principal and interests also takes into account the amount registered in the currency elected by the Parties under

the agreement. Loans are registered in their currency of origin, even though converted into Brazilian Reais when received by the local debtor. Remittance of principal and interests also takes into account the amount registered in the currency of origin.

This registration is (a) is carried out by the debtor by means of the Central Bank's electronic systems and is usually obtained automatically, (b) is of a declaratory nature (meaning that the debtor is liable for any incorrect or false information provided to the Central Bank), and (c) is aimed at (c.1) providing the Central Bank with information regarding exchange movements of foreign capital, (c.2) gathering statistics on total foreign assets and liabilities of the Brazilian economy, in order to evaluate the degree of internationalization of the Brazilian economy, and (c.3) giving foreign investors the right to repatriate capital remitted to Brazil.

Interest payments in shareholder loans are subject to thin capitalization rules (Law 12,249/2010, regulated by Federal Revenue Normative Instruction 1,154/2011). If not complied, such interests are not deductible in the calculation of the local entity's corporate income taxes, but this does not affect the ability to remit principal and interests. As a rule, the debt equity ratio is of 2:1, which means that the indebtedness cannot exceed two times the equity held by such shareholder. Any interest payable to abroad should also observe Brazilian transfer pricing rules.

The funds remitted in foreign currency to Brazil must be converted into Brazilian Reais by way of foreign exchange contracts. These exchange contracts must be made with local banks and financial institutions authorized by the Central Bank to operate in the foreign exchange market. The exchange rate is freely negotiated between the parties to the foreign exchange contract.

Companies may enter into any foreign exchange transactions that are legal, based on economic reasons, supported by documented obligations and in accordance with the regulatory requirements applicable to the transaction. The entity responsible for the remittance of funds must classify foreign exchange transactions according to their legal nature/code and provide such classification to the local bank or financial institution engaged to settle the foreign exchange transaction.

Foreign exchange transactions are subject to the Tax on Financial Operations ("**IOF Tax**"), levied in accordance with the type of underlying transaction. Nonetheless, currently IOF Tax applies at a zero percent on any cross-border loan, irrespective of their maturity. Interests on loans are subject to withholding taxes (typically at a 15% rate, when non-tax heaven jurisdictions are involved, and 25% in such cases).

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Foreign direct investments ("**FDI**") and returns on them are allowed in Brazil.

Based on Law No 14,286 of December 29, 2021 and Central Bank Resolution No. 278 of December 31, 2022, not all transactions associated with FDI are subject to registration with the Central Bank. Reporting is only mandatory for each individual FDI event/transaction (e.g., capitalization, payment of dividends, etc.) if they exceed, in each case, US$100,000 (or more), or the equivalent in other currencies.

Regardless of the waiver for event-driven FDI registrations, the local entity receiving the FDI must report its total FDI to the Central Bank (i) on a quarterly basis, for entities with FDI exceeding BRL300,000,000; (ii) on an annual basis, for entities with FDI exceeding BRL100,000,000 (but lower than BRL300,000,000); or (iii) every five years,

for entities with FDI exceeding BRL100,000 (but lower than BRL100,000,000).

FDI subject to registration (both for event-driven registrations and for ongoing reports to the Central Bank, as the case may be) must be electronically registered with the Central Bank (on a declaratory basis) by the local entity receiving the FDI. No minimum stay period for foreign investments is required. Foreign investors may, at any time, dispose of their equity in Brazilian companies and repatriate the invested capital, provided that it is supported by documentation of the transaction and that the remittance has economic grounds. Repatriation of FDI may be subject to capital gains tax. Dividend payments are not subject to taxation. Brazilian companies may pay interest on their equity. Those payments to foreign shareholders are subject to withholding tax.

There are restrictions to the participation of foreign capital in certain economic sectors. These restrictions involve a state monopoly over certain activities, prohibitions with respect to ownership or control by non-Brazilians of certain Brazilian assets, or the limitation of FDI in certain types of businesses not to exceed a specific amount. Sectors include: development of activities involving nuclear energy operations, hospitals and healthcare services, mail and telegraphs, aerospace industry (but not the production or sale of satellites, aircraft, its equipment), acquisition of rural properties and land on areas of international frontiers, financial institutions, public air transportation services, mass media companies (newspapers, magazines, radio and TV broadcasting).

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There are no specific minimum equity requirements due to the use of project financing structures. However, in infrastructure sectors (e.g., energy, oil and gas, transportation), regulators will typically require minimum equity and/or financial robustness from shareholders as a condition to grant a concession. For financial and business reasons, banks will typically require a minimum sponsor equity commitment when structuring project financing transactions.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Brazilian collateral documents must be registered to be perfected. Thus, once executed, the security agreement must be registered with the competent public registry, depending on the type of collateral and its location (e.g., Real Estate Registry for real property and pledge over equipment and machinery, Registry of Titles and Deeds for security interests over most moveable goods, Maritime Court for Brazilian ships). Security agreements related to certain assets (e.g., real property and ships) require public form – i.e., the parties' representatives shall be present before a public official who will write down the agreement as a public deed. Security interest over credit rights requires notification or, if required by the underlying agreements, consent of the debtor. Notarization of signatures is possible but not mandatory (and its use has reduced after the adoption of certified electronic signatures).

As a general rule, foreign documents do not require specific measures to be valid and enforceable in Brazil. However: (i) the presentation to courts of documents in a language other than Portuguese requires that the documents be translated by a sworn translator registered as such in Brazil; (ii) foreign documents must be registered

with the Registry of Titles and Deeds to be presented as evidence before Brazilian authorities; however, in practical terms, Brazilian courts will typically only require the sworn translation; (iii) notarization of foreign documents and/or of their signatures is not mandatory, but foreign notarizations and foreign public documents must be legalized, either pursuant the Hague Apostille Convention of 5 October 1961 (Brazil is a party thereto and it shall apply if the country of origin is also) or by authentication by a consular official of Brazil in the relevant jurisdiction.

In terms of local fees, fee values are set at state level. Notarization is charged per signature certified and immaterial (about US$ 2.00 per signature). Registration fees are generally charged based on: (i) the number of pages and other quantitative aspects of the document; or (ii) the transaction amount, but subject to a cap (typically around US$ 12,000 in Registries of Titles and Deeds, but higher amounts in Real Estate and Maritime Registries). Fees related to public deeds (due to the notary office preparing the deed) are charged based on the underlying asset value and also subject to caps, and vary state-by-state.

There are no stamp duties in Brazil, i.e., mandatory taxes that are owed to ascertain the validity of the underlying transaction.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

No, local insurance policies must be governed by Brazilian law. In addition, Brazilian entities cannot hire foreign insurance except in limited situations, in particular: (i) coverage of risks for which there is no insurance available in Brazil or in specific situations where the local prices are not compatible with the international market; and (ii) coverage of risks overseas. Brazilian shipping companies are authorized to hire P&I – protection and indemnity and H&M – hull and machinery insurance coverage internationally.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes. Local and foreign secured creditors can be made third-party beneficiaries or co-insured parties under the insurance and reinsurance policies, and/or create a security interest over the relevant policy.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

The Brazilian Civil Code provides that the insurance company has the subrogation right against the party that caused the damage, its representatives and successors, which may require a waiver of subrogation rights.

The inclusion of a third party in an insurance policy requires an insurance endorsement, and parties should liaise in advance with the insurance company.

The use of third-party beneficiaries or co-insured parties clauses is more frequent than the creation of security interests over policies. Although typically more effective towards insurance companies, these alternatives do not create *in rem* rights, which would provide protection from third parties trying to attach on such receivables.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, the PPP is a permitted method of developing projects in Brazil. The PPP

Law (Law 11,079/2004) defines them as a relationship established between public authorities and private partners to develop infrastructure projects. PPPs are distinguished from ordinary concessions to the extent that concessions do not enjoy public funding but only payments made by the users of the services.

There are two different types of PPPs in Brazil: (i) Administrative PPP, in which the public authority will pay the private partner to implement and execute the services inherent to the activity; and (ii) Sponsored PPP, in which the public authority will pay up to 70% of the provision of services (a payment higher than 70% requires specific legislative approval) and the remaining will be obtained by payments made by users of the services (i.e., public funding coexists with user payments)

PPPs were implemented by Brazilian states and municipalities in several sectors, such as water and sewage treatment, highways, subway transport systems, sports stadiums, hospitals, urban mobility projects, public hospitals, schools, and prisons. Municipalities are currently implementing various public lighting PPPs.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

They are possible but uncommon. As an example, the State of São Paulo used them in concessions for toll roads: São Paulo Midwest Roads; Calçados Road; Rodoanel Norte; and Piraciaba-Panorama Road. They are referred to as "Triparty Agreements", whereby the concessionaire, the creditors, and the public administration will be parties and adjust its rights and obligations regarding an event of default. The direct agreement was, however, optional.

In financings of offshore oil assets and other vessels chartered by Petrobras (which are not PPP or concession arrangements), contract consent documents and mortgage letters of quiet enjoyment partially fulfil the role of a direct agreement between lenders and Petrobras (as offtaker).

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The PPP Law (Law 11,079/2004) provides for a federal PPP Guarantee Fund, in the value up to R$ 6 billion with the aim of guaranteeing the debts assumed by the public partner in the PPP. Nevertheless, such Guarantee Fund has never been used and, more recently, in 2014, a new fund, named Fundo Garantidor de Infraestrutura – FGIE, was established. FGIE is managed by Agência Brasileira Gestora de Fundos Garantidores e Garantias S/A – ABGF, a company controlled by the federal government, and, among other purposes, FGIE can grant guarantees in favor of concessionaires of PPP projects in Brazil. There are ongoing discussions on how to improve the federal support to states and municipalities PPPs.

States and municipalities have also created their own PPP guarantee funds (without much success as most of the time they are not isolated from the State general funds), in addition to other tools, in order to provide guarantees under PPP agreements. Finally, PPP arrangements sometimes provide specific guarantees. For instance: (i) the State of Minas Gerais used a creditworthy separate public company (CODEMIG) as guarantor in the toll road MG-050, (ii) the State of Bahia used tax receivables mandatorily transferred from the Federal Union to the State as collateral to its PPPs, (iii) municipalities often use public lighting taxes, collected by local energy distribution companies, as collateral in public lighting PPPs.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

The allocation of risks must be verified in each PPP agreement, as specific risk matrixes are prepared for each project and risk sharing is an essential element in PPPs. "Political risk" is a vague concept, but typically seems to encompass electoral aspects, social demonstrations, socio-political stability, payments from the public partner and the ability to have cross-border payments.

Depending on how these risks are manifested, their allocation may be to the public or private party. For instance, payment default from the public partner would be a breach of contract, subject to court remedies. Reduction of income due to a reduction in the use of the service following social demonstrations may have been allocated to the private or public partner. Risks that materialize due to a change in law and affect the economic balance of the contract would allow for a rearrangement of the economic-financial balance of the contract.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

While provisions "freezing" the laws to the moment of signing are not valid, investors and lenders are protected from certain changes in law both as a result of the constitutional protection to vested rights and of the economic-financial balance clause in contracts with the public administration (public works, concessions or PPPs). In addition, the Concessions Law establishes that, with exception of income taxes, a change in tax laws gives cause to the rebalance of agreements. If *factum principis* affects the economic balance of a contract with the public administration, the private party is allowed to claim contractual changes to reestablish the original contract balance (except if the relevant agreement expressly allocates such risk to the private party).

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is regulated by Brazilian Civil Code as "*the necessary fact, whose effects could not be avoided or prevented*". Scholars and court precedents further interpret this definition to require that some requisites are present so that a force majeure event may be characterized: (i) the event must have been inevitable and unavoidable for the party to be released from his obligations; (ii) the event must be out of the ordinary course of business and prevent the party from performing its obligations; (iii) there must be a direct connection between the event and the inability to perform; and (iv) the party shall not have contributed to the occurrence of the event. The characterization of an event of force majeure is determined on a case-by-case analysis.

Notwithstanding the legal definition, parties are free to adjust in their contracts whether certain events will or not be characterized as force majeure, as well as to decide on their risk allocation.

**24. What are the general environmental and social requirements in project financings?**

Environmental licensing is required for infrastructure projects in Brazil. Entrepreneurs are required to present an environmental impact assessment (EIA) to start the licensing process, which comprises three licenses: (i) previous license – states that the project is environmentally possible and establishes preliminary compensations

and limitations for the project; (ii) installation license – authorizes the construction of the project and establishes compensations and limitations for its construction; and (iii) operation license – authorizes the operation of the project and establishes compensations and limitations for its operation. Certain regulated sectors have additional licensing requirements, such as projects that require deforestation, seismic and drilling activities. Depending on the type of activity to be performed by the project company, health and safety laws will apply.

## F. Jurisdiction, Waiver of Immunity

### 25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

Although not explicit in the Brazilian conflicts of law rules and without court precedents confirming it, most international financing practitioners agree that the Brazilian law allows the choice of law in cross-border agreements involving contractual obligations of private parties (including mixed capital companies, such as Petrobras). This consensus was reinforced after the Economic Freedom Act (Law 13,874/2019). Submission to foreign courts is also valid between private companies, except in situations in which Brazilian courts have exclusive jurisdiction (for example, lawsuits regarding real estate located in Brazil). Security agreements over assets located in Brazil (i.e., the creation of *in rem* rights) and concession agreements are mandatorily governed by Brazilian laws.

Except in connection with acts of commercial nature, public entities require prior legislative approval to submit themselves to foreign jurisdiction or to waive immunity provisions. Mixed capital companies do not have immunity based solely on their subjective characteristics.

Assets that may be necessary for the continuation of the provision of public services or that are reversible (i.e., they are transferred to the government at the end of the concession period) are immune from attachment and seizure, whoever owns them.

### 26. Can financing documents provide for arbitration clauses?

Yes, financing documents may provide for arbitration clauses. In domestic arbitrations, the Arbitration Law (Law 9,307/1996) applies. In international arbitrations, Brazil is a party to the New York Convention and to the MERCOSUL International Commercial Arbitration Agreement. Foreign arbitral decisions must be confirmed by the Brazilian Superior Court of Justice, in accordance with requisites set forth in the New York Convention.

Arbitration clauses in loan agreements are uncommon in Brazil, as the disputes will typically involve a straightforward payment default in which creditors can quickly seek to collect money and attach assets through courts, given that arbitrators lack police power (i.e., the ability to order seizure of assets).

## G. Trends and Projections

### 27. What are the main current trends in project financings in your jurisdiction?

In terms of financing, three main trends can be noticed:

(1) Acquisition financing of operating assets via project finance structures, with bidders/purchasers levering their acquisition prices on the assets and revenues of the target company/project. Examples are very much present in the Petrobras divestments of refineries and oil fields and in the acquisition of certain operating power plants.

(2) Green and sustainability-linked financings. "Green" financing had a push from 2020 onwards when Decree 10,387 regulated Law 12,431 to allow tax benefits to local project bonds that provide relevant social or environmental benefits. Various issuances were certified green due to benefits such as reduced carbon emissions (mostly in the energy sector), advantages to urban mobility and reduction in the use of private automobiles (such as subway and tram companies) and public health gains (water and sanitation projects). Sustainable finance in Brazil began with cross-border corporate financings and local corporate bonds issuances, and is currently expanding to local project bond issuances, with provisions for reduced interest rates in case of operational improvements (such as reduced water usage) or meeting of diversity and inclusion targets (such as percentage of women in managerial roles).

(3) New structures in financings in which multilateral institutions participate. In order to further their role of financing infrastructure with positive social and economic externalities, multilaterals are not only providing direct financings but also other forms of credit support, such as via equity funds, mezzanine positions in securitization funds, credit guarantees in bonds issuances and co-financing with local institutions and/or capital markets instruments. Particularly the latter often results in complex collateral sharing arrangements, as the underlying credit instruments are typically not fully aligned.

In terms of economic sectors, energy and oil and gas are, historically, sectors with high volumes of funding with project financing structures. Currently, the main sector expected to use project finance for its development is the sanitation sector, in which large investments are expected (for instance, R$ 30 billion in Rio de Janeiro alone). In the short term, toll roads and other transportation projects are expected as well – for example, the Nova Dutra Road (BR-116/RJ/SP), a 625,8 km road that connects Rio de Janeiro and São Paulo, two of main cities of Brazil, has R$14,8 billion in projected investments in connection with its new concession.

**28. Are any significant development or change expected in the near future in the project finance market?**

The Brazilian project finance market is in constant development. Even during the Covid-19 pandemic, several projects remained under development. Brazilian new Public Works and Bidding Law (Law 14,133 of 2021) updated several rules and reduced bureaucracy in this regard. Law 14,286, which came into force on December 31, 2022, simplified rules on foreign exchange, foreign direct investment registration and expanded the situations in which contracts can be USD-pegged.

In fact, as a result of the new foreign exchange law authorizing USD-pegged power purchase contracts when the offtaker is an exporter, it is expected that the energy sector will benefit from an influx of foreign financing – the fact that revenues were BRL-denominated created foreign exchange risks that shunned away foreign financiers.

There is currently uncertainty on the role that BNDES will take after the current federal administration took office in 2023. Market expectation is that BNDES will go back to its past role of being the main financier of infrastructure in the country, moving away from the stance (of the past six years) of structuring projects to be developed and financed by private parties.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR Libor (London Interbank Offered Rate) transition period?**

Until the moment the Brazilian Federal Revenue (*Receita Federal Brasileira*) did not publish an official pronouncement regarding LIBOR (London Interbank Offered Rate) transition. Whereas there is not a consensus regarding of a standard rate, several banks are calculating their own rates based on the Risk-Free Rate (RFR).

While the Brazilian Federal Revenue does not regulate the topic, banks are using the following rates: (i) Overnight Financing Rate (SOFR), of the United States of America; (ii) Sterling Overnight Index Average (Sonia), of the United Kingdom; (iii) Euro Short-Term Rate (EST), of the European Union; and (iv) Tokyo Overnight Average Rate (TONAR), of Japan.

# CROATIA

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Project financing as such is not regulated in Croatia. Croatia does however regulate areas closely related to project financing such as public private relationships and concessions. The main relevant regulations include:

- the Public Private Partnership Act,
- the Concessions Act,
- the Act on Strategic Investment Projects of the Republic of Croatia, and
- the Investment Promotion Act.

Additionally, sector-specific areas in which project financing typically takes place such as energy, real estate and infrastructure are also all mostly regulated in Croatia.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in Croatia started in the mid-1990s and early 2000s when the first major public private partnership projects for the construction of Croatian motorways began. These included the construction of the motorway in the north-west of Croatia connecting Pula with Rijeka and the Slovenian border (the so-called "Istrian Y" highway - the construction of which continues today) and the highway connecting Zagreb and Macelj. Both these projects were based on the establishment of concessions rights over the constructed highways.

The first Croatian Public Partnership Act was enacted in 2008, and it was followed by an update of the legislation in 2012 which is still in force today.

All major project finance-based investments in Croatia (except for the Zagreb Airport which was developed in the period from 2012 to 2017) date from the period before the economic crisis that started in 2008. This negative trend continued, and there have been no new major project financing arrangements closed in the last 12 months. Of note however, is the continuing construction of the "Istrian Y" highway with a project value of EUR 191 million. Completion is expected in 2024.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most commonly used security types in project financing in Croatia are:

- pledge over shares, movables, bank accounts, rights or receivables,
- mortgage over real estate,
- floating charge over movables, and
- guarantees.

Another Croatia-specific security instrument used in project financing is a debenture note (in Croatian: *zadužnica*). A debenture note allows for a direct collection of funds from the security provider's bank accounts.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, company shares can be pledged as security in favor of lenders. In order to establish a valid security over shares, a title instrument and an act of perfection are required.

Project financing projects in Croatian typically involved limited liability companies, and for the pledge of their shares, it is specifically required that (i) a share pledge agreement is executed before a Croatian public notary in the form of a Croatian notarial deed, and (ii) the pledge is registered with the book of shares of the company and the Croatian Registry of Judicial and Notarial Security (in Croatian: *Upisnik sudskih i javnobilježničkih osiguranja*) held with the Croatian Financial Agency (in Croatian: *Financijska agencija*).

The establishment of a pledge over the shares (stocks) of a joint stock company only slightly differs from the process of establishment of a pledge over the shares of a limited liability company. A pledge agreement aiming to create a pledge over stocks of a joint stock company generally does not need to be executed in the form of a notarial deed. However, as a standard Croatian market practice also pledge agreements creating pledges over stocks are regularly concluded in form of notarial deeds as such form allows the creditor to pursue direct enforcement of the pledge through enforcement proceedings based on the pledge agreement only (without the need to go through judicial proceedings first for obtaining an enforceable document). In terms of perfection, the pledge over stocks needs to be registered with the Croatian Central Clearing and Depositary Company (in Croatian: *Središnje klirinško i depozitarno društvo*).

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Private sale is recognized as a method of enforcement of the share pledge in Croatia. The private sale option is regularly provided for in share pledge agreements, but the option is very rarely exercised in practice.

The reason for that is that the regulation of enforcement *via* the private sale of shares is very vague, and the option is rarely used in practice. As a result, the regulation and practice in relation to it are extremely scarce, leaving room for uncertainties, which thus generally discourages creditors from pursuing such an option.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Security interest in Croatia may not be established over the future property of the borrower, but rather any object of a security interest must be owned by the borrower at the moment of establishment of the security interest.

With regards to the creation of security over receivables specifically, there is a well-established market practice that future (undue) receivables may be pledged under the condition that at least the creditor, debtor and legal basis from which such receivables will be arising are determined at the moment of establishment of the pledge.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

In case the borrower becomes insolvent (while official insolvency proceedings have not yet been opened against the debtor), a lender may formally initiate regular enforcement proceedings against the borrower under the condition that the lender's claim became due. In case a security agreement has been entered into in the form of a notarial deed, the lender will be entitled to initiate direct enforcement proceedings based on such security agreement. The direct enforcement proceedings involve the following steps:

- the lender must obtain an enforcement confirmation on the relevant security agreement from the public notary. The conditions for obtaining an enforcement confirmation are set by the security agreement, and typically only a statement of the lender confirming that a claim became due is considered as sufficient,
- an enforcement request must be filed by the creditor with the court requesting enforcement over the relevant security based on the security agreement with the enforcement confirmation,
- the enforcement proceedings take place before the court and, unless successfully challenged by the borrower, the enforcement should end by the sale of the relevant collateral by the court and distribution of the sale proceeds to the lender.

In case official insolvency proceedings are opened against the debtor, generally any enforcement proceedings initiated against the debtor before the opening of the insolvency proceedings will be suspended and the enforcement will continue as part of the insolvency proceedings.

In case a lender should not have initiated enforcement proceedings before official insolvency proceedings have been opened, all of the claims of the lender against the debtor would be considered due as of the moment of the opening of the insolvency proceedings, and the lender will be entitled to pursue its claim within insolvency.

In terms of enforcement of security within insolvency proceedings (whether enforcement has been initiated before the opening of the insolvency proceedings or not), a secured lender that has security over the debtor's assets will be entitled to a separate settlement. Enforcement within

insolvency is generally processed as regular enforcement, meaning that the asset subject to security will be sold and the sale proceeds will be directed to the secured lender for the satisfaction of its claim (and only if there should be any proceeds left after the lender's claim has been satisfied in full, this will be distributed among other creditors).

The enforcement process is different in case a security agreement is not concluded in the form of a notarial deed. In such a case, the enforcement process must start with a lawsuit that must be filed by the creditor against the borrower. As a result of such proceedings, the creditor's claim should be established by way of a court decision with which the lender may then proceed to enforcement proceedings. In case official insolvency proceedings are started, the secured creditor will also be generally entitled to a separate settlement, but the debtor, the other creditors and the insolvency trustee will be allowed to challenge its claim, and in such case, the lender will again need to prove the existence of its claim through civil proceedings. For all of these reasons, it is recommended, and it is standard market practice for lenders to have the security agreements concluded in form of a notarial deed.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Croatian law does not recognize the concept of a security trustee. This is typically solved through a parallel debt structure, whereby the parties to an agreement agree that the security agent shall be the joint and several creditors of each and every obligation of the borrower towards each finance party (other than the security agent).

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Incentive measures for investment projects in Croatia are regulated by the Croatian Investment Promotion Act and pertain to investment projects in manufacturing and processing activities, development and innovation activities, business support activities and high-added value services. The main incentives relate to either tax refunds or cash grants for enterprises registered in Croatia, as follows:

- tax refunds and tax advantages,
- cash grants for costs of new jobs and/or employee trainings linked to investment projects,
- aid for development and innovation activities, business support and high value-added services,
- cash grants for capital costs of investment projects and labor-intensive investment projects,
- incentives for investments which utilize inactive government-owned property, and
- incentives to modernize business processes through automation and digitalization of production and manufacturing processes.

Substantial tax cuts on profits (minimum 50% and up to 100% reduction) are also available depending on the size of the investment and the number of new jobs created as well as profit tax reductions for investments modernizing the manufacturing industry.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

There are no special incentives and exemptions which apply to foreign investors.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency. The Constitution of the Republic of Croatia sets out that all rights acquired by investing capital will not be limited by law or other legal act and that foreign investors are guaranteed free transfer and repatriation of profits and invested capital.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

There are no specific laws aimed at foreign investment; both foreign and domestic market participants in Croatia are protected under the same legislation. Pursuant to the Croatian companies' law, domestic and foreign companies operate under equal conditions in Croatia. A foreign investor may establish or participate in establishing a company and may acquire rights and/or obligations under the same conditions as any domestic investor. Specific restrictions may apply in areas related to Croatia's national security, defense and areas of its strategic interest.

In terms of real estate investment in Croatia, foreign investors may acquire Croatian properties under the condition of reciprocity; however, this restriction does not apply to citizens and legal entities from the member states of the European Union. European Union citizens and legal entities can acquire properties in Croatia under the same conditions as Croatian citizens and legal entities except for agricultural land and protected areas according to special legal provisions. Nonetheless, this restriction is often circumvented by the establishment of a company in Croatia which, as a domestic legal entity, may acquire agricultural property without any restrictions.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

No, provisions of Croatian law do not prescribe an equity requirement specifically for project financing in Croatia. However, the minimum share capital for the establishment of a limited liability company in Croatia amounts to EUR 2,500 and for a joint stock company EUR 25,000.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

There are no special registration and filing requirements generally applicable to project finance documents in Croatia, apart from security documents which need to be registered with the relevant authorities for the sake of perfection. Also, project financing involving public authorities (such as concessions and PPP) needs to go through regulated procedures which, among others, in certain steps may require the filing of project financing documents.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

In terms of choice of law, European Union law directly applicable in Croatia makes a distinction between insurance contracts covering large risks, whether or not the risk covered is situated in a member state of the European Union, and all other insurance contracts covering risks situated inside the territory of the Member States.

Large risks are specifically defined and listed in European Union's Solvency II Directive and include risks such as risks in relation to aircrafts and ships. In case of insurance contracts covering large risks, the parties have full freedom of choice regarding the governing law of the insurance policy. There is however a limitation for cases where the parties have chosen the law of a foreign country when all other elements relevant to the situation are located in a different country. In that case, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

For insurance policies securing risks other than large risks, the parties' choice of foreign law is limited only to:

- the law of any member state of the European Union where the risk is situated at the time of conclusion of the contract,
- the law of the country where the policyholder has its habitual residence,
- in the case of life insurance, the law of the member state of the European Union of which the policyholder is a national,
- for insurance contracts covering risks limited to events occurring in one member state of the European Union other than the member state where the risk is situated, the law of that member state, and
- where the policyholder pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different member states of the European Union, the law of any of the member states concerned or the law of the country of the habitual residence of the policyholder.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Insurance proceeds may generally be assigned to the benefit of the lenders, except for proceeds from insurance policies which by their nature do not allow assignment (such as insurance proceeds from policies securing damages to third parties).

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

In terms of the assignment of insurance policies in favor of the lenders, Croatian law requires that the insurers are notified of such an assignment for the sake of the full perfection of the assignment. In case of insurance of high amounts where there are several insurers and/or reinsurance takes place, the delivery of the notices of assignment and particularly providing evidence of such delivery may be challenging. On the lender side however, it is a common expectation that evidence of delivery of the notice of assignment will take place as a condition precedent to any funding which may delay closings or require for waivers of conditions precedents.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Public-private partnership is a permitted method of developing projects in Croatia. To date, contracts for 17 public-private partnership projects have been concluded in Croatia with an estimated capital value of EUR 338 million. The public-private

partnerships were mostly established for the construction of public service accommodations (such as school buildings, entertainment or sports facilities and government buildings) and transport infrastructure (such as highways, airports and bus terminals).

The most dynamic period for public-private partnership in Croatia was between 2006 and 2008 with building projects of new sport facilities in Split and Varaždin, the construction of the bus terminal in Osijek and the reconstruction of the Varaždin County palace. Further, nine contracted projects were related to the educational system with the purpose of construction, upgrading and maintenance of schools and school buildings. In 2013, a contract for the construction of a new passenger terminal at Zagreb Airport was signed for EUR 188 million, thereby becoming the public-private partnership project with the highest capital value in Croatia.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between public authorities and lenders are not prohibited by Croatian law; however, they are not common in the Croatian market. Generally, public authorities enter into public-private partnership agreements with private companies incorporated for a specific purpose*, i.e.,* for the implementation of a specific public-private partnership project. The lenders then enter into loan agreements with the "specific purpose" private company in order to finance the project.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption, etc.) available in your jurisdiction.**

Croatian government support may be found in public-private partnership agreements mostly in the form of tax exemptions, tax deductions and establishing a building right without consideration payment or assistance in obtaining necessary permits and approvals in the initial phases of the public-private partnership project. Occasionally, the government will provide private partners with state guarantees, equity financing or some form of additional financial support. The level of government support varies and is determined on a case-by-case basis.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Generally, the political risk under public-private partnership agreements is assumed by the public party. Political risk usually means the probability of changes in certain legal regulations that can significantly affect the cash flows of the public-private partnership project (such as tax rates changes) or prevent further business development (for instance property expropriation). Therefore, public-private partnership agreements regularly contain a provision by which the private party is entitled to monetary compensation, if during the implementation of the public-private partnership project, statutory regulations are changed due to political reasons.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

When it comes to concession agreements, investors and lenders are usually not protected against the risk of legislative changes. Namely, granting a concession for works or services includes the transfer

of operational risk to the private partner which also includes the transfer of the demand and/or supply risk. For example, a legislative change regarding the increase of the value added tax rate can cause an increase in the selling price of certain work or services and therefore, the demand by the end user for specific work or a service may significantly decrease. This means that the materialization of the legislative change risk can induce a whole range of other risks which may be borne by investors and lenders.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is generally regulated by the provisions of Croatian obligations law which regulates the basics of contractual and non-contractual mandatory relations between parties. In general, the concept of *force majeure* is defined as an external, unpredictable and extraordinary event that could not be prevented, eliminated or avoided. The Croatian Public Private Partnership Act specifically regulates that every PPP agreement must contain a *force majeure* clause in order to be binding.

**24. What are the general environmental and social requirements in project financings?**

In project financing, companies must comply with applicable statutory obligations in the field of environmental, social and labor law. There is a general awareness of societal expectations regarding responsible business conduct which is regulated by law. The government effectively implements domestic laws in order to maintain consumer and environmental protections and avoid the infringement of human and labor rights.

Croatia has also implemented and continues to implement all the European Union legislation which requires a due diligence approach to responsible business conduct. Labor laws are strictly implemented and not waived to retain or attract investment. Collective bargaining is a common tool, mostly implemented by unions, which overwhelmingly represent workers associated with government spending and state-owned enterprises.

Various laws related to forest and water management, concessions and environmental protection maintain a high level of environmental and human rights standards. For instance, provisions of the Croatian Concession Act prescribe that the impact on the environment must be taken into account and form part of the justification study when granting a concession to a private entity.

Finally, ever-growing environmental, social and governance (ESG) legislation became a significant part of Croatia's corporate environment in recent years. With demand for transparent and sustainable business practices at an all-time high, companies have had to set up environmental, social and governance strategies and reporting standards for environmental, social and governance factors to meet investor, customer, employee and regulator expectations. Since 2021, an increasing number of Croatian companies have started implementing sustainable business practices which are environmentally responsible, protect employee well-being and ensure transparent company operations.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Yes, submission to foreign law and waiver of immunity provisions are generally enforceable in Croatia. In terms of choice of law, enforcement thereof may be limited to the extent that the application

of foreign law may be found contrary to Croatian public policy (*order public*) and/or mandatory provisions of Croatian law.

**26. Can financing documents provide for arbitration clauses?**

Yes, arbitration clauses may be included in financing documents. Arbitration awards may be generally enforced in Croatia without examination of the merits of the case, subject to applicable recognition and enforcement treaties and regulations of general application.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

In Croatia, project financing is currently often used in energy-related projects, especially in developing private energy production facilities. These are mostly private projects, and there is little project financing active in the public sector in Croatia at the moment. Currently in Croatia, there is a stagnation in the number of concluded public-private partnerships. This is largely due to the funds made available through Croatia's membership in the European Union, where most of the largest infrastructure projects in Croatia in the past five-year period were co-financed by the European Union, and this trend is expected to continue in the coming years.

**28. Are any significant development or change expected in the near future in the project finance market?**

The lending industry in Croatia is generally expecting a positive outlook following Croatia's entrance into the Eurozone in 2023. The loss of the exchange rate risk with respect to the Euro should lower financing costs and foster foreign financing and investment. Project financing is expected to benefit from this forecast as well.

Though the need for the development of a legal framework for project financing in Croatia is generally recognized among stakeholders in the financing industry in Croatia, there are still no official initiatives in that respect.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

LIBOR has not been widely applied in Croatia. In the small amount of transactions where LIBOR was used, the interest rate was mainly turned into SOFR or STR during the transition period.

# DENMARK

## GORRISSEN FEDERSPIEL

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

There is no specific legal framework governing project financings in Denmark. Project finance is governed by general principles of law. However, there are some acts specific acts regulating lending in general, guarantees etc.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Denmark has a well-developed project finance market, supported by a stable political and economic environment, a skilled workforce, and a strong renewable energy sector. The country is known for its ambitious renewable energy targets and has been a pioneer in the development of offshore wind farms.

The most significant project financings closed in Denmark in recent years have been in the renewable energy sector. Two examples of such transactions are the following:

- Obton transaction: Platform project financing of Obton which is one of Denmark's largest and longest-established developers of solar PV projects, having developed projects across Europe, North America and in Far East Asia for more than 10 years. Projects are being developed as green field projects and it is the intention of Obton to develop the project to a "ready-to-build stage".
- Anaergia transaction: Financing of Anaergia Inc. investment in and development of a large scale biogas facility in Southern Denmark.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The following security types are the ones most commonly used in project financings in Denmark:

- Mortgage over real property (including land)
- Assignment and subrogation agreement relating to the construction agreement and other project agreements
- Assignment of project insurances
- Pledge over bank accounts
- Pledge over shares in special purpose vehicle company
- Assignment of intercompany loans (if any)
- Guarantees

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

The shares in a company incorporated in Denmark can be pledged as security for the benefit of lenders.

A security interest over shares is protected against competing rights by providing notice of the pledge to the issuing company and having the pledge registered in the company's share register.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

**Private sale**

In Denmark, private sale is a recognized method for the enforcement of a share pledge, however, a private sale of the shares is only available if agreed between parties in the share pledge agreement

Market standard Danish law share pledge agreements provide for an option to enforce the share pledge by private sale upon the occurrence of certain triggering events, typically an event of default under the facilities agreement pursuant to which the security is provided.

Any enforcement by way of taking over the shares after valuation or a private sale of the shares may only be initiated after the pledgor has been given a one week's prior written notice (calculated from the delivery of the notice) by registered mail unless an immediate sale is required in order to avoid or limit losses. This is a mandatory rule set out in the Danish Administration of Justice Act that may not be deviated from by agreement.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

**Future assets**

Future assets can only be pledged if it is clearly described in the pledge document, i.e., the assets need to be identified accurately. As fixed mortgages over assets (such as machinery and chattel) cannot cover collections of uniform assets, each asset must be identified in the pledge agreement.

In most cases (depending on the assets to be pledged), perfection cannot be achieved prior to the pledgor receiving title to the relevant asset. This applies to pledges over real property and chattel.

In cases where the pledgor becomes subject to bankruptcy proceedings within a period of three months after proper perfection of the security (and in some instances two years), such security would be subject to avoidance.

**Future Rights and Receivables**

It is possible under Danish law to assign future rights and receivables. However,

any assignment of such rights and receivables will normally not be valid vis-á-vis the creditors of the Seller (including its bankruptcy estate) until such time as the future rights and receivables are clearly identified.

Bulk sales would most likely not create an enforceable right for the pledgor, as each receivable that is to be assigned must be clearly identified at the time of the assignment in order to eliminate any uncertainty as to the nature and scope of the future receivables.

However, any assignment of future rights and receivables will only be valid vis-á-vis the creditors of the Seller (including its bankruptcy estate) if the perfection requirements, including satisfaction of the notice to the debtor, clearly identifying the rights/receivables assigned (the "**Identification Prong**"). As there is very limited Danish case law on the subject, it is difficult to establish precise guidelines detailing what would be required to satisfy the Identification Prong. Generally, however, the Identification Prong will likely be satisfied provided that the contractual relationship between the Seller and the debtor, which gives rise to relevant future receivables, can be described in detail.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Both the debtor and any creditor may initiate bankruptcy proceedings in respect of the debtor where the debtor is insolvent where "insolvent" for such purpose means inability to pay its debts as they fall due. In general, when it becomes likely that the company will not make it through the distress, the directors should file for bankruptcy. If not, they may incur liability for debt incurred after it should have been clear to the directors that the company would not be able to survive.

During bankruptcy, it is in principle possible for a pledgee to enforce a pledge of shares, a pledge of bank accounts and assignments of contractual rights and receivables. The enforcement proceedings must not be made in cooperation with the bankruptcy estate, and can be made without the consent of the administrator of the bankruptcy estate. However, the administrator can require that a valuation of the pledged assets be carried out. If such a valuation is not made, the pledgee will have to ensure – and will ultimately be held liable for – having completed the realisation of the relevant assets at a fair market value.

The enforcement of security over real estate will be impacted by the commencement of bankruptcy proceedings. Such security interests may only be enforced by the bankruptcy administrator, and the creditors cannot demand enforcement of such security interests until six months after the declaration of bankruptcy. Prudent bankruptcy administrators will, however, cooperate closely with a mortgagee so as to arrange for the best sale of the real estate which is often by way of a private sale. Where the outstanding loan secured under a mortgage exceeds the value of the real estate, the bankruptcy administrator will generally take instructions from the mortgagee in respect of the conduct of the sale.

Generally, the bankruptcy administrator will have to account to the secured creditors (and the non-secured creditors as well) for any significant step taken by the administrator in respect of the assets of the bankruptcy estate. For assets over which mortgages are registered, such as real estate, the bankruptcy administrator would not be able to sell below the loan

secured by the mortgage(s) by way of a private sale. However, the bankruptcy administrator may initiate a forced auction sale and it is generally acknowledged that a sale on a forced action cannot qualify as an undervalue sale whatever the sales price and whether or not the secured loan is fully discharged. Costs incurred by the bankruptcy estate in respect of the secured assets, e.g., in respect of insurance, maintenance, operational costs, sales costs (including sales fee to the bankruptcy administrator), etc., rank ahead of the secured debt. If the mortgage over the asset in question also includes earnings from the asset (e.g., rental), such earnings will cover the said costs first and then the secured debt.

A 'straight forward' bankruptcy would normally be able to be concluded within 6-18 months, but may – and many will - obviously be delayed by many factors, such as litigation, sale of assets, claims against other bankruptcy estates, the complexity of the debtor group, etc.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Denmark does not recognise the concept of trust and is not a party to the Hague Convention on Trusts 1986. However, the concept of security agents/trustees administering security on behalf of the secured parties, i.e., by way of the security trustee acting as an agent on behalf of the secured parties is recognised under Danish law. Moreover, it is possible to grant the relevant security for the benefit of the security trustee on behalf of each of the secured parties by appointing the security agent/trustee as an agent in accordance with Section 18(1) cf. Section 1(2) of the Danish Act on Capital Markets (in Danish: *lov om kapitalmarkeder*). In such case, the security agent may enforce the security on behalf of all other finance parties.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Denmark has a well-developed project financing market, and there are various incentives and exemptions available for project financing in the country. Some of the main incentives and exemptions include:

1. Public funding: The Danish government does in some instances provide public funding to support project financing, including loans, and guarantees. These funding programs are designed to encourage investment in specific sectors, such as renewable energy, infrastructure and research and development.
2. Green bonds: Denmark is a leader in the issuance of green bonds, which are debt securities that are specifically used to finance environmentally-friendly projects.
3. Supportive regulatory environment: Denmark has a supportive regulatory environment for project financing, with clear and transparent laws and regulations that promote investment and protect the rights of investors.
4. Strong project pipeline: Denmark has a strong pipeline of projects that are suitable for project financing, particularly in the areas of renewable energy, infrastructure, and real estate. This provides investors with a diverse range of investment opportunities and reduces their risk exposure.

Overall, the main incentives and exemptions for project financing in Denmark are designed to promote

investment in sustainable and socially responsible projects, while also providing investors with attractive returns and reducing their risk exposure.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

There are no tax or other incentives provided preferentially to foreign investors or creditors.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions in Denmark in regards to borrowing bank loans and/or shareholder loans from abroad or in a foreign currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

On 1 July 2021, the act on screening of certain foreign investments etc. in Denmark entered into force pursuant to which foreign investors in some cases are obliged to obtain approval from the Danish Business Authority ("**DBA**") prior to executing the transaction. The rules are quite broad and will be described in general below.

**Transactions that will trigger screening requirements**

The act introduces (i) a mandatory screening mechanism for certain foreign investments in sensitive sectors if the foreign investor obtains at least 10 % ownership or voting rights, or equivalent control by other means, and (ii) a voluntary cross-sectoral notification mechanism for certain foreign investors who obtain at least 25 % ownership or voting rights, or equivalent control by other means (relevant for investments in non-sensitive sectors which may nevertheless threaten national security or public order). Investments, where control is acquired indirectly, may also trigger a screening requirement e.g., in case of a sale of a foreign parent with a Danish subsidiary.

The sensitive sectors for which the mandatory screening requirement applies are (i) defence, (ii) IT security or processing of classified information, (iii) companies producing dual-use goods, (iv) other critical technology, or (v) companies within critical infrastructure.

**Investors covered by the screening requirements**

- Foreign citizens.
- Companies not domiciled in Denmark even though they have a permanent establishment in Denmark.
- Companies domiciled in Denmark if the company is a subsidiary or a branch of a company not domiciled in Denmark.
- Companies domiciled in Denmark if a foreign person or undertaking has control of or significant influence over the company.

**Danish authority that controls and monitors foreign investments**

The DBA controls and monitors foreign direct investments and receives and processes filings related to the screening mechanisms.

**Consequences of not filing**

The Danish authorities can issue an order to roll-back a planned or completed investment if an investor fails to file. If the order is not complied with, the DBA may, for instance, annul the foreign investor's voting rights.

**Legislation that impact investments in Danish companies**

Foreign investors seeking to invest in Danish companies must at an early stage

factor-in that the investment may need to be approved by the DBA prior to the investment being concluded. This also applies even if the intended investment does not concern a company that operates in or is otherwise active within any of the sensitive sectors set out in the act.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no specific minimum equity requirement for project financing in Denmark under the legislation. However, the amount of equity required for a project finance transaction in practice will depend on a variety of factors, including the type and size of the project, the perceived risk of the project, and the requirements of the lenders.

In general, project finance transactions in Denmark are typically structured with a mix of equity and debt financing. The equity component of the financing is typically provided by the project sponsors, who are responsible for providing a portion of the project's capital in the form of equity.

The amount of equity required for a project finance transaction in Denmark will vary depending on the specific project and the risk profile of the project. In some cases, lenders may require a minimum equity contribution from the project sponsors to ensure that they have a sufficient stake in the project and are incentivized to ensure its success.

It is important to note that while there is no specific minimum equity requirement for project financing in Denmark under the legislation, lenders will carefully evaluate the equity component of a project finance transaction to ensure that it is sufficient to support the project and to provide a cushion against potential losses. This evaluation will typically include a review of the project sponsors' financial strength, their experience in the relevant industry, and their commitment to the project.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In general, project finance documents are not subject to any registration and filing requirements.

However, if security has been taken over the property in the form of a non-possessory pledge (i.e., legal mortgage) the perfection requirement is registration with the Danish Land Registry (in Danish: *Tingbogen*). Registrations are publicly available and serve as protection against both contracting parties and other creditors of the mortgagor.

Security over real estate is established by way of a mortgage. There are three types of mortgages available:

(i) the ordinary mortgage, which is usually applied by mortgage-credit institutions (in Danish: realkreditinstitutter);

(ii) the indemnity mortgage (in Danish: skadesløsbrev); and

(iii) the owner's mortgage (in Danish: ejerpantebrev).

Registration of mortgages with the Danish Land Registry is subject to a registration fee of 1.5 per cent of the face value of the secured amount, together with a handling fee of DKK 1,660.

Further, it is common in project financings that a negative pledge is registered over the property in the Danish Land Registry. The consequence of registering such a negative pledge is that it will not be possible to register new mortgages in

favour of third parties without the consent of the pledgee. If negative pledges are to be registered with the Danish Land Register of the real estates, such registration should be made a condition subsequent to completion. Otherwise, it can negatively impact the timing of the registration process of the mortgages required to be registered for the purpose of completion.

The registration of a negative pledge with the Danish Land Registry is subject to a handling fee of DKK 1,660.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

It is possible for local insurance policies in Denmark to be governed by a foreign law.

Under Danish law, parties to an insurance contract are generally free to choose the law that will govern their contract, as long as the choice of law is not contrary to Danish mandatory rules. This means that parties may choose to have a foreign law govern their insurance contract, as long as the choice of law does not violate mandatory provisions of Danish law, such as those concerning consumer protection or public policy.

If a foreign law is chosen to govern an insurance policy, the policy must still comply with Danish mandatory provisions, such as those related to claims handling, dispute resolution, and consumer protection.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

It is market practice in Danish project finance transactions that the company's rights under insurance policies are assigned in favor of the lenders/security agent.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There are no other general complications, concerns or issues in relation to the insurance provisions under project financing documentation.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

PPP is a permitted and often used method for developing projects in Denmark.

Below are a few examples of PPP projects that have been developed in Denmark:

**Hobro tinglysningsret** project in Denmark is a public-private partnership ("**PPP**") project that involved the construction of a new building to house the Danish Registration Court. The project was a joint venture between the Danish government and a private company, which is responsible for designing, building, and financing the facility. It has been seen as a model for future PPP projects in Denmark and elsewhere to have a positive impact on the local economy, creating jobs and attracting new businesses to the area as it demonstrates the potential benefits of public-private partnerships in delivering public services more efficiently and effectively.

**Kliplev-Sønderborg Motorvejen**: Kliplev-Sønderborg Motorvejen is a highway project in Denmark that was developed through a PPP model.

Under the PPP agreement, a private consortium was responsible for financing,

designing, constructing, and operating the motorway for a period of 30 years. The consortium included several construction and engineering firms, as well as a financial partner.

The motorway project included the construction of approximately 30 kilometers of new four-lane motorway, as well as the widening and upgrading of approximately 13 kilometers of the existing motorway. The project also included the construction of several bridges, interchanges, and other associated infrastructure.

The PPP agreement between the private consortium and the Danish government included a number of key provisions. For example, the private consortium was responsible for financing the project through a combination of equity and debt financing. The consortium also assumed the risk of construction delays, cost overruns, and other potential risks associated with the project.

In exchange for assuming these risks and delivering the motorway project, the private consortium was granted a long-term concession to operate and maintain the motorway for a period of 30 years. The government agreed to make payments to the consortium over this period, based on the consortium's performance in meeting certain key performance indicators, such as traffic volumes and maintenance standards.

Overall, the Kliplev-Sønderborg Motorvejen project is an example of how PPP models can be used to finance and deliver large-scale infrastructure projects while sharing risks and responsibilities between the public and private sectors.

In all of these projects, the private sector partners are responsible for financing the construction of the infrastructure, and for operating and maintaining the facilities over a period of time. The public sector partner provides a long-term contract and payment stream to the private partner in exchange for the delivery and operation of the infrastructure.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between the public authorities and the Lenders are permissible under Danish law and are often seen in regards to infrastructure projects.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The Danish government can provide a treasury guarantee to lenders on behalf of the borrower. This guarantee is issued by the Danish Ministry of Finance and covers both principal and interest payments. The guarantee reduces the risk for lenders and may result in lower interest rates for borrowers.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

In Denmark, as in most other countries, the allocation of responsibility for political risk events in Public-Private Partnership agreements depends on the specific terms and conditions of the agreement.

PPP agreements usually contain provisions that allocate the risk of political events between the public and private parties. These provisions may vary depending on the specific project and the preferences of the parties involved.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

In general, investors and lenders in project financings may not be fully protected against a change in law passing subsequent to the signing of the relevant concession agreement in Denmark. However, the specific provisions and protections offered in the concession agreement, as well as the relevant laws and regulations in Denmark, may provide some level of protection to investors and lenders.

In Denmark, concession agreements are typically negotiated between the project sponsor and the public authority responsible for the infrastructure project. These agreements outline the terms and conditions of the project, including the rights and obligations of the parties involved. Concession agreements are typically governed by Danish law and subject to the jurisdiction of Danish courts.

In terms of protection against changes in law, the concession agreement may include provisions that address this issue. For example, the agreement may include a force majeure clause that provides for relief in the event of unforeseeable circumstances beyond the control of the parties, including changes in law. Additionally, the agreement may specify a dispute resolution process that can be used to resolve disputes arising from changes in law.

However, the level of protection provided by the concession agreement will depend on the specific terms and conditions negotiated by the parties. Furthermore, the Danish legal system provides for the possibility of legislative changes that may impact the terms of the concession agreement or the project itself. In such cases, investors and lenders may need to rely on the protections offered by the concession agreement or seek recourse through the courts or arbitration process.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not specifically regulated under Danish legislation in regards to project financing. Under the Danish Contracts Act, force majeure is referred to as "*force majeure og lignende tilfælde*" (force majeure and similar cases). According to Section 24 of the Danish Contracts Act, a party to a contract may be released from its obligations if it can be demonstrated that the failure to perform was due to a force majeure event. The party claiming force majeure must show that the event was beyond its control and could not have been foreseen at the time of entering into the contract. The party must also show that the event has made it impossible to fulfill its obligations under the contract.

It is important to note that force majeure clauses are not implied in contracts in Denmark, which means that parties must specifically include a force majeure clause in their contract if they wish to rely on it. The clause must specify what events will constitute a force majeure event and the consequences of such an event, such as whether the party will be released from its obligations or whether the contract will be terminated.

**24. What are the general environmental and social requirements in project financings?**

There are several Danish acts dealing with the issue of environmental contamination and clean-up orders, which are generally supervised by the regions.

Any Danish property is to some extent surveyed in order to establish an overview

of contaminated or possibly contaminated properties, to minimise the risk of groundwater pollution, prevent pollution expanding and to ensure that public health is not put at risk. If a property is mapped as contaminated or possibly contaminated, certain restrictions to the property apply. A contamination registration does not restrict the actual use of the property, but any change of the use to sensitive use or construction on the mapped property requires a permit from the authorities.

The "polluter pays" principle is well-established in Denmark. Clean-up orders can be issued to polluters even though they do not own the polluted property. In such case, the owner can be ordered to tolerate the clean-up.

The environmental liabilities under Danish public law are supplemented by the general law of torts, which generally bases liability on negligence but under some circumstances applies a strict liability.

Rules on health and safety in the work place, including working hours and holidays, are mainly set forth in the Danish Holiday Act, the Danish Act on Working Hours and the Danish Act on Working Environment (and related executive orders).

The above acts are all administered by the Ministry of Employment. Further, the Danish Working Environment Authority (which is an agency under the Ministry of Employment) contributes to the creation of safe working conditions at Danish workplaces, e.g., by carrying out inspections of companies.

## F. Jurisdiction, Waiver of Immunity

### 25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

A Danish company may submit to a foreign jurisdiction, although a judgment obtained in a foreign jurisdiction may not be immediately enforceable in Denmark.

Furthermore, a waiver of immunity will generally be effective. However, assets which are necessary for the proper functioning of the Kingdom of Denmark will be protected against post-judgment measures of constraint such as attachment, arrest or execution in Denmark.

### 26. Can financing documents provide for arbitration clauses?

Financing documents may provide for arbitration clauses. Denmark is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which means that arbitration agreements and awards made in other countries that are signatories to the convention are recognized and enforceable in Denmark, subject to certain limited exceptions.

Furthermore, the Danish Arbitration Act allows parties to agree to submit their disputes to arbitration, and the Act applies to both domestic and international arbitrations. The Act also allows parties to agree on the procedure for appointing arbitrators and the conduct of the arbitration proceedings.

Therefore, parties can include arbitration clauses in their financing documents in Denmark, and these clauses will generally be enforceable under Danish law.

## G. Trends and Projections

### 27. What are the main current trends in project financings in your jurisdiction?

The main current trends in project financing in Denmark are:

- **Green financing**: Denmark is committed to achieving a carbon-neutral economy by 2050, and this has led to an increased focus on green

financing. Many projects related to renewable energy, energy efficiency, and sustainable infrastructure are being financed through green bonds, loans, and other instruments.

- **Public-private partnerships (PPPs)**: The Danish government is actively promoting the use of PPPs to finance infrastructure projects. PPPs involve a partnership between the public sector and private companies, and they are being used to finance projects such as hospitals, schools, and transportation infrastructure.
- **ESG considerations**: Environmental, social, and governance ("**ESG**") considerations are becoming increasingly important in project financing. Lenders and investors are placing more emphasis on the sustainability and social impact of the projects they finance.

**28. Are any significant development or change expected in the near future in the project finance market?**

Denmark has a strong tradition of project finance, particularly in the renewable energy sector. In recent years, there has been a significant increase in the number of large-scale wind and solar projects in Denmark, many of which have been financed through project finance structures.

One recent development in the project finance market in Denmark is the increasing focus on sustainability and ESG (Environmental, Social, and Governance) factors. Investors are increasingly interested in financing projects that align with their sustainability objectives, and many financial institutions are incorporating sustainability criteria into their lending decisions.

Another potential development in the project finance market in Denmark is the use of alternative financing structures, such as green bonds and green loans. These financing structures are specifically designed to fund environmentally sustainable projects and are often attractive to investors with a focus on sustainability.

Finally, the Danish government has set ambitious targets for reducing greenhouse gas emissions and increasing the share of renewable energy in the country's energy mix. These targets are expected to drive continued growth in the renewable energy sector and may lead to increased investment in project finance structures to fund renewable energy projects.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

The current Danish reference term rate for Danish Kroner, CIBOR, is still in place and it is expected that it will continue to exist for years to come. There does not appear to be any overall requirement or desire from any Danish authorities or regulators to discontinue CIBOR, but market participants seem in general to take the view that if Europe moves away from "term rates" such as EURIBOR to actual market rates/risk-free rates, the Danish market will likely do the same to harmonise with the international market. Hence, we believe that CIBOR at some point will be discontinued.

# FRANCE

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Domestic regulatory framework:

Public, Private Partnerships ("**PPPs**") and concessions are mainly governed by two binding legal texts:

- Ordinance of 23 July 2015 and Decree of 25 March 2016 for PPPs; and
- Ordinance of 29 January 2016 for concessions. Prior to the enactment of the Ordinance of 29 January 2016, concessions were largely defined by the case law of the "*Conseil d'Etat*" (the French supreme administrative court), a number of decisions of which continue to apply and which have set the general principles of administrative law applicable to concessions.

More generally, the legal provisions governing project finance are to be found in in the French Civil code, Commercial code and Monetary and financial code.

International treaties:

European Union law is an important source of legislation, through the implementation of EU directives and the direct application of EU regulations governing subject matters relevant to project finance.

France is also party to many international treaties governing human rights, assets and liabilities, judicial co-operation and the environment.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in France is a very mature market. For a bit less than 30 years, significant transport infrastructure,

especially motorways, have been developed using limited recourse project financing. Other transport infrastructure, such as high-speed and urban railway projects have also been developed using limited recourse financing. In the years following 2003, a large number of social infrastructure (hospitals, schools, universities, prisons, police stations, army barracks, sports infrastructure and stadiums, government accommodation projects, etc.) were developed and financed though the implementation of availability scheme PPPs, making France one of the leading project finance markets in the world. A large number of deals in the power and renewables sector (such as wind and solar projects) have also been financed through limited recourse financing structures. In more recent times, a number of, very large telecom fiber deals have also been developed using limited recourse project financing. The most significant projects to have reached financial close over the last 12 months in France include:

- the Cegelog deal, which is the project for the externalization of the development and management of state-owned housing units designated to the French Armed Forces with a total debt amount of EUR 1.3 billion; and
- the Obelix telecom fiber deal with a total debt amount of EUR 1.6 billion.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

A variety of security interests can be used in project financings in France. These include pledges, which can be granted over assets, shares, financial securities accounts, bank accounts and a wide variety of receivables.

Receivables can also be secured through an assignment by way of security. The *Dailly* assignment (governed by Articles L. 313-23 *et seq*. of the French Monetary and financial code) has been one of the most popular instruments because of its simplicity and efficiency: title to the receivables is immediately transferred to the beneficiary, which has proven to be a useful protection in the case of debtors' insolvencies. However, only credit institutions and specific investment vehicles can benefit from it. A reform passed in 2021 has offered an alternative with the creation of a "common law" assignment of receivables by way of security in the Civil code, which can be granted for the benefit of any type of creditor and offers rights comparable to those available under the *Dailly* assignment.

Personal guarantees can also be granted under French law, in particular suretyships (*cautionnement*) and on-demand guarantees *(garanties autonomes)* granted by a credit institution or a parent company. Debt delegation *(délégation de paiements)* is another technique which grants the creditors a direct right over the project company's debtors.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Share pledges are very common in France.

Pledges over the shares of a French *société par actions simplifiée* (which is the most commonly used corporate vehicle for project financings in France) take the form of a financial securities account pledge.

The validity of financial securities accounts pledges requires a statement of pledge (*déclaration de nantissement de comptes de titres financiers*) including specific mandatory information to be signed by the pledgor. No further formality is required for the validity of the pledge.

For specific categories of companies which are not regularly incorporated in the context of project finance transactions, formalities in relation to registration of a pledge over their shares are required under French law.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Under French law, there is a general prohibition of enforcement of security interests by way of private sale (*voie parée*). However, private foreclosure (*pacte commissoire*) is possible and allows the beneficiary to take ownership of the pledged asset without any judicial procedure.

Share certificates do not exist under French law and shares are dematerialized. All joint-stock companies (*sociétés par actions*), which include the *société par actions simplifiée*, keep shareholders' accounts specifying the identity and the number of shares detained by each shareholder, which serve as a proof of the relevant shares' ownership. Shareholders' accounts also specify whether the shares are subject to any pledge.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Security interests can be established over future assets, rights and receivables under French law.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Under French law, any contractual clause adversely affecting the position of the borrower as a direct result of the opening of amicable or insolvency proceedings (such as triggering an event of default) is deemed null and void.

If the borrower is under out-of-court, amicable proceedings (*mandat ad hoc* or conciliation proceedings), no automatic stay on claims will apply, so the lenders may theoretically enforce their security interests. It is, however, common practice that all the creditors involved in negotiations in the context of amicable proceedings commit not to make any repayment demand or to enforce their security interests against the borrower during the period of the negotiations (full standstill period). In addition, in the context of conciliation proceedings, the borrower is entitled to request extensions of time for payment of up to 24 months from the Court, which may prevent the enforcement of security interests.

If the borrower is subject to judicial insolvency proceedings governed by the *Livre VI* of the French Commercial code (safeguard, reorganization or liquidation proceedings), an automatic stay will apply to all unsecured and secured creditors. Except for a few exceptions and depending on the type of insolvency proceedings, the lenders will in principle not be able to enforce their security interests during the proceedings.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

A new security trustee regime was introduced under French law by a reform passed in 2017. It has enabled the security agent to take, manage and enforce security interests granted in favor of the creditors, act on their behalf in relation to the security interests and hold title to the security interests. The security interests held by the security agent are not part of its estate or the creditors', but are held in an autonomous and distinct estate. Therefore, insolvency proceedings affecting the

security agent cannot affect the creditors' rights in relation to the security interests.

Additionally, the French Judicial Supreme Court (*Cour de cassation*) has recognized the validity of parallel debt provisions.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Foreign and local investors may benefit from subsidies and financial incentives based on various considerations, such as the project's sector and location, the project company's size, the level of contribution to research and development, etc.

It should be noted that the European Commission closely monitors such state aid for compatibility with EU competition rules. All but the smallest incentive schemes require the Commission's approval.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Please refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

A project company may take out loans from abroad as long as it complies with the anti-money laundering and terrorism financing regulations. It should also be noted that, in relation to trans-border shareholder loans, specific tax rules may apply which may limit or eliminate the project company's ability to deduct interests from its taxable income (Article 238 A of the French General tax code prohibits such deduction if the shareholder is located in a non-cooperative country or territory for tax purposes).

Borrowing in a foreign currency is not subject to any limitation in particular.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

A number of ordinances and decrees have broadened the scope of the foreign investment control regime under French law.

Articles L.151-3 and R. 151-1 and seq. of the Monetary and financial code require the prior approval of the Ministry of Economy for foreign investments made in strategic sectors if they result in the control of a French entity (according to different criteria).

Strategic sectors include activities in relation to national defense, public order and public safety.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

French law does not provide for any minimum equity requirement in relation to project financings. Even though the equity requirement will depend on the projects' characteristics and risks, it is unlikely that equity will be lower than 30% of the aggregate financing in practice.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In general, project documents and finance documents do not require any filling or registration.

Only a number of security documents are subject to registration in order to be enforceable against third parties. Per example:

- pledges of assets need to be registered at the commercial court registry of the place of registration of the pledged company; and

- non-possessory pledges over tangible furniture must be registered in a special register within the commercial court registry of the place of registration of the grantor.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

The parties to project finance documents are free to choose the law governing the insurance policy in accordance with Article 7 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Insurance proceeds constitute receivables which can be pledged or assigned by way of security to the benefit of the lenders.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There are no complications or concerns or issues in relation to the insurance provisions under French law in the context of project financing.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

PPPs are expressly permitted under Article L.1112-1 of the French *Code de la commande publique*. They are refered to as "*marchés de partenariat*" which is a specific form of public procurement. There has been a very large recourse to PPPs in France with hundreds of examples in a variety of projects including hospitals, schools, universities, prisons, governmental accommodation projects, railways, stadiums, sports facilities, street lighting, army barracks, police stations, etc.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements are permissible and very common in project financings governed by French law with local governments and authorities. There are no examples of direct agreements in the context of projects involving central national government in concession-based projects.

Direct agreements typically provide the lenders with specific rights such as direct payment rights, step-in rights and substitution rights to ensure the continuation of the project in case of failure by the project company.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Pursuant to an instrument entitled "Act of acceptance of the assignment or pledge of a professional claim", the public entity may accept to pay a significant part of the remuneration due to the project company under a partnership contract directly to the lenders, who benefit from a Dailly assignment granted by the project company (in accordance with Articles L. 313-29 et seq of the Monetary and financial code). This may be done on a lump-sum basis or in installments, which in fact result in a form of debt assumption.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Political risk events usually fall under the scope of the force majeure regime, as they are traditionally considered as force majeure events – hence not under the responsibility of the private party.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

A general change in law does not typically entitle the investors to make a claim for protection or compensation. However, such measures may be afforded for specific changes in law in French projects.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is defined in and governed by Article 1218 of the French Civil code: it occurs when an event (i) beyond the control of the debtor, (ii) which could not reasonably be foreseen at the time of the conclusion of the contract and (iii) the effects of which cannot be avoided by appropriate measures, prevents the performance of its obligations by the debtor. Force majeure allows the affected party to suspend its performance or to terminate the contract.

However, the parties are free to contractually agree on a different definition of the *force majeure* or to exclude its application.

The above-mentioned conditions to qualify an event as *force majeure* (exteriority, unpredictability and irresistibility) apply differently under administrative law, which governs contracts entered into between a private party and a public authority.

**24. What are the general environmental and social requirements in project financings?**

Any company established or operating in France must comply with French labor law and other requirements in relation to environmental protection (through stringent permitting and consenting processes which generally apply to all projects), construction permitting, human rights, anti-money laundering and anti-corruption.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Administrative law agreements (such as concessions and PPPs) must be governed by French law. It is also the case for security documents in relation to assets located in France (such as real estate and shares of a company registered in France). The other project and finance documents may be governed by a foreign law chosen by the parties as long as such choice of governing law does not violate French international public policy.

Waiver of immunity provisions clearly expressed by a foreign State are enforceable in France. Regarding the immunity of the French public authorities, the law remains silent on whether such immunity may be waived. It is however prohibited to take any security interest over State-owned assets.

**26. Can financing documents provide for arbitration clauses?**

Finance documents can provide for arbitration clauses. However, the enforceability of the arbitration decision will be subject to an exequatur judgement by a French court.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

A number of legislative reforms have made French law more modern with regard to taking security and the role of security agents.

The French banking monopoly has also been relaxed to enable new players such as debt funds to enter the market as lenders. The French banking monopoly is the principle according to which only credit institutions and financing companies (*sociétés de financement*) are authorized to enter into credit transactions and receive funds from the public on a regular basis (Article 511-5 of the Monetary and financial code). There are various exceptions to the requirement of holding a banking license, which were extended to certain investment vehicles by Law of 9 December 2016 and Ordinance of 4 October 2017: regulated funds, finance organizations (*organismes de financement*), which include the existing securitization organizations (*organismes de titrisation*), and specialized finance organizations (*organismes de financement spécialisés*).

**28. Are any significant development or change expected in the near future in the project finance market?**

The French Parliament has adopted a new law for the acceleration of renewable energy projects on 7 February 2023, with the objective to promote and simplify the development of renewable energy projects. In particular, the law has introduced planning for offshore wind projects in France and includes measures for the reduction of the authorization process' duration, such as the mutualization of the public debate for all offshore wind projects located in the same seafront, which is likely to accelerate the development of future offshore windfarms.

This reform is in line with the European Green Deal, a package of policy initiatives aiming at bringing the EU to climate neutrality by 2050 which includes binding objectives. In this context, the project finance market will certainly see a significant increase of renewable energy transactions.

In addition, the Government has recently announced a 100 billion euro plan for railway projects by 2040, with two main ambitions: modernizing and decarbonizing the rail network.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

EURIBOR was not affected by the LIBOR transition. It is still being published and no decision to cease its publication was taken by the European authorities. The governance and calculation methodology of EURIBOR have been strengthened by its administrator (EMMI) as part of its prerogatives and to comply with the FSB / IOSCO recommendations and the requirements of the BMR regulation (Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016). EURIBOR is authorized under the BMR regulation and has been registered with ESMA since 2 July 2019. This index can therefore continue to be used without any time limit.

# GIBRALTAR

## HASSANS

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Gibraltar is a common law jurisdiction based on the British legal system, however Gibraltar (unlike Great Britain), also has its own constitution which summarily, establishes its own executive, legislative and judiciary, and adopts the laws of Gibraltar. Moreover, in the absence of any Gibraltar authority on any particular matter, English and Commonwealth case law is highly persuasive in Gibraltar and will typically be followed. To the extent however that such matters may concern the interpretation of different Gibraltar statutory instruments and provisions, such English and/or Commonwealth decisions cannot be expressed to be binding.

Generally speaking, there are no principal piece(s) of statutory legislative instruments relating to project finance in Gibraltar. Depending on the type and nature of the applicable project, as well as the underlying governing laws of the same, a range of Gibraltar legislation (and applicable international treaties) may need to be considered and adhered to, including legislation pertaining to corporate structuring, tax, financing, environmental, insurance, planning, health and safety, and insolvency. In addition, approvals and consents from governmental bodies and departments may be required throughout.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Notwithstanding Gibraltar's land mass of approximately 6.8kmsq, the project finance market in Gibraltar continues to go from strength to strength. Over many years, numerous Gibraltar based entities (or subsidiaries within larger global group structures) have undertaken numerous

global financing projects, specifically in the context of secured and unsecured financing projects such as bond and note issuances. In recent years however, the buoyant nature of the property and real estate market in Gibraltar has provoked a notable increase in both commercial and residential property developments. Accordingly, this has attracted a substantial degree of international interest and investment in Gibraltar, specifically in the context of development finance, with luxury property developments such as EuroCity and Forbes recently completing, and new projects (featuring reclaimed land on British Gibraltar Territorial Waters) being announced such as of Victoria Quays and the Eastside Marina (the latter currently seeking to include a superyacht marina).

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Generally, as permitted by Gibraltar law, it is common in project financing transactions for a security trustee and/or security agent to be appointed for the purposes of holding security for the benefit of a single lender, a syndicate of lenders, or such other applicable secured parties. Moreover, a range of security interests may be granted in project financings, including but not limited to: (i) all asset debentures; (ii) fixed and/or floating charges; (iii) mortgages; (iv) pledges; and ultimately (v) quasi-security interests such as guarantees.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes – to the extent that a Gibraltar registered company grants a security interest (typically in the form of those security interests mentioned in Question 3 above, with the exception of a guarantee), over its assets (including shares held in a subsidiary), the directors of said Gibraltar company would be required to file the instrument of transfer creating said security interests at Companies House, Gibraltar. In the case of a Gibraltar company this is required to be done within 30 days of the date borne on the same, and in the case of a partnership, within 21 days. Additionally, subject to the underlying transactional/ security documents' governing law, the shares of a Gibraltar company may be pledged as security by its foreign shareholder (however this would not be registrable in Gibraltar). Failure to timely register the relevant security interest in Gibraltar could affect the priority of the security, and additionally become void as against any creditors and/or liquidators of the borrower.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

In Gibraltar, a private sale is a recognized method for the enforcement of a share pledge/mortgage of shares. The Land Law and Conveyancing Act 1895 (as amended by the UK Conveyancing and Law of Property Act 1881), affords creditors power of sale in the case of a mortgage which is made by deed. Generally, the power will arise when the secured indebtedness has become payable, and it enables the secured party to sell the property concerned. Statutory restrictions on the power of sale do exist, however such restrictions are invariably included in the terms of security documents.

With regards to share certificates being endorsed, the security document will typically be accompanied by: (i) a signed and undated instrument of transfer of shares (typically in the form of a share

transfer form); and (ii) signed and undated share certificates in the name of the secured party, which would be held by the secured party and/or security trustee/ agent once the share pledge/mortgage of shares is entered to, and which can become effective once dated in the event the indebtedness becomes due and payable.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Save with the exception of a legal mortgage (on the basis that, generally speaking, it is not possible to create a legal mortgage over future property unless the same is both in existence and owned by the mortgagor at the relevant time), Gibraltar law (which largely follows the position under common law), does allow for the possibility of taking security over intangibles such as future assets, rights and receivables.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

From a Gibraltar legal perspective, the applicable security document needs to explain when and how the security can be enforced, including setting out the lenders' remedies. For example, a debenture over all the assets of the borrower would typically permit the lender to appoint an administrator or administrative receiver. Where the security document is not an all-asset debenture, it is expected that the security document would provide for enforcement powers to be tailored to the type of asset which is the subject of the security, including the appointment of a receiver with powers to manage the assets comprising the security. Equally, in cases of technical or actual insolvency, Gibraltar law affords statutory remedies and options to secured and unsecured parties under the provisions of the Insolvency Act 2011.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The concept of a security trustee (or security agent as also referred to from time to time) is permitted in Gibraltar, and is common in project finance transactions. The security trustee will be appointed to hold security for the benefit of a single lender or syndicate of lenders. For the avoidance of doubt, it is typically the case that registrable security in Gibraltar be registered in favour of the security trustee (who will hold the same for and on behalf of the lenders)

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The reality is that any incentives and/or exemptions applicable to local (as well as foreign investors) are not specifically applicable to project finance in Gibraltar, and ultimately noting that the application and relevance of each of these will be fact and project specific. Moreover, tax credits (including foreign tax credits), and potential incentives such as development aid may, to the relevant parties, be deemed to be incentives for project financing in Gibraltar. In order to attract investments (specifically private developments) to Gibraltar, development aid for example offers promoters and developers of approved projects certain forms of tax relief, import duty relief, and rates relief.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Please refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Gibraltar does not currently have any exchange control restrictions, there being a complete freedom to remit funds into and out of the territory and to convert funds into other currencies. Incidentally, and subject to any potential prohibition under Gibraltar law (including for example, sanction regimes), Gibraltar companies are permitted to hold bank accounts in foreign jurisdictions.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Gibraltar attaches great importance to free markets and competition and save with the exception of any potential prohibitions under Gibraltar law (including for example, sanction regimes), there are no restrictions imposed on foreign ownership or investment.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

To the best of our knowledge, there are no minimum equity requirements in Gibraltar for project financings, whether under Gibraltar legislation or in practice.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In the majority of project financing scenarios, the only documents required to be registered in Gibraltar will be the security documents as more particularly set out above in our response to Question 4.

In addition, project financing transactions concerning land in Gibraltar may be subject to further registration requirements with the Gibraltar Land Registry.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Generally speaking, parties are free to choose the specific choice of law governing policies. In our experience, parties determine this in consideration of all relevant details of the insurable risk, including but not limited to: (i) the class and type of business; (ii) the location of the risk; and (iii) the location of the insured.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Subject to the form and terms of the underlying insurance and/or reinsurance policies, and on the assumption that each of the same are governed under the laws of Gibraltar, in our experience lenders can take security over insurance/reinsurance policies by an assignment by way of security.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Specific complications, concerns and issues relating to insurance provisions under project financing documentation will ultimately be driven and arise in the context of the project in question which will vary from deal to deal. Risks that lenders would generally require to be insured against, and which would require careful thought and consideration, would be in relation to loss or damage, third party liability, business interruption, start-up delays, and forms of environmental risk.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

In Gibraltar, PPP is a permitted method of developing projects. In recent years, particularly in the context of the 'construction boom' Gibraltar is still experiencing, efforts have been made to include the private sector in the development and fundings of public facilities and services. Naturally, there are many different forms of PPP structures and arrangements (which exceed the scope of this text), however in Gibraltar the Build Operate Transfer ("**BOT**") PPP method, whereby the private sector finances, constructs and operates and maintains the facilities for a given period, with the public sector acquiring operational control at the end of that period. This method is best known for assisting policymakers with controlling capital expenditure on public infrastructure projects, and also maintaining public finances. In recent years, there have been numerous PPP projects in Gibraltar, specifically in regard to schooling, healthcare, energy and government housing.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements are permissible under local law, however to the best of our knowledge, save for the BOT method explained in Question 18, these arrangements are not in our experience commonly seen.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Different types of government support in Gibraltar may ultimately depend on the form, nature and terms of each different project. As a minimum, the government will provide its co-operation in many large projects, including at times the transfer and sale of the land, and provision of further assistance in expediting (for cost-time efficient purposes), the developers' provision and receipt of statutory approvals, authorisations and consents for the constructions and operation of the project.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

In our experience this will typically be determined by the specific agreement reached by the parties in the procurement stage and prior to formalizing and entering into a PPP agreement. On the basis that Gibraltar is considered to be a jurisdiction of political certainty and stability, we would expect the risk of any political event to be remote in nature, and in any event borne by the private party (albeit noting that this is not standardized, and the position on the same my fluctuate depending on the specific nature of individual projects).

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

In our experience, investors and lenders may from time to time (and subject always to the type and nature of the project at hand) seek to make provision for protective mechanisms to be included within the underlying project finance documentation in cases of changes in law, notably in the event that such changes render the obligations or the performance of parties to be illegal and/or contrary to law, in

which case this may trigger an entitled for investors and/or lenders to expect immediate repayment.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not specifically regulated under local legislation in Gibraltar. On the basis that Gibraltar is a common law jurisdiction, force majeure clauses are (similarly to English law), drafted in relatively defined scope, identifying acts, events or circumstances beyond the reasonable control of one of the parties to the relevant document. To the extent that the performance of a contract is rendered as an impossibility under the applicable force majeure clause, the English common law doctrine of frustration may be invoked in certain circumstances, which may ultimately operate to terminate the said contract.

**24. What are the general environmental and social requirements in project financings?**

Gibraltar's land area amounts to approximately 640 hectares but due to the topography of the Rock, much of this is undevelopable. Accordingly, Gibraltar's scarce land resources have created a coordinated set of policies and proposals which seek to manage Gibraltar's future growth, and which accounts for numerous competing environmental, social and economical demands and interests. This is enshrined in the Gibraltar Development Plan (the "**Plan**"), a planning scheme implemented pursuant to the Town Planning Act 2018. The Plan, as enforced by the Gibraltar Development and Planning Commission ("**DPC**"), set out numerous planning policies pertaining to the different areas and zones in Gibraltar, each of which differs and has their own specific set of policies, considerations and safeguards.

The Plan is to be used, amongst others, by developers when formulating new developments on the Rock, and ensure full conformity with the policies and proposals in the Plan. Policies and requirements include many aspects relating to ESG matters, including new developments requirements: (i) environmental impact assessment studies; (ii) appropriate assessments on land use; (iii) protection and enhancement of Gibraltar's culture and heritage; and (iv) energy efficiency and consumption. Currently, the DPC as well as other related stakeholders are in discussions with HM Government of Gibraltar to develop a new Gibraltar development plan, particularly in the context of the recent influx of residential and property developments on the Rock.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Submission to foreign law and waiver of immunity provisions are enforceable, and in certain circumstances would not require a re-examination of the facts. This will however ultimately depend on the requirements of the foreign law in question.

**26. Can financing documents provide for arbitration clauses?**

Confirmed that Gibraltar law does not prohibit parties from including arbitration clauses within financing documents, and are (as a matter of course and best market practices) expected to typically consider and pursue different methods of alternative dispute resolution.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

As alluded to in our response to Question 2, most recently Gibraltar can be considered to have enjoyed a 'boom' of both private commercial and residential property developments. Notwithstanding the political uncertainty of Brexit and economic implications of the Covid-19 pandemic, the buoyant nature and surge of (almost uninterrupted) economic activity in the property and real estate market in Gibraltar has created an expectation that in the context of project finance, development finance will continue to trend as the principal protagonist. This has also been exacerbated by the relocation of numerous ultra-high and high-net worth individuals, which has consequently attracted an array of international investment in to Gibraltar. Currently, there are numerous property developments which have either been announced; are seeking either outline or full planning permission; or are presently under construction. Examples include: (i) numerous high-rise residential property developments; (ii) a new ~£100 million national Category 4 football stadium complex (comprising 92 additional units of residential homes, retail and office units and a business center); and (iii) a largescale development on the east side of Gibraltar (encompassing, amongst other things, ~1,300 luxury residential homes and a 550-600 berth marina for boats ranging from six meters in length to superyachts). Undoubtedly, traditional streams of project finance in Gibraltar will also compliment this, particularly in the context of corporate finance transactions and projects concerning largescale secured lending in and amongst established industries in Gibraltar such as online gaming and fintech.

**28. Are any significant development or change expected in the near future in the project finance market?**

Unquestionably for both the project finance market and for Gibraltar as a jurisdiction, the most significant development or change expected in the near future will be the precise form and scope of the Schengen-style treaty governing Gibraltar's future relationship with the EU, and the mutual benefits this may afford in terms of fluidity of goods and people in Gibraltar. Originally announced on 31 December 2020, the intention by all parties concerned, notably Gibraltar, the United Kingdom and the EU (together with Gibraltar's neighboring EU Member State, Spain) was to seek to find, consider and implement a 'bespoke solution' of developing a framework and/or treaty which would allow for the application in Gibraltar of the relevant parts of the Schengen acquis necessary to achieve the elimination of the control of the movement of persons and goods (but not services) between Gibraltar and the Schengen area. Since said initial announcement, all relevant parties have entered into negotiations, committing personnel and resources to various rounds of progressive dialogue with a view to developing a mutually agreeable form of treaty (which is currently expected during the course of 2023). Undoubtedly, we expect any favourable treaty which is implemented to add to Gibraltar's offering to both the domestic and global project finance market.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

At the time of writing, the alternative reference interest rates to LIBOR which we have seen deployed in project financing transactional documents are either SOFR (Secured Overnight Funding Rate) or SONIA (Sterling Overnight Index Average).

# HUNGARY

## DENTONS

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The primary legislation is the Hungarian Civil Code, regulating various fundamental issues, such as lending and security interests, on a general level. In addition, there are further specific pieces of legislation on various levels regulating or otherwise affecting, for example, lenders and related licences (a.k.a. via the Banking Act), capital adequacy rules, creating and registering security interests (on land, movables, etc.) and similar issues.

A special feature of Hungarian law is the application of a construction trustee, relevant and mandatory for construction projects over EUR 5.3 million: it is regulated in a special act.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

We consider the Hungarian market, albeit small, but rather matured: while it is rare that very complicated structures (e.g., with bonds or mezzanine layer) are applied, but single-lender and club deals are frequent in project financing, especially in the real estate and energy sector, where more recently the PV plant financings are a frequent feature.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The Hungarian equivalents of fixed and floating charges, share pledges, as well as pledges over bank accounts, rights and receivables are granted in almost every case. In addition, if freehold structures so permit, real estate mortgages are also usually created. Other typical elements, such as cost overrun guarantees, direct agreements and subordination are also frequently applied.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, such security is available in respect of companies incorporated in the most common forms (such as Kft-s (limited liability companies, similar to the German GmbHs), and Zrt/Nyts (public or private companies limited by shares, similar to the German AGs). The related specific requirements depend on the corporate form of the encumbered company: the pledge over a Kft's shares (quotas) are registered and non-possessory type security (with the court of registration recording any such security), while the pledge over a Nyrt/Zrt's shares are either possessory pledge (a.k.a. security deposit), if granted over the (printed) share certificates or an account pledge over the securities account where the dematerialized shares are kept. Accordingly, there are related perfection requirements (registration for Kft-s, physical handover or account blocking for Zrt/Nyrt-s).

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, enforcement can take place privately or via court and private sale can occur. The key rule is that the collateral is to be sold to third parties, so appropriation (direct seizure by the creditor) is permitted only in rather limited cases, upon certain conditions.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes in most cases. Nevertheless, in practice fixed charges (e.g., on PV panels) are granted only once the assets are actually purchased and the inventory number is available, as this would greatly enhance any future enforcement step.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

It depends on the actual insolvency process commenced, but the fundamental rule is that all creditors have to report their claims to the court appointed officer (insolvency office holder) if any, and then, depending on the outcome of the process, either the debtor recovers without lenders enforcing security or the insolvency office holder distributes the sale proceeds resulting from the winding-up of the debtor in accordance with the statutory order.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Yes, there is a unique Hungarian concept (usually called 'collateral agent') which is a special Hungarian version of an English law-type security agent, with some notable differences regarding, inter alia, liability (less autonomy is vested there than usual in an LMA-type intercreditor) and the scope of security (it relates to asset security, but not applicable for guarantees).

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

For developers, certain strategic projects (e.g., battery manufacturing plants) can get direct state incentives (grants or tax benefits) and licensing can also be streamlined. In certain industries (such as in energy), fixed tariff subsidies can also be available). For lenders, some green projects can enjoy preferable treatment from capital adequacy/reserves point of view.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Please refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Yes, a specific FDI process is relevant in case of non-EU lenders would rely on security granted over so-called strategic assets (such as power plants, shopping malls or alike). The shareholding structure of the (direct and indirect) beneficiaries of the security (being either banks providing external funding or affiliates within the same group) are relevant for such purposes. Other than restrictions setting from sanctions, no currency-related restrictions apply.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Yes, as mentioned above, a specific FDI process is relevant in Hungary: it is mostly relevant for (and designed to capture) acquisitions, but affects financing s as well.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

Yes, there are certain thin capitalization rules that are applicable in Hungary and are relevant for debt-to-equity ratios. Account firms are usually consulted thereon.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

As mentioned above, the registration and filing requirements for security interest differ in the various asset types: regarding shares please see above, pledge over fixed assets and receivables are registered in an on-line registry maintained by the Hungarian Chamber of Public Notaries, mortgage over lands are registered by the relevant land registries, other registries are applicable for IP rights, vehicles, etc. Given its complexity, specific advice should be sought for every specific project.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

No, but Hungarian can approach non-Hungarian insurers for insurances, where the underlying law is other than Hungarian.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

As usual, exclusions under each relevant insurance shall be carefully assessed by creditors and the participation of a construction trustee (referred to above) in the deal shall also be factored in.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

In theory, yes, but after a wave of PPPs in the early 2000-s (where motorways, stadiums and swimming pools were built), such structures are nowadays not used, especially since 2010.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, direct agreements are required by lenders in several (but far from all) cases, but those are usually with private parties (EPC contractors, offtakers, etc.) and rarely with public authorities (but specific exemptions exists).

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Please see response No 9. above.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

In PPP, such risks were placed on the public party – noting that not many recent deals were concluded and it greatly depends on the position and level of the public party (government organs are more likely take this risk than, for example, local municipalities).

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, other than tax laws.

**23. Is force majeure specifically regulated under the local legislation?**

No. Although force majeure is recognized under Hungarian law as a factor externally affecting contracts, it is not specifically regulated.

**24. What are the general environmental and social requirements in project financings?**

Financial institutions (Hungarians and non-Hungarians alike) shall follow the applicable ESG-related regulations (applicable on an EU-wide level, on country level or for any banking group), developers shall meet the sectoral requirements (e.g., for infrastructure, energy, real estates, etc.).

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Yes, submission to a foreign jurisdiction is usually recognised (subject to specific exceptions) and immunity is not frequently applicable (but if it is, it is very rarely waived).

**26. Can financing documents provide for arbitration clauses?**

Yes, both Hungarian and international arbitration is recognized.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Renewable-related projects are likely to remain popular in project financings. In the real estate segment, luxury residential projects will be expected to continue or commence, while less transactions are anticipated on the lower retail (residential housing and shopping mall) segments.

**28. Are any significant development or change expected in the near future in the project finance market?**

The entry into force of the new key legislation regulating the land registry cadaster will affect both real estate and energy projects.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

For financings in Hungarian forints, usually BUBOR is applied, closely followed by EURIBOR in financings in Euros. Financings in GBP and USD are less frequent on the market, so the LIBOR transition period hardly affects the local deals.

# INDIA

## JSA ADVOCATES & SOLICITORS

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Project finance transactions in India are regulated by various Indian laws and regulations that are applicable to such transactions depending on the nature of financing and the project itself including the following legislations governing the contractual relationships, companies, creating interest in immovable property:

(a) the Indian Contract Act, 1872 ("**Indian Contract Act**");

(b) the Companies Act, 2013 ("**Companies Act**"); and

(c) the Transfer of Property Act, 1882 (the "**Transfer of Property Act**").

The enforcement of security interest is governed for central banks and financial institutions by:

(a) the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**"); and

(b) Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Insolvency resolution, liquidation and bankruptcy and filing recovery suits is governed by:

(a) the Insolvency and Bankruptcy Code, 2016 ("**IBC**"); and

(b) the Code of Civil Procedure, 1908.

Arbitration as a mode of dispute resolution is governed by the Arbitration and Conciliation Act , 1996 ("**Arbitration Act**").

Scheduled commercial banks and NBFCs with the Reserve Bank of India ("**RBI**") (India's monetary authority, banking regulator and foreign exchange control law regulator) and regulated under:

(a) the Banking Regulation Act, 1949; and

(b) the Reserve Bank of India Act, 1934 along with guidelines, master directions, notifications and circulars issued by the RBI from time to time.

Foreign exchange related transactions are governed by:

(a) the Consolidated Foreign Direct Investment Policy issued from time to time by the Department of Industrial Policy and Promotion ("**FDI Policy**");

(b) Foreign Exchange Management Act, 1999 and various rules and regulations issued thereunder ("**FEMA**");

(c) the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 issued by the RBI ("**NDI Rules**");

(d) the Foreign Exchange Management (Debt Instruments) Regulations, 2019 issued by the RBI;

(e) the Master Direction on External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency dated 26 March 2019 ("**ECB Guidelines**") issued by the RBI; and

(f) the Foreign Exchange Management (Borrowing or Lending) Regulations, 2018, as amended from time to time.

Additionally, in the context of infrastructure projects, sector-specific regulators govern projects, such as:

(a) the National Highway Authority of India under the National Highways Authority of India Act, 1988;

(b) the Directorate General of Hydrocarbons under the Petroleum Act, 1934;

(c) the Central Electricity Regulatory Commission and relevant State Electricity Regulatory Commission under the Electricity Act, 2003 read with Electricity Rules, 2005; and

(d) the Airport Authority of India under the Aircraft Act, 1934 and Aircraft Rules, 1937.

Various multilateral bilateral International Treaties may also be relevant including:

(a) Free Trade Agreements;

(b) Comprehensive Economic Partnership Agreements;

(c) Comprehensive Economic Co-operation Agreements;

(d) Preferential Trade Agreements;

(e) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958("**New York Convention**");

(f) the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("**Geneva Convention**"); and

(g) Cape Town Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment.

Additionally, India has signed double tax avoidance agreements with ninety-four countries and limited agreements with eight countries.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in India is quite mature. The primary sources of financing infrastructure projects are equity, debt and government grants. Both domestic financing through rupee denominated loans and corporate bonds by scheduled commercial banks regulated by the RBI both state owned and private, non-banking finance companies registered with RBI as well as foreign banks operating with licenses from the RBI; and cross-border debt financing through foreign currency

bonds and loans from international banks and multilateral financial institutions are prevalent. Private credit funds are also becoming increasingly active in certain types of mezzanine and special situation financings in the infrastructure project space.

**Some of the significant project finance deals in the last 12 months were**:

Several renewable energy developers such as Adani Green Energy Limited, Ayana Renewable Power, JSW Energy and Renew Power have tied up financing for their wind or solar or hybrid power projects.

The roads arm of Adani Enterprises Limited, achieved financial closure for the development of access controlled six lane (expandable to eight lane) greenfield Ganga Expressway Project in Uttar Pradesh respectively on design, build, finance, operate and transfer (Toll) basis under public private partnerships ("**PPP**") mode tied up project financing of INR 102,380,000,000 (Indian Rupees One Hundred Two Billion Three Hundred Eighty Million) underwritten by the State Bank of India. MSRDC Tunnels Limited (a wholly owned subsidiary of Maharashtra State Road Development Corporation Limited) achieved financial closure from a consortium of local banks for designing and constructing the missing link and augmenting the existing section of the Mumbai Pune Expressway.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Most commonly, the following forms of security are created in project financing transactions:

**Mortgage of immovable properties**

A security interest can be created over the immovable property (such as land which is owned or leased, buildings or structures on the land, any permanent attachments on the land, any rights attached (such as easement rights) to the land) by way of a mortgage. The most common types of mortgages used are (a) a registered or English mortgage, by executing and registering a mortgage deed or an indenture of a mortgage; and (b) an equitable mortgage or mortgage by depositing the title deeds of the immoveable property in question with the lender or security trustee.

The Transfer of Property Act mandates that any indenture of mortgage or a mortgage deed should be entered into by written instruments attested by two witnesses and registered with the relevant Sub-Registrar of Assurances, which is a governmental authority which has offices in each district or locality in the states in India, which keep a record of transfer of ownership or security interest in immovable property.

For the purposes of creating an equitable mortgage or mortgage by deposit of title deeds, a director or authorised representative of the mortgagor deposits title deeds with the lender (or a security trustee on its behalf) for the property being mortgaged with the intention to create a mortgage. The acknowledgement of the same is recorded by the lender (or security trustee on its behalf) in a memorandum of entry. There may be a mandatory requirement of registering or notifying the equitable mortgage or notifying the Sub-Registrar of Assurances in certain states.

**Pledge of Shares**

A security interest can be created over shares and other securities such as debentures by creating a pledge over such securities in favour of a pledgee. A share pledge agreement between the pledgor and pledgee records the terms of the

pledge, along with a separate power of attorney issued by the pledgor in favour of the pledgee, which authorises the pledgee to transfer the securities on an event of default.

**Hypothecation or charge over movable properties**

Under Indian law, 'hypothecation' involves the creation of a security interest by way of a charge by a security provider in favour of a lender or a security trustee, without actual delivery of possession, by executing a deed of hypothecation. Hypothecation can be created over tangible movable assets, such as fixed assets, plant and machinery, bank accounts, current assets, stock-in trade, insurance policies and receivables as well as intangible movable assets such as rights accruing under project documents, intellectual property, etc. by way of charge, etc., whether existing presently or in the future. The charge can be a fixed charge or a floating charge.

**Credit Enhancements and Contractual Undertakings**

Separately, a debt can also be secured or credit enhanced by way of corporate guarantees or sponsor support undertakings from corporate entities such as parent companies or other group companies, personal guarantees from individual promoters and non-disposal undertakings, etc.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, as mentioned above, security can be created by way of a pledge on the shares of a company for securing payments of any debt. The following procedures are required for creating and perfecting a pledge on shares of companies.

(a) **Documentation**: Execution of a share pledge agreement and a notarised power of attorney.

(b) **Stamp Duty**: Applicable stamp duty on both documents must be paid in accordance with applicable stamp laws, which vary across states.

(c) **Filings**:

(i) Filings with the Registrar of Companies ("**ROC**"): The charge created pursuant to the share pledge agreement must be registered with the ROC by registering such creation of security interest in the relevant charge form, paying the requisite fees and obtaining a certificate of charge from the ROC.

(ii) Filings with the Depository: In case of dematerialised shares, the Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018 requires that a beneficial owner of dematerialised shares of Indian companies must give an intimation of a such pledge to the depository in a prescribed pledge format and the depository shall record the entries of the pledge in its records accordingly.

(iii) Deposit of Share Certificates: In case of physical shares, if the shares of the Indian company are in physical form, then the share certificates are required to be physically deposited along with a signed and undated share transfer form.

(iv) Filing with Information Utility: Under the IBC and under the Insolvency and Bankruptcy Board of India (Information Utility) Regulations, 2017, relevant information in relation to a facility and security is required to be

filed with the information utilities in the format prescribed under the said regulations.

(v) Disclosures to Stock Exchanges: If the shares of a listed company are to be pledged, certain disclosures must be made by the beneficiary of the pledge and the pledgor who is a promoter, to the relevant stock exchanges under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011, if the pledge is in excess of certain prescribed thresholds and under the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, private sale is a recognized method for the enforcement of security created over shares under a share pledge agreement.

A pledge on shares can be enforced by the pledgee by giving a reasonable notice to the pledgor, which is a requirement under the Indian Contract Act. On the expiry of such a notice, the pledgee will have the right to invoke the share pledge through its depository participant and sell the shares to any third party or on the stock exchange (in case the shares are listed). The pledgee does not need to obtain a court order to sell the pledged assets. As the pledged assets are in possession of the pledgee, it can directly dispose of the pledged shares.

Please note that public unlisted companies and companies listed with a stock exchange are mandatorily required to issue shares in dematerialised form.

In case of private companies with physical shares, in accordance with the Companies Act read with Companies (Share Capital & Debentures) Rules 2014, the pledgor is required to:

(a) intimate the company regarding the transfer;

(b) execute a duly executed and undated share transfer form (with requite stamp duty) with the pledgee (which is typically obtained upfront by the lender at the time of pledge creation);

(c) and deliver the same to the company within 60 (sixty) days from the date of such execution; and

(d) deposit the share certificates with the company,

after which, the company will pass a board resolution registering the transfer. The company is required to deliver the share certificates of all securities transferred within 1 (one) month of an instrument of transfer.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, please as mentioned above, under Indian laws a charge can be created on movable assets, whether tangible or intangible and whether existing presently or in the future. However, it may be noted that a mortgage cannot be created on immovable properties, which have not yet been acquired and will be acquired in the future.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Under the relevant financing and security documents, a lender would have the right to enforce its security upon occurrence of an event of default. Following process is followed for enforcement of the security:

**Immovable Property**

If the mortgage is an English Mortgage, the mortgagee has the power to sell the mortgaged property without the intervention of the court, subject to certain notification requirements. Where the mortgage is an equitable mortgage, the mortgagor must apply to the court for a decree to sell the mortgaged property in order to recover the debt.

Secured creditors such as Indian banks, certain notified financial institutions and debenture trustees for listed and secured non-convertible debentures ("**NCDs**") can enforce security under the SARFAESI Act, which is a specialised legislation, which provides for a quicker mode of enforcing security out of court by taking possession (actual or symbolic).

Additionally, it is pertinent to note that the Supreme Court of India has held that the enforcement of a mortgage is not an arbitrable dispute and should only be tried by a judicial forum, and not by an arbitral tribunal.

**Movable Property**

The terms of hypothecation are entirely regulated by the terms of the deed of hypothecation between the hypothecator (the security provider) and the hypothecatee (the lender). A deed of hypothecation can be enforced either by appointing a receiver and selling the charged assets or by obtaining a decree for the sale of the movable property. Indian banks, certain notified financial institutions and debenture trustees for NCDs can enforce hypothecation under the SARFAESI Act, which provides for a quicker mode of enforcing security out of court by taking possession of the property (actual or symbolic).

**Pledge over Shares**

A pledgee may enforce a pledge by giving reasonable notice of enforcement to the pledgor. The pledgee does not need to obtain a court order to sell the pledged shares unless the pledgor or the borrower has obtained an interim injunction order from a court. If the pledged shares are held in physical form, the pledgee must submit the executed share transfer forms it holds to the company whose shares are being pledged. The company will then need to approve the transfer of shares in the name of the lender or third-party transferee at its board meeting. If the company refuses to approve the transfer of shares, the lender or third-party transferee will need to approach the competent courts and tribunals to challenge such refusal.

Typically, most concession agreements stipulate that consent is required from the concessioning authority prior to effecting a change in control of the project company. If a pledge enforcement results in a change of control, prior consent of the concessioning authority will also be required for enforcement of the pledge.

**Substitution under Project Documents**

Upon the occurrence of payment defaults, the lenders usually have the right to seek substitution of the project counterparty with a person selected by the lenders, as per the terms of the relevant concession agreement. The lenders may in some cases be able to enter into a direct agreement with the concessioning authority. Some concession agreements like for highway projects provide for a tripartite substitution agreement format between the lender, concessioning authority and the project special purpose vehicle / borrower. The lenders' selectee usually needs to be a person who is approved by the concessioning authority or as per the terms of the concession agreement.

**Corporate Insolvency Resolution Process ("CIRP")**

If a company makes any default in making a payment of INR 10,000,000 (Rupees Ten Million only) or more, then the creditors, individually and/ or through other creditors (CIRP against the corporate debtor can be filed jointly by not less than one hundred of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less), can choose to file an application for initiating the corporate insolvency resolution process against such company as the corporate debtor before the relevant National Company Law Tribunal ("**NCLT**") under Section 7 of the IBC.

As per the provisions of the IBC, upon admission of an application for commencement of a corporate insolvency resolution, the NCLT shall by order, inter alia:

(a) declare a moratorium prohibiting, inter alia:

  (i) initiation of any suit or proceeding against the corporate debtor including execution of any judgment, decree or order in any court or tribunal;

  (ii) transfer, alienation, encumbrance or disposal of any assets of the corporate debtor;

  (iii) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its properties including any action under SARFAESI Act, till the completion of the insolvency resolution process;

(b) appoint an interim insolvency resolution professional; and

(c) cause a public announcement of the initiation of corporate insolvency resolution process in respect of the corporate debtor.

The interim insolvency resolution professional will take over the management of the corporate debtor and take all actions for and on behalf of the corporate debtor. The financial institutions maintaining the accounts of the corporate debtor, will act on the instructions of the interim insolvency resolution professional and will furnish all information of the corporate debtor as available with them. The interim insolvency resolution professional will be responsible for ensuring that the corporate debtor runs on a going concern basis.

The interim insolvency resolution professional will also form a committee of creditors ("**COC**") in accordance with the provisions of the IBC. The interim resolution professional may be confirmed as the resolution professional by the COC or the COC may appoint another person in place as the resolution professional. The COC will approve a resolution plan for the corporate debtor. Where there are financial creditors, the COC will only comprise financial creditors (but excluding any financial creditors that are related parties of the corporate debtor). The decisions at the COC have to be taken by 51%, 66% or 90% majority of financial creditors in terms of the value of the financial debt, depending on the decision to be taken. The creditors will be the members of the COC of the corporate debtor. If the creditors constitute 66% or more of the financial debt of the corporate debtor, they will be able to finalise a resolution plan. However, if they do not hold 66% or more of the financial debt, then they will also need the buy-in of other financial creditors to approve a plan acceptable to them. As per the IBC and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (as amended), operational creditors will have to be paid in priority to the financial creditors of the corporate debtor as part of the resolution plan. However, the resolution

applicant can assume in the resolution plan that the liquidation value due to operational creditors is zero in case the liquidation estate is not sufficient to pay the debts ranking above operational creditors as per the prescribed waterfall under the IBC or specify in the resolution plan that the amount to be paid to the operational creditors.

It may be noted that the COC can choose to liquidate the corporate debtor if the resolution plan is not viable or sustainable. In such case, the insolvency resolution professional will recommend to the NCLT for liquidation of the corporate debtor. If the resolution plan is approved by the prescribed majority of the COC and the NCLT, the resolution plan will be implemented for insolvency resolution of the corporate debtor (assuming there are no appeals against the NCLT order).

The entire CIRP (except the implementation of the resolution plan) is required to be completed within a period of 330 days from the insolvency commencement date.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The principles of agency and trust are acknowledged and widely accepted in the Indian banking sector. In India, for usual financing transaction involving multiple lenders, security interest generally is created in the name of a trustee company who holds the security for the consortium of lenders as a trustee. This is done for the simplification and convenience of creation and enforcement of security and syndication of loans. A separate agreement for appointment of such security trustee is executed.

Generally, in a financing arrangement comprising of consortium of lenders in India, facility agent is also appointed on behalf of the lenders in accordance with the terms that have been mutually agreed upon. This agent is in charge of coordinating the process of drawdown of loans and administration.

However, it is possible to have parallel debt under multiple banking arrangements with different lenders where each lender enters into bilateral financing and security documents. However, in case of pledge of dematerialised shares, a single person is recorded as the holder of a pledge with the depository and thereafter a security trustee or a security agent may need to be appointed. Additionally, earlier charge holders may need to cede charge if theirpriority is to be *pari passu* by issuing a consent letter, security sharing letter or signing up to an inter-creditor agreement.

Appointing of an onshore security trustee is generally preferred. Additionally, appointed security trustee or security agent would make filings with authorities and enforcement of security interests easier.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

PPP projects have been incentivising the projects through government schemes for making them commercially viable and bankable PPP projects. Such funding schemes include the Viability Gap Funding (VGF) scheme of up to 40% of the cost of the project or the India Infrastructure Project Development Fund ("**IIPDF**").

Other tax incentives are available for all infrastructure-related projects. A deduction of 100% of the capital expenditure for projects that commence on or after April 1, 2017. Certain state governments have also provided tax incentives including:

- Electricity duty exemptions.

- Rebates in tariffs for electricity, water or gas.
- Subsidies on clean manufacturing technology, pollution control and so on.

India is also a signatory to numerous bilateral free trade agreements, double taxation avoidance treaties ("**DTAT**"), comprehensive economic partnership agreements or co-operation agreements, and preferential trade agreements (which aim to protect foreign investments in projects in India). These treaties and agreements protect foreign investors even in the event of foreclosure of the project, subject to the RBI and other industry-related authority guidelines.

However, to avoid tax avoidance and treaty shopping, recently DTATs with certain countries have been sought to be amended by the Indian government.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

The government has fully liberalised investments in the infrastructure sector and permits foreign direct investment ("**FDI**") of up to 100% of the share capital of a company through the automatic route i.e., without requiring prior approval of the Government of India.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

**External Commercial Borrowings**

Loans, credit facilities granted by a foreign lender or bonds subscribed by foreign capital market investors, to or issued by, an Indian borrower is governed by FEMA, and the ECB Guidelines.

There are two types of external commercial borrowings ("**ECBs**"): (a) foreign currency-denominated ECBs; and (b) rupee-denominated ECB.

A borrower availing of an ECB facility should be eligible to receive FDI (even if such FDI is subject to any conditions under the prevalent FDI policy). The following eligibility criteria have to be complied by a foreign lender to be recognised as an "eligible lender":

(a) a resident of a country that is a member of the Financial Action Task Force ("**FATF**") or a member of a FATF-Style Regional Body; and should not be a country identified in the public statement of the FATF as a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply or a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies;

(b) a resident of a country whose securities market regulator is a signatory to the International Organisation of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding or a signatory to bilateral Memorandum of Understanding with the Securities and Exchange Board of India ("**SEBI**") for information sharing arrangements;

(c) a multilateral and regional financial institution where India is a member country;

(d) foreign equity holders; or

(e) foreign branches or subsidiaries of Indian banks (only for foreign currency ECBs and except in certain cases).

The minimum average maturity period ("**MAMP**") for ECBs ranges from 1 year (for ECBs up to USD 50 million or its equivalent per financial year) and generally for 3 years. In certain situations, based on the end use of the ECBs (such as use for working capital

purposes, general corporate or repayment of rupee loans) the prescribed MAMP may vary from 5 years, 7 years or 10 years.

Additionally, proceeds of ECBs cannot be utilised for certain negative end usesreal estate activities, investment in capital market and equity investment.

An eligible foreign lender providing an ECB to an Indian borrower is not required to obtain any consent or licence to lend in India to an eligible Indian borrower or to enforce its rights under any loan agreement. However, an Indian borrower is required to apply for a loan registration number with the RBI through an Authorized Dealer Bank (which is a bank licensed by the RBI to deal in foreign currency and has certain delegation authority under exchange control regulations).

Under the ECB Guidelines, there are ceilings prescribed for all-in-costs which include rate of interest, other fees, expenses, charges, guarantee fees and export credit agency charges.

**FPI Route**

Under Indian law, entities registered with SEBI as 'foreign portfolio investors' ("**FPI**") are permitted to subscribe to corporate bonds (or as referred to in India as non-convertible debentures) issued by Indian companies. There are two routes in which an FPI may subscribe to NCDs issued by an Indian company:

General Route

Under the general route, an FPI may invest in NCDs issued by a company in India subject to compliance with the following:

(a) an FPI may subscribe to corporate bonds with minimum residual maturity of above one year only – however, an FPI may invest in securities with residual maturity of up to one year if such investment does not exceed 30% of the total investment of such FPI in corporate bonds on an end-of-day basis;

(b) investment by an FPI should not exceed 50% of the issue size of the NCDs;

(c) the above-mentioned caps of 30% and 50% are not applicable for certain types of exempted securities such as security receipts and debt instruments issued by asset reconstruction companies and debt instruments issued by an entity under CIRP or defaulted NCDs.

Voluntary Retention Route

Under the Voluntary Retention Route, no minimum residual maturity of the NCDs is stipulated for investing in NCDs by an FPI. There are no limits to the number of corporate bonds that can be subscribed by an FPI (subscription to 100% of the corporate bonds is permissible).

However, there is a minimum retention period of 3 (three) years during which time the FPI has voluntarily committed to retain the amount allotted to it invested in India and this retention period will be applicable to 75% of the total amount allotted for investment to an FPI by RBI.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Transactions dealing with the inflows and outflows of currency are governed by FEMA. The policy framework on foreign investment in India is transparent and comprehensible and aimed at promoting and creating a conducive environment for foreign investment.

A non-resident entity may invest or participate in India in the following ways:

**Foreign Direct Investment**

An investor investing under the FDI route can invest in equity instruments such as

equity shares, compulsorily convertible debentures or compulsorily convertible preference shares or in 10% or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company and even contribution to the capital of a limited liability partnership.

Investments under this route are subject to the sectoral caps or limits, as the case may be, and the conditionalities specified under the NDI Rules and the FDI Policy (as amended by various press notes from time to time) issued by the Department of Industrial Policy and Promotion Ministry of Commerce and Industry Government of India and also requirements/ policies prescribed by relevant sectoral regulators and government policies, if any.

Certain sectors are placed either under the automatic route (i.e., without requiring the prior approval of the Government of India) or under the approval route (i.e., which requires the prior approval of the Government of India).

**Foreign Portfolio Investors (FPI)**

A separate registration is issued by the SEBI under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019 to foreign entities to operate as an FPI.

As mentioned earlier, FPIs can invest in listed and with certain restrictions on end use, unlisted debt securities. FPIs also invest in certain securities including equity shares listed on the stock exchange, units of mutual funds and certain regulated pooled investment funds.

**Foreign Venture Capital Investment**

The Foreign Venture Capital Investment ("**FVCI**") regime is a route that permits certain identified eligible foreign entities which are registered with SEBI as 'foreign venture capital investors' to make venture capital investments in specified sectors in India such as biotechnology, information technology (hardware and software development), nanotechnology, seed research and development, new chemical entities in the pharmaceutical sector, dairy and poultry industries, bio-fuels, certain capacity hotel-cum convention centres and the infrastructure sector.

FVCIs can invest in unlisted equity and equity linked instrument and debt/ debt instruments, units of certain types of pooled investment funds, and equity or equity linked instrument and debt instrument issued by an Indian start-up. FVCIs can invest in debt securities where in which the FVCI has already made an investment by way of equity.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

While there is no minimum equity requirement under the Indian laws and legislations, as a practice for project financings generally debt to equity ratios between the ranges of 80:20-70:30 are followed, depending on the nature of the sponsor entity. In India, for construction of power projects, bid documents are issued for inviting tenders. Bid documents and tender conditions may prescribe debt equity requirements. Additionally, we have also seen that obligations are placed over the borrowing entity for bringing in minimum equity to the project under project documents or under project finance documentation.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In India, there are multiple requirements to create, perfect and record security interests. These include:

(a) Registration with the ROC: The particulars of charge/security interests over any type of property of companies and limited liability partnership have to be reported with the ROC within 30 days of creation of such charge by the person who has created the security interest. Unless the security interest is registered and the registration certificate is issued by the ROC, the charge-holder's claim will not be recognised by the liquidator or other creditors of the company.

(b) Filing with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India ("**CERSAI**"): The particulars of charge/security interest over immovable properties and movable properties have to be registered with the CERSAI, a repository created under the SARFAESI Act. A secured creditor is permitted to exercise enforcement rights on a security interest under the procedure provided in the SARFAESI Act and gets a priority against government taxes and dues only if such security interest is not registered with CERSAI. There are operational issues and ambiguities in relation to filings by non-residents and certain forms of security.

(c) Filings with the Information Utilities: Information of any financial indebtedness availed along with information relating to assets over which any security interest has been created has to be submitted to information utilities set up under the IBC.

(d) Depository: In case of pledge of dematerialised securities, pledge has to be recorded in the depository system with the depository participant holding the shares on behalf of the pledgor. The relevant depository thereupon marks an entry of such charge in its records recording the pledge of the securities.

(e) Registration with the Sub-Registrar of Assurances: An indenture of mortgage executed for an English mortgage or a registered mortgage or a mortgage deed is required to be registered with the local sub-registrar of assurances. In some states, an equitable mortgage also needs to be registered with or notified to the land registry. This is accompanied with payment of state-specific registration fees, as applicable in the state of registration of such document.

(f) No-objection certificate of the Income Tax Authorities: Prior to creating a charge over certain specified fixed assets, it may be necessary to procure prior consent of the Indian income tax authorities to ensure that pending income tax dues are not given a priority to the dues of a secured creditor.

## D. Insurance

### 15. Can local insurance policies be governed by a foreign law?

The choice of foreign law clauses made by parties in contracts based on parties' autonomy should be upheld by the Indian courts, except where public policy issues are involved. However, if the insurance contract is being undertaken in India it would also need to be in compliance with Indian law and regulations.

### 16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?

Yes, insurance proceeds and rights of a borrower under insurance contracts can be assigned to the benefit of lenders. This is usually done by a charge under a deed of hypothecation. It is also possible to assign the insurance proceeds in favour of the lenders (including foreign lenders) by naming them as beneficiaries or first loss

payees of an insurance policy by obtaining an endorsement of the insurance policy. The conditions for applying insurance proceeds are often incorporated in the transaction documents. Typically, insurance proceeds are required to be deposited into an escrow account or a trust and retention account in case of project finance transactions in India and used for mandatory prepayment or in case of smaller claims for replacement of assets. The insurance proceeds are then applied in accordance with the cash-flow waterfall as provided under the escrow account agreement.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There are no major complications or issues in relation to insurance provisions under the project financing documentation. The process for marking lenders as first loss payees or beneficiaries is set out above. Other considerations in relation to the inter-play of insurance proceeds and the trust and retention account for a project are also mentioned above.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

PPP projects are prevalent methods used in India to enable private sector participation in the development of sectors such as infrastructure, power, transport, telecommunications and certain utilities (greenfield airports and urban rail infrastructure). The Department of Economic Affairs of the Ministry of Finance has been primarily overseeing the development of the central public infrastructure through the PPP model across the country. The government of India has streamlined the appraisal and approval mechanism of certain central PPP projects by setting up the Public Private Partnership Appraisal Committee.

The development of a mass rapid transit system in Mumbai, various large airports in Delhi, Mumbai, Bengaluru and Goa including two greenfield airports being developed in Jewar (near the National Capital Region) and in Navi Mumbai (on the outskirts of Mumbai) and several national highway projects launched by the National Highway Authority of India ("**NHAI**") have also been under the PPP model.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, direct agreements between public authorities and lenders are permissible.

Signing direct agreements or substitution agreements with government counterparties in projects is prevalent where it is specifically contemplated under the concession agreement such as the NHAI concession agreements. For private project counterparties, direct agreements may be negotiated in some cases and in some cases the project contract will upfront permit an assignment in favour of the lenders. These direct agreements are usually limited to step-in rights to the lenders in the event of the concessionaire's default, which allows them to replace the borrower with a third-party entity and prevent termination.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

There are several different government support schemes such as VGF as mentioned

earlier to cover up to 40% of the total project cost, Jawaharlal Nehru National Urban Renewal Mission for funding infrastructure projects such as road networks, water and sanitation, solid waste management and other urban transportation projects, in major cities and the IIPDF set up in 2007 by the Ministry of Finance to provide financial support for quality project development activities.

Additionally, certain financial institutions have also been incorporated or set up as wholly owned companies of the Indian government such as Indian Infrastructure Finance Company Limited or the Indian Renewable Energy Development Agency Limited which makes use of the government's ability to borrow money on the open market to build a sizable fund that can then lend money to PPP or specific types of projects. India's largest bank, which is a public sector undertaking, the State Bank of India is also a major financier for infrastructure projects. National Investment and Infrastructure Fund was set up as a sovereign wealth fund for providing long-term capital for infra-related projects.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Typically, a concession agreement would include political events (including legal risks) under force majeure provisions. Following the occurrence of an event which would trigger force majeure, all costs related to such an event will be reimbursed by the government party. A concession agreement would ideally also provide scope claiming additional compensation to the concessionaire in the event of certain identified categories of force majeure events (including political events).

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

A concession agreement would usually provide compensation or adjustment of the tariff to private parties for qualifying changes in the law or a fundamental change in the law.

With respect to qualifying changes in the law, the scope of relief provided to a private party is to a reasonable extent, only if the increased costs are a direct consequence of the change and occur after a prescribed cut-off date, which is usually the bid submission date. However, disputes in relation to the attributability of such costs are resolved through the dispute resolution mechanism provided in the agreement.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is a recognised legal doctrine under Indian law and contractually provided in various concession agreements. If the non-performance of obligations is owning to a force majeure event which are usually events specified as being outside the control of the parties, a party may be exempted from the consequences of non-performance. Prolonged force majeure may also lead to termination of the agreement.

Section 32 of the Indian Contract Act, 1872 provides that contracts will be held void if it is contingent on the occurrence of an event, which subsequently becomes impossible. Similarly, Section 56 of the Indian Contract Act provides that an agreement to do an impossible act in itself is void. Prior to the execution of a project agreement, the parties agree upon an exhaustive list of events that would trigger provisions in relation to the consequences of force majeure events.

**24. What are the general environmental and social requirements in project financings?**

The Indian regulatory framework in relation to environmental, social and governance ("**ESG**") is codified under various legislations, which cover a plethora of ESG related issues, such as:

(a) environmental protection (e.g., the Environment Protection Act, 1986, the Air (Prevention and Control of Pollution) Act, 1981, the Water (Prevention and Control of Pollution) Act, 1974, etc.);

(b) employee benefits (e.g., the Factories Act, 1948, the Code on Wages, 2019, etc.); and

(c) corporate governance (e.g., the Companies Act, SEBI, Prevention of Money Laundering, 2002, etc.)

The Environment Protection Act, 1986 categorises industries, in accordance with the levels of pollution that results from their operations, as red, orange, green or white and a prior clearance of the Ministry of Environment and Forests is required depending on the category of the project. Under the other legislations mentioned above, projects are also mandatorily required to obtain 'consent to establish' and 'consent to operate' permits from the relevant state pollution control board and depending on the location and impact of the project. Renewable energy projects are under the white-list category and exempted to obtain such approvals.

Labour licenses, principal employer registration and factory licenses are also required to be obtained from government authorities in accordance with relevant labour codes.

The Companies Act also provides enhanced governance norms for larger companies. Certain provisions of the Companies Act read with the Companies (Corporate Social Responsibility Policy) Rules, 2014, also mandate companies with a certain net worth to spend at least 2% of their average net profits from the previous three financial years on corporate social responsibility initiatives and prescribes other governance measures such as constituting a corporate social responsibility committee. The Companies Act also requires the board report to contain certain details relating to steps taken for conservation of energy, alternative sources of energy etc.

Additionally, there are certain provisions of the regulations prescribed by SEBI which provide for certain disclosures for certain categories of listed entities by market capitalisation to have a business responsibility report describing the initiatives taken by the listed entity from an environmental, social and governance perspective.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Submission to foreign law:

The *bona fide* choice of a foreign law and submission to foreign jurisdiction as per the parties' intention the governing law of the contract would be recognised and upheld by Indian courts subject to certain exemptions, such as if the choice of jurisdiction is oppressive or is in a *forum non conveniens*, if the same is against public policy or the basic principles of morality and justice.

Similarly, agreements executed with governmental authorities would normally be governed by Indian law. Security documents creating a charge over any property situated in India should be governed by Indian law in order for it to be enforceable.

While India does not have a comprehensive legislation governing a foreign state's immunity, it is a signatory to the United Nations Convention on the Jurisdictional Immunities of the States and their Property. Additionally, as per Section 86 of the Civil Procedure Code, 1808, no foreign state can be sued in any Indian court without the prior consent of the central government.

Transaction documents specifically lay down waiver of immunity clauses. The Supreme Court of India in a judicial decision has held that the immunity enjoyed by a foreign state is not absolute. A foreign state will enjoy immunity if the acts are government acts and are not considered commercial or non-sovereign in nature.

**26. Can financing documents provide for arbitration clauses?**

Yes, financing documents can provide for arbitration clauses in accordance with the provisions of the Arbitration Act.

India is a signatory to the New York Convention and the Geneva Convention, and the Arbitration Act recognizes the enforcement of foreign awards. A foreign award will be enforceable in India if the seat is in a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India.

However, as per Section 48 of the Arbitration Act, enforcement of a foreign award governed by the New York Convention or the Geneva Convention may be refused on the following grounds:

(a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made;

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place;

(e) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which that award was made;

(f) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(g) the enforcement of the award would be contrary to the public policy of India.

The Supreme Court, in a judicial decision has in the case of a mortgage of immovable property, the dispute has been held to be non-arbitrable as it deals with rights *in rem* instead of a right *in personam*.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Some of the main current trends in project financing in India include a push towards the renewable energy industry. India has in the 26th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in Glasgow from the earlier Paris Climate Accords committed to decarbonisation by reducing carbon emissions by 50% by 2030 and becoming energy independent by 2047 and net zero by 2070.

India has a significant infrastructure gap, and the Indian government is investing heavily in infrastructure development. This includes projects such as highways, railways, airports, ports, and logistics which are attracting significant portion of project financing in India. Logistics facilities under a new policy are proposed to attract new investment. Energy transition has increased focus to battery storage, green hydrogen and electric vehicles as well.

Infrastructure investment trusts ("**InvITs**") have been gaining traction in India as a means of forming platforms for revenue generating operational infrastructure projects by private equity players. The NHAI has formed its own InvIT for monetisation of road projects and there are many private sponsor held InvITs as well.

**28. Are any significant development or change expected in the near future in the project finance market?**

Under the Union Budget for the financial year 2023–24, India, the budgetary allocations for key non-fossil fuel energy projects have been increased significantly, especially for the bioenergy programme, the solar energy projects and most notable for the grid renewable energy projects.

The Electricity Act , 2003 is also proposed to be amended to address various issues being faced by the power sector. There are certain amendments proposed in an Energy Conservation Act, 2001 for incentivising non-fossil fuel energy sources and penalise industrial polluters. A regulatory framework for carbon credit trading is also proposed to be implemented soon. The Government of India has introduced a "National Green Hydrogen Mission" which aims to provide a comprehensive action plan for establishing a Green Hydrogen ecosystem and catalysing a systemic response to the opportunities and challenges of this sector.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

As mentioned above, the foreign currency borrowings in India are through ECBs. The RBI has issued notification on changes in ECB Guidelines due to LIBOR transition dated December 08, 2021, wherein RBI has clarified that a benchmark rate for an ECB would include any widely accepted interbank rate or alternative reference rate ("**ARR**"). The policy position of foreign financial institutions are driven by the requirements of the ECB guidelines in relation to lending to Indian borrowers.

In India, majority of the foreign currency borrowers are adopting to either Term Secured Overnight (Term SOFR) Financing Rate or Compounded Secured Overnight Financing Rate (Compounded SOFR). We have also seen, depending on the underlying currency of the borrowing, other popular ARRs such as Sterling Overnight Index Average (SONIA) and Tokyo Overnight Average rate (TONA).

# IVORY COAST

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

There is no single focus legislation governing project finance in Côte d'Ivoire. The legal framework of project finance comprises a variety of international treaties, domestic laws and regulations, and a number of sector-specific laws and regulations which vary from one project to another. The main legal framework of project financing in Côte d'Ivoire includes the following international treaties, and domestic laws and regulations:

- 2020 General rules of the Regional Stock Exchange (Bourse Régionale Des Valeurs Mobilières, (*BRVM)*);
- 2010 WAMU Banking Framework Regulation;
- 2010 Regulation Relating to Covered Bonds in the West African Economic and Monetary Union ("WAEMU");
- 2016 Decision Relating to the Implementation of the Monetary Penalties Mechanisms Applicable on the Regional Financial Market of the WAMU;
- 1974 Law Financial Markets in Côte d'Ivoire;
- 2011 WAEMU Instruction on Regional financial markets;
- 2015 WAEMU Instruction governing activities of electronic money issuers;
- 2013 Law on Electronic Transactions in Côte d'Ivoire;
- 2010 Regulation on the external financial relations of the Member States of the WAEMU
- 2014 Law on the Litigation of Infringements of the Regulation on External Financial Relations of WAEMU Member States;

- 2014 OHADA Uniform Act on Commercial Companies and Economic Interest Groups;
- 2010 OHADA Uniform Act on Securities;
- 2018 OHADA Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures
- 2017 OHADA Uniform Act on Accounting Law and Financial Reporting;
- 2015 OHADA Uniform Act Organizing Collective Proceedings for Clearing of Debts;
- 2018 Ordinance on the Investment Code;
- 2019 Ordinance Amending the 2018 Ordinance on the Investment Code;
- 2009 Ordinance on the *Banking Law;*
- 2018 Decree Setting up the Rules relating to Public-Private Partnership Contracts;
- 2016 Consumer (Protection) Law
- 2016 Anti-money laundering Law
- 2022 Cote d'Ivoire General Tax Code;

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Côte d'Ivoire is regarded as one of the most developed financial sectors in the Economic Community of West African States (ECOWAS) region. However, credit growth remains heavily concentrated, and many micro, small and medium-sized enterprises ("**MSMEs**") are experiencing difficulties in accessing credit. According to the SME Finance Forum, the MSME finance gap in Côte d'Ivoire was estimated to be USD 2.4 billion in 2017. Available credit often has interest rates that are higher than the average rate of return on the investments and require large collateral, which is prohibitive for most MSMEs. An important reason behind the low extension of credit is the fact that commercial banks can easily be profitable through investment in government bonds that have high profitability.

According to a 2020 World Bank report on the country's private sector diagnosis, the key constraints to greater development of the financial sector include (a) low deposit mobilization, (b) poor financial inclusion, (c) weak credit information infrastructure, (d) underdeveloped local capital markets, and (v) limited availability of digital financial services.

The above notwithstanding, the most significant project financings closed during the last 12 months include:

- Singrobo-Ahouaty hydroelectric project: The financing of the Singrobo-Ahouaty hydroelectric project has been completed with the mobilization of 174.3 million euros. The funds were raised from several international financial institutions.
- Montage Gold's Koné project: West Africa-focused gold explorer Montage Gold (TSXV: MAU) has closed a financing of approximately C$20 million ($15.5m) to fund its acquisition and subsequent development of the Mankono-Sissédougou joint venture project in Côte d'Ivoire.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most commonly used security types in Côte d'Ivoire are governed by the 2010 OHADA Uniform Act on Securities. The latter provides for limitative and restricted list of security interests that can be granted in a framework of a project finance :

- Surety Bonds (*Cautionnement*);
- Autonomous guarantee and autonomous counter-guarantee;
- Retention Rights (Possessory Lien);
- Property retained or transferred as security
  - Retention of Title (Réserve de propriété);
  - Property transferred as Security;
- Assignment by way of security
- Cash collateral
- Pledge of tangible assets:
  - Pledge over movable assets (including motors vehicles, professional equipment, and inventory)
- Pledge over intangible assets:
  - Pledge of receivables;
  - Pledge of bank account;
  - Pledge of shares and financial instruments;
  - Pledge of securities account;
  - Pledge of business ;
  - Pledge of intellectual property rights ;
- Mortgages.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

The shares of any company duly incorporated in Côte d'Ivoire can be pledged as a security to the benefit of lenders, subject to the requirements provided for in the applicable laws (mainly the 2010 OHADA Uniform Act on Securities, the 2014 OHADA Uniform Act on Commercial Companies and Economic Interest Groups and the General Tax Code).

Regarding the specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge, the 2010 OHADA Uniform Act on securities provides that any pledge of shares shall be done in writing and include the following information:

1. designation of the parties to the pledge agreement;
2. identification of the registered office and incorporation ("**RCCM**") number of the issuer of shares;
3. shares value (or their valuation method), and where applicable, the numbers of the shares pledged;
4. any information allowing the individualisation of the underlying secured obligation such as its amount or valuation, its term and maturity.

Moreover, in some instances, a prior approval of the pledgor's board may be required for the pledge to be valid. A careful review of the relevant provisions of the pledgor's articles of association will determine whether such prior approval is required or not. However, any enforcement of pledge of shares are subject to the provisions of company law regarding the admission of new shareholder.

Furthermore, the total amount of secured obligations shall be clearly stated in the security documents. In that regard, the parties to the pledge agreement are expected to agree on a maximum amount of the secured guarantee which would include principal, interests, fees and ancillary of the secured obligations.

The perfection formalities of any pledge of shares usually include the following two steps :

Step 1 - Registration of the pledge agreement and any document evidencing the underlying secured obligation with the Tax Administration:

Any documents to be filed with the Tax administration shall be in French. If the documents evidencing the underlying secured obligation are in a foreign language a certified French translation thereof shall be provided for purposes of registration with the Tax Administration. The registration process takes around 7-10 business days to complete. Depending on the type of document (pledge agreement or loan) to be registered, the applicant will be required to pay the applicable registration fees and the stamp duties of XOF 1000 (approx. € 1,52) per page.

Step 2 - Filing of the pledge agreement with the Trade Registry ("**RCCM**") :

The filing of the pledge agreement with the RCCM can take around 7-10 business days to complete or longer.

The fees payable at the RCCM include a fixed fee of XOF 15,000 (approx. € 23) and a proportional fee set by tranche on a percentage of a maximum amount of the secured obligations:

- from XOF 1 to XOF 300,000 (approx. € 457): 0.15 %
- from XOF 300,001 to XOF 1,000,000 (approx. €1525): 0.10 %
- from XOF 1,000,001 to XOF 2,000,000 (approx. € 3049): 0.05% • above XOF 2,000,000: 0.02%.

Overall, perfection of a security would take approximately three to four weeks to complete in Côte d'Ivoire.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Pursuant to Article 104 of the 2010 OHADA Uniform Act on securities, the lack of payment by the due date allows the pledgee-creditor, in possession of a writ of execution, to proceed to the forceful sale of the collateral eight days after notice has been duly served on the debtor and, where necessary, on the third party settlor under the conditions laid down by the provisions organizing measures of execution from which no pledge may derogate. Under such a situation, he can exercise its preference right on the price of the collateral sold based on article 226 of the same Act.

The endorsement types typically used for the share certificates are the bearer or registered forms.

Shares and bonds shall be in the form of bearer bonds or registered securities irrespective of whether they are issued against non-cash contributions or cash contributions. However, registered securities may be the exclusive form imposed by the provisions of the Act or by the Articles of Association.

The owner of securities which are part of an issue comprising bearer bonds shall have the option, notwithstanding any clause to the contrary, to convert his bearer bonds into registered securities and vice-versa.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

A security interest may be granted on the borrower's future assets, rights and claims provided that they are identified or identifiable.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Pursuant to Article 75 of the 2015 OHADA Uniform Act on collective proceedings and

wiping off debts, the opening of collective proceedings automatically prohibits enforcement procedures or suspends all individual lawsuits or arbitration proceedings by creditors. If enforcement procedures were not yet in progress, they will no longer be exercised, whereas if they were pending, they will be suspended. The same goes for individual lawsuits or arbitration proceedings by creditors.

In general, all the proceedings remain subject to the rigor of suspension or prohibition when they are initiated by the creditors after the opening of the collective proceedings. Legal actions and enforcement procedures other than those referred to above may only be exercised or pursued during the legal redress or liquidation of property proceedings against the debtor, assisted by the trustee in the case of legal redress or represented by the trustee in the case of liquidation of property. However, the creditors benefiting from these guarantees can take protective measures. The restriction to the individual right of the creditors also concerns the stopping of the flow of the registrations of the securities.

Lastly, the opening of collective proceedings also has the consequence of stopping, with regard to the general body of creditors only, the accrual of legal and contractual interest, all interest and late payment increases on all claims, whether or not they are guaranteed by a security. However, in the case of interest resulting from loan contracts concluded for a term of one (1) year or more or contracts with a deferred payment of one (1) year or more, the course of interest shall continue during the legal redress proceedings.

In principle, only the bankruptcy judge has the power to decide on the admission or rejection of a claim. Indeed, article 11 and article 148 paragraph 1 of the 2015 OHADA Uniform Act on collective proceedings and wiping off debts provide that the bankruptcy judge may authorize the debtor and or the trustee to make an act of disposal unrelated to the day-to-day management of the company, to grant a mortgage, a pledge or a collateral or to compromise.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Under Côte d'Ivoire law, it is possible to appoint a security agent/trustee. Any such agent can be a foreign person. However, financial or credit institutions are the only eligible entity to act as a security agent under the OHADA Law system.

The security agent can represent secured creditors for virtually all matters related to the secured obligations and can make the various required filings at the competent RCCM in the sole name of the security agent. When so acting and for such filings, the security agent must clearly indicate its capacity as security agent.

In some cases, the 2010 OHADA Uniform Act on securities provides that the creation or enforcement of the security leads to a transfer of ownership of collateral in favour of the secured party. In the case of a security agent, the new law provides that such collateral will constitute a dedicated estate (patrimoine d'affectation) of the security agent solely for the purpose of its mission as security agent, and that such property must be segregated from the agent's own assets.

The security deed may be subject to a foreign law but must comply with the provisions of the Uniform Act.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The main incentives and exemptions for project financing in Côte d'Ivoire

are provided for in the 2018 Investment Code which provides for tax benefits in three geographical zones (A, B, and C), to be defined by an Order issued by the government. The duration for the tax benefit granted in the respective geographical zone is as follows:

- Zone A 5 years .
- Zone B 10 years .
- Zone C 15 years .

The Investment Code includes two specific tax incentive regimes: the Investment Declaration Regime and the Investment Approval Regime. Both regimes apply to all economic activities, excluding finance and banking, non-industrial buildings' builders, liberal activities (e.g., lawyer, notary), and commerce activities. However, investment related to the creation or the development of important shopping centers could qualify for the exemptions if certain conditions are met.

The Investment Code has also created priority economic sectors (Category 1), as opposed to non-priority economic sectors.

Category 1 includes:

- Agriculture and agro-industrial activities.
- Hotels for projects from XOF 5 billion in Zone A and from XOF 2 billion in Zones B and C.
- Health.
- Private investment in high and specialised education.

Category 2 includes all other economic sectors (except those excluded from the benefit from the Investment Code) and hotel projects that do not reach the thresholds for Category 1.

For the Investment Approval Regime, the minimum investment cost is:

- XOF 200 million (VAT and working capital exclusive) for large companies (with more than XOF 1 billion turnover).
- XOF 50 million (VAT and working capital exclusive) for SMEs.
- For shopping centres: XOF 10 billion in Zone A and XOF 5 billion in Zones B and C.
- For Category 1 hotels: XOF 5 billion in Zone A and XOF 2 billion in Zones B and C.

For Category 2 hotels: Less than XOF 5 billion in Zone A and less than XOF 2 billion in Zones B and C.

For major structuring investments: XOF 100 billion in Zone A, XOF 50 billion in Zone B, and XOF 15 billion in Zone C.

The benefit from the Investment Code is granted by the Centre for the Promotion of Investments (named CEPICI) after an application is filed by the requestor.

During the investment period, the beneficiary enjoys the following:

- Exemption from customs duties (excluding statistic fee and community levies).
- Temporary suspension of VAT on acquisition of equipment, goods, and service for activities subject to VAT.
- Exemption of VAT for activities exempted.

Following the completion of the investment, the beneficiary enjoys the following exemptions during a period that depends on the Category of activity and Zone the company is located in. The investment companies approved for developing activities are not concerned by the below exemptions.

Capital investment incentives

With prior approval of the tax authorities and varying with geographical location, 35% to 40% of the total investment in fixed assets related to commercial, industrial, or agricultural activity may be deducted from taxable income. The deduction is limited to 50% of taxable profits. The balance of deduction of the first year may be carried forward over the three following years.

The minimum investment threshold required to benefit from the tax reduction measure is XOF 100 million.

Tax credit for waste recycling business

A tax credit is granted to waste recycling business for the four years following the end of the investment.

This tax credit is equal to 10% of the investment amount but cannot exceed 50% of the taxable profits.

Special incentive tax measures for investments in agro industry

Special incentive tax measures are granted for investments made in cashew and rubber processing under the approval investments regime of the Investment Code.

The specific incentive measures provide additional tax credits and exemptions for companies operating in Category 1.

Tax credit for hiring and training

Tax credits are available for small and medium enterprises (SMEs) and large companies for hiring local individuals and interns for degree validation internships.

Export incentives

No VAT is levied on export sales.

Export incentives for the mining industry

During the exploration phase, investments may be exempt from payroll tax; VAT on goods and services; additional tax (on the sale of goods) on imports and purchases; all import taxes and duties, including VAT on materials, machines, and equipment used in research activities; registration duties applicable to in-kind or cash share-capital contributions; real estate tax; CIT; and minimum tax.

In the exploration phase, mining subcontractors can benefit from the same import VAT and customs exemptions granted to mining title holders.

Export incentives for petroleum service contractors

A special and optional tax treatment applies to petroleum service contractors that meet established criteria. The FY21 Financial Law provides for two rates as follows:

- 6% for service providers to oil companies in the exploration phase.
- 2.17% for service providers to oil companies in the exploitation phase.

The above-mentioned rates are applicable on all tax-free turnover made in Côte d'Ivoire (FY22 Financial Law).

This optional simplified tax regime covers dividend tax and payroll tax.

CIT and the tax on insurance premiums are exempted.

Standard rates apply for business franchise tax and social security contributions for local personnel. The exemption from customs duties and VAT for oil companies is extended to petroleum service contractors.

Favorable tax regime for investment companies with fixed capital

The 2022 tax schedule provides for a favorable tax regime for the benefit of fixed capital investment companies. This regime results in exemptions, particularly in terms of income tax and IRVM, for a period of 15 years from the date of creation of the company. They also benefit from exemptions on capital gains from the

sale of securities as well as in terms of registration fees.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Not specifically applicable to foreign investors. The incentives or exemptions described above will apply to all investors regardless of their nationality.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Pursuant to the Article 2 of the 2010 WAEMU Regulation N°09 relating to the external financial relations of Member States of the WAEMU, the foreign exchange transactions, capital flows and settlements of any kind between a WAEMU Member State and a foreigner or within the WAEMU between a resident and a non-resident may only be carried out through the Central Bank ("**BCEAO**"), the Administration or the Post Office, an approved intermediary or a manual exchange licensee.

Current payments to foreign countries can be executed by the intermediaries mentioned in Article 2 of the 2010 WAEMU Regulation N°09, under their responsibility, based on the principle of freedom of transfer.

In that regard, payments to foreign countries relating to transactions concerning, among other things, interest and dividends, are authorized on a general basis, subject to the presentation of supporting documents to the relevant intermediary (Article 4 of the 2010 WAEMU Regulation N°9). Furthermore, the transfer of sums required for, among other things, the contractual amortization of debts can be freely executed by the approved intermediary subject to the presentation of supporting documents.

Payments abroad for capital transactions, other than those provided for in the previous paragraph, must be the subject of an application for foreign exchange authorization, submitted to the Minister of Finance. Each application for authorization must be accompanied by supporting documents attesting to the nature and reality of the operation (Article 7 of the 2010 WAEMU Regulation N°9).

Any reimbursement of any foreign borrowing must be reported for statistical purposes to the Directorate of External Finance ("**FINEX**") and the BCEAO, with all reimbursement activity carried out through an authorized intermediary.(Article 11 of the 2010 WAEMU Regulation N°9). The term extensions and early repayments of loans must be notified to the authorized intermediaries by borrowers.

With respect to investment operations, any investments in a WAEMU member state and the transfer of investments between non-residents are reported for statistical purposes to the FINEX and to the Central Bank (BCEAO) in the case of direct investment.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

There are no general restrictions on foreign investors incorporating or acquiring the shares of a local company. However, there are sector-specific market access limitations applicable to foreign investments in the ride-hailing services, land, and suppliers in the oil and gas sectors.

In the sector of the ride-hailing services, Ivorian law requires the operator to establish a local entity with at least 25% share capital held by Ivorian nationals (See Article 8 of the 2021 Decree No. 2021-860 on the Regulation of Private Public Transport of Persons).

In the land sector, foreign nationals or foreign entities are precluded from holding any interest in rural land. (See Article 1 of Law on Rural Land).

In oil and gas sectors, holders of oil and gas companies operating in Côte d'Ivoire are expected, in all sectors of the value chain, from exploration to exploitation, to give preference to Ivorian companies for subcontracting activities, provision of services and supply of goods, and enjoins them to exploit the financial and insurance services available in Côte d'Ivoire.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no minimum equity requirement for project financings in Côte d'Ivoire.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Project finance documents to be valid and enforceable in Cote d'Ivoire must be registered with the Tax Administration and filed at the Ministry of Economy and Finance.

In terms of procedural requirements, any company creating a security interest over its assets must register the charge with the relevant registre du commerce. If a charge is created but not registered with the RCCM, the claim will not be recognized by the liquidator or other charge holders of the borrower company.

For all public-private partnership ("**PPP**") projects, the relevant government provider (concession authority) and the private party developing the project must enter into a concession agreement. The concession agreements often specify that all related project documents and amendments must be submitted to the concession authority before execution and any changes required by the concession authority must be incorporated into the project documents.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Although policymaking related to the sector is under the responsibility of the Ivorian Insurance Department at the Ministry of Economy and Finance, Côte d'Ivoire is also part of CIMA, the regional insurance body that issues regulation and steers enforcement efforts for its 14-member countries.

Since the signing of its founding treaty in 1992 and the establishment of its first insurance code in 1995, CIMA has overseen the regulatory implementation and enforcement of insurance rules for Côte d'Ivoire, Gabon, Cameroon, Benin, the Central African Republic, Congo, Mali, Niger, Guinea, Equatorial Guinea, Chad, Togo, Senegal and Burkina Faso.

The consequence of being a member of this organization is that the CIMA regulation applies to the Côte d'Ivoire legal system.

As a result, a local insurance policy cannot be governed by a foreign law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders, provided that such an assignment is consented to in writing by the initial insured (Article 59 of CIMA Code).

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Pursuant to Article 422 of the General Tax Code, any insurance agreement concluded with an insurance company or with any other Ivorian or foreign insurer is subject, regardless of the place and date on which it is or has been concluded to a compulsory annual tax.

The tax is levied on the amount of the sums stipulated for the benefit of the insurer and an accessories from which the insurer benefits directly or indirectly from the action of the insured.

The rate of the tax is set at 14,5% (refer to Article 423-7 of the General Tax Code).

The reinsurance agreement will be subject to VAT at the rate of 18%. This VAT is only due when the beneficiary of the reinsurance is established in Côte d'Ivoire or when the service is used in Côte d'Ivoire (refer to Article 425 of the General Tax Code).

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

PPP is a permitted method of developing projects in Côte d'Ivoire. Since 2012, the Government of Côte d'Ivoire (GoCI) has put in place a public-private partnership (PPP) legal and institutional framework with the adoption of the following two decrees: (a) the PPP Decree No. 12-1151 of 19 December and (b) a decree setting the institutional framework for PPP development, which includes the creation of the National Public Private Partnerships Committee (CNP-PPP). The latter has benefited from a comprehensive World Bank support under the Côte d'Ivoire Infrastructure Financing Project (P158820).

Based on the PPP projects authority's activity report of 22 July 2022, many projects have been developed to date in Cote d'Ivoire. These include:

- PPP contract for the design-financing-installation-user training-operations-maintenance and renewal of certain equipment of an IT solution for securing the collection of traffic rights related to the activities of the administration of maritime affairs concluded between the Ivorian Ministry of Transport and the company Continental Maritime Services (CMS);
- PPP contract for the financing, equipment, operation and maintenance of equipment concluded between the Ministry of Transport and the company NAS Ivoire for the reinforcement of the airport's performance and the provision of quality ground handling services at competitive costs;
- PPP contract for the construction, financing and operation of the Kossihouen technical recovery and landfill centre (CVET) concluded between the Ministry of Sanitation and Hygiene and the company Clean Eburnie; and
- PPP contract for the construction, financing and equipment of the university campus of San-Pedro concluded between the Ministry of Higher Education and Scientific Research and Envol Partenariats CI.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between the public authorities and the Lenders are governed by Article 20 of the 2018 Decree Laying out the Rules relating to Public-Private Partnership Contracts. However, they are not widely used in the Project Finance due to their restrictive nature.

In terms of Article 20 of the 2018 Decree Laying out the Rules relating to Public-Private Partnership Contracts, the direct agreements procedure may only be used:

- when compelling urgency, motivated by unpredictable circumstances or force majeure, not allowing to meet the deadlines provided in tender procedures or competitive dialogue, requires an immediate response;
- where the project relates to defense or national security;
- where only one source is able to provide the requested service, where the provision of the service requires the use of a right of intellectual property, professional secrets or other rights exclusive property or possession of one or more persons;
- when the services can only be entrusted to an operator determined for artistic, technical or investment reasons important prerequisites;
- where a screening or tendering procedure has been unsuccessful, or that only one compliant offer has been submitted in the case provided for in the Article 14, and where, in the opinion of the Contracting Authority, a new procedure short-listing or tendering would have little chance of the timely award of the PPP contract.

Any direct negotiation procedure is carried out in accordance with a framework document drawn up by the contracting authority and submitted for prior approval by the supervisory authority.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

In a project finance, government guarantees are often requested by private sector investors— especially lenders—to protect them from various risks that may affect the project's cash flows, especially those risks that are beyond the control of the private partner. There are no specific provisions on the types of host government supports available. The parties at the negation table usually determine on a case-by-case basis their needs and the supports that they seek from the government.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Usually, depending on the structure of the transaction, the parties determine freely which side is best suited to bear the pollical risk associated with the project without jeopardizing the very existence of the project.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

The short response is yes. In general, the investors and lenders provide for clauses on force majeure, unforeseeability and "le fait du prince" protected against a change in law passing subsequent to the signing of the relevant concession agreement

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is regulated under the 2018 Decree Laying out the Rules relating to Public-Private Partnership Contracts.

**24. What are the general environmental and social requirements in project financings?**

In terms of general environmental and social requirements in project financings, please kindly note that a party implementing and operating a financed project is expected to meet the following:

- Assessment and Management of Environmental and Social Risks and Impacts: Requires borrowers to incorporate an environmental and social management system (ESMS) to identify environmental and social risks in a project; establish an overarching environmental and social policy, management programs, emergency preparedness and response and organizational capacity and competency; enable stakeholder engagement; and coordinate monitoring and review.
- Labor and Working Conditions: Aims to promote fair treatment of workers, improve worker management relationships and promote compliance with national employment laws. The specific standard will depend on the nature of the relationship.
- Community Health, Safety, and Security: Requires borrowers to evaluate health and safety risks including infrastructure and equipment design and safety, hazardous materials management and safety, ecosystem services, community exposure to disease, and emergency preparedness and response.
- Land Acquisition and Involuntary Resettlement: Includes community engagement, compensation and benefits for displaced persons, project design considerations to minimize displacement, grievance mechanisms, and resettlement and livelihood restoration planning.
- Biodiversity Conservation and Sustainable Management of Living Natural Resources.
- Indigenous Peoples: Requires parties to avoid adverse impacts on communities of indigenous peoples and to engage with affected communities to ensure they have given their Free Prior and Informed Consent. Cultural Heritage: Aims to protect cultural heritage through consultation procedures, community access and removal of replicable cultural heritage.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

The submission to a foreign law and the waiver of immunity provisions are enforceable unless it is contrary to public order and morality.

**26. Can financing documents provide for arbitration clauses?**

The short response is yes.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Cote d'Ivoire has a development plan to accelerate its economic and social transformation and become an upper middle-income country by 2030. National Development Plan is valued at 90 billion euros. 7 priority industrial clusters have been identified by the Côte d'Ivoire government according to regional economic potentialities. These include: Agro-industry, Chemicals – Plasturgy, Construction and Building Materials, Pharmaceutical Industry, Textile Industry, Packaging, and Automotive & OEM. Other growth niches to be harnessed include: Digital Economy, Tourism and Hospitality, and Creative Industries.

Under the priority sectors and growth niches listed above, there are investment opportunities in a number of key sectors including:

- Farming Sector, particularly in agriculture machinery, fertilizers and crop protection products

- Agro-Industry, particularly in processing of cocoa, cashew nuts, fruits and vegetables, palm oil, coffee, and natural rubber
- Housing & Construction particularly in social housing, Middle and high standing housing, Malls, and Commercial centers
- Mining & Energies, particularly in gold and natural resources exploitation, building, operation and maintenance of hydropower, solar, biomass and PEV power plants.
- Tourism & Hospitality, particularly in building and operation of hotels and recreational facilities, seaside tourism, ecotourism, medical tourism, business tourism
- Health & Pharmaceutical, particularly in building private hospitals, modernisation of technical facilities and equipment
- Digital Economy, Invest in data centers, optical fiber networks, biotechnology and ICT
- Transports & Logistics, particularly in Invest to extend port terminals, BRT projects, railroads construction, ride hailing services

Moreover, the reduction of tariff and nontariff barriers introduced as part of the new African Continental Free Trade Agreement ("**AfCFTA**") offers further growth opportunities in some of the priority sectors listed above. However, The Ivorian manufacturing sector, dominated by low-tech industries, has not fully benefitted from the opening of regional and global markets. Once implemented, the AfCFTA would not only boost intra-African trade by an estimated USD 70 billion by 2040, but it would also provide Côte d'Ivoire with greater access to the large consumer markets in South Africa, Ethiopia, Kenya, and Angola.

Climate change issues and policy options

Côte d'Ivoire is 130 on the 2021 Global Climate Risk Index (GCRI). More than two-thirds of its coastline is affected by coastal erosion. Its economy is dependent on climate-sensitive sectors— agriculture, livestock, aquaculture, and energy. In July 2018, the World Bank evaluated the losses to GDP associated with climate change at between $681 million and $1.4 billion in constant 2017 $ between now and 2040. To counter the threat, the government is conducting several programs. During COP26, it committed to reduce its GHGs by 30.4% between then and 2030 (versus an initial target of 28.2% in 2015). The financing of the updated NDC, at a cost of about $22 billion, requires resources from climate funds and the private sector, because the government allocates only an average of $400 billion a year to environmental protection. To reinforce resilience and accompany the energy transition, the NDP 2021–2025 aims to increase contributions to RE in the energy mix from 39.5% to 42% between 2019 and 2025, accelerate development of the low-carbon strategy, and reduce damages and losses linked to natural disasters.

**28. Are any significant development or change expected in the near future in the project finance market?**

Geneva, 10 March 2022 - The Enhanced Integrated Framework (EIF), the United Nations Economic Commission for Africa (UNECA) and the International Islamic Trade Finance Corporation (ITFC) are partnering in a new project to help eight African countries operationalise the AfCFTA.

The project was launched at a virtual event on 10 March that brought together trade ministers from Senegal, Niger and Togo, as well as government representatives from Guinea, Burkina Faso and Mauritania. The project will support the implementation of over 30 activities in the FTAA strategies

of Burkina Faso, Côte d'Ivoire, Guinea, Mauritania, Niger, Senegal, Togo and Tunisia.

By assisting in the implementation of priority actions formulated by the ECA, the project will contribute to creating an environment where trade can be more efficient and inclusive in the eight beneficiary countries. By the end of the project, their capacity will have been strengthened for tangible results, such as jobs and other economic opportunities for project financings.

The AfCFTA is expected to boost intra-African trade and have positive spillover effects on trade between the least developed African countries. It is also expected that the AfCFTA will pave the way for increased inter-African trade through improved access to the intercontinental market.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

As a country previously covered by LIBOR, alternative rates like ESTER, SARON, SONIA and SOFR are used. In any case, the effective total interest rate (in French "taux effectif global" or "TEG") must be set out in writing and comply with usury legislation.

# KAZAKHSTAN

## GRATA

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The main legislation governing the project financing in the Republic of Kazakhstan ("**Kazakhstan**") are:

1) the Constitution dated 30 August 1995;
2) the Civil Code (General Part) dated 27 December 1994 and the Civil Code (Special Part) dated 1 July 1999 No. 409-I (the "**Civil Code**");
3) the Entrepreneurial Code dated 29 October 2015 No. 375-V (the "**Entrepreneurial Code**");
4) the Law on Securities Market dated 2 July 2003 No. 461-II;
5) the Law on Project Financing and Securitization dated 20 February 2006 No. 126-III;
6) the Law on Public Private Partnership dated 31 October 2015 No. 379-V (the "**PPP Law**");
7) the Law on Concessions dated 7 July 2006 No. 167-III (the "**Concessions Law**"); and
8) other legal acts.

The main international treaties governing the project financing in Kazakhstan are:

1) the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
2) the 1985 Seoul Convention on Establishing the Multilateral Investment Guarantee Agency;
3) the 1993 Ashgabat Agreement on Cooperation in the field of Investment Activity;
4) the 1997 Moscow Convention on Protection of Rights of Investor;

5) agreements on encouragement and mutual protection of investments with around 52 countries (USA, UK, Germany, France, Netherlands, Russia, etc.);
6) the 1994 Lisbon Energy Charter Treaty; and
7) other international treaties[8].

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Project finance in the strict sense of the term (i.e., where the financing structure is based on the performance of the project itself) has not yet developed and is not tested so far in Kazakhstan. So-called 'project finance' transactions that took place in Kazakhstan so far, in fact, were either conventional bank loans (mostly by international financial institutions like the European Bank for Reconstruction and Development (EBRD) or the International Finance Corporation (IFC)) that have somehow benefited from government guarantees, security packages, direct budgetary investments or net private investments.

Although the Kazakh law on Securitization was adopted in 2006 and later in 2012 it was transformed into the Kazakh law on Project Financing and Securitization (the ("**Law on Project Financing and Securitization**"), we are not aware of major projects being implemented under its framework.

The major projects implemented in Kazakhstan over the last 12 months include the following:

1) Construction of the plant for the production of polypropylene in the Atyrau region with a capacity of 500 thousand tons per year (entered the TOP-10 global producers of this product);
2) Construction of the first domestic plant for the production of tire products with a capacity of 3.5 million tires annually. It is expected that it will fully cover the needs of domestic automakers. Investments in the project amounted to 171 billion tenge;
3) Construction of a gas turbine plant with a capacity of 57 MW at the Aktobe CHPP, construction of 12 renewable energy projects for 385 MW, auctions held for the commissioning of flexible capacities for 1200 MW and the selection of renewable energy projects with a total capacity of 440 MW.

There are a number of major projects announced and/or being implemented in Kazakhstan.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Kazakh law provides for several methods of securing obligation. Obligations could be secured by penalty, pledge, surety, guarantee, deposit, withholding of the debtor's property, guarantee deposit, security deposit, and other methods stipulated by legislation or agreement[9].

The most commonly used types of security in Kazakhstan are pledges and guarantees.

Though assignment is not strictly speaking a type of security under Kazakh law, it is quite often a part of a standard security package in international finance transactions.

Also, in a typical project finance deal creditors require so-called "step-in" rights

8 https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan

9 Article 292 of the Civil Code.

that enable them to appoint a nominee to undertake the project company rights together with the project company itself (with the project company remaining liable for all the obligations) or appoint a new obligor in the place of the project company to repay the amounts due to the lenders. These "step-in" rights enable the lenders to take over control of the project and implement the project by finding a long-term buyer, thus ensuring that the project continues generating revenues. It should be noted that Kazakh law does not recognise concept of "step-in rights".

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Holders of shares of a Kazakh joint-stock company (the "**JSC**") and participatory interests of a Kazakh limited liability partnership (the "**LLP**") have the right to pledge all or part of such shares or participatory interests respectively in favour of creditors (including foreign creditors). The major shortcoming of such a pledge is that the creditors would not be entitled to take possession of the shares but must instead seek to sell the shares through a public auction.

A pledge over shares of the JSC must be registered with the Central Securities Depository, which will make an entry regarding the pledge in the system of registers of security holders. Such pledge is only valid upon its registration.

Another form of commercial legal entity under Kazakh law is an LLP which has participatory interests as opposed to shares. A pledge over participatory interests of the LLP is, generally, can be registered with the "State Corporation "Government for Citizens" NJSC, unless the Central Securities Depository is provided under the corporate documents of the LLP and in this case pledge over participatory interests must be registered with the Central Securities Depository.

Establishing and perfecting a share pledge shall be made in the same manner as most other types of pledges of movable property.

It should be noted that a purchaser of more than 50% of shares or participatory interests in a Kazakh company may be required to obtain approval of such purchase from the Competition Agency. If the purchase is subject to the antimonopoly approval (this will depend on the combined asset value or annual turnover of the purchaser and the Kazakh entity), then the purchaser will be required to apply for approval within 30 days after the public auction at which it acquired the shares or participatory interests. If the pledge provides for a transfer of voting rights in the event of default over more than 50% of shares or participatory interests, such transfer may be a subject of separate approval of the Competition Agency.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Under the Civil Code, a secured creditor cannot simply take possession of the collateral (except for cash and receivables). The creditor shall seek to sell the collateral through a public auction and recover the debt from the sale proceeds. The sale proceeds will be used first to cover expenses incurred in connection with the enforcement and sale (including any fines imposed on the debtor by a court marshal during the enforcement). After that, the proceeds will be used to repay the debts. The remainder, if any, will be returned to

the debtor. Enforcement may take up to 6 months from the moment of default to the sale of the pledged property. It may take longer if the pledgor contests the underlying default.

A pledge agreement may be enforced either through a court-supervised judicial procedure or through an out-of-court procedure. The relevant pledge agreement must specify the mode of enforcement (i.e., through the courts or without court involvement). We outline those in more details below.

Out-of-Court Enforcement. In the out-of-court enforcement procedure, the pledgee (its representative) will organize and carry out the enforcement procedure, including the sale of the collateral. For this, it will be necessary for the pledgee's representative to carry out a number of procedural steps, including preparing and registering a default notice, publishing an auction notice in mass media, and conducting the auction.

In case the auction fails for the reason of being attended by less than two bidders, the pledgee will have the option to either take possession of the collateral at its estimated value determined by a licensed appraiser or to conduct a new auction.

If the pledge agreement provides for out-of-court pledge enforcement procedure, the lenders will be able to enforce the pledge by selling the collateral without the need to pay the court fee or any other State fee. However, if the local borrower refuses to cooperate with the lenders in selling the collateral or otherwise obstructs the enforcement of the pledge, the lenders will have no other recourse but to apply to a Kazakhstani court seeking judicial enforcement of the pledge. In such case, it will be necessary for the lenders to pay a court fee in the amount of 3% of the value of the collateral (if the lenders are successful in their litigation, the court would require the customer to reimburse the lenders for the paid court fee).

Enforcement may take up to 6 months from the moment of default to the sale of the pledged property. It may take longer if the pledgor contests the underlying default. The enforcement costs should be in a range of several thousand U.S. dollars (without taking into account the court fee). The law, however, provides that expenses incurred by the pledgee are recoverable from the sale proceeds, and the court fees are to be reimbursed by the pledgor.

Judicial Enforcement. If the lender enforces the pledge through a court-supervised procedure, it will be necessary for the lender to pay a court fee in the amount of 3% of the value of the collateral. If the lender is successful in its court action seeking pledge enforcement, the court will order the customer to reimburse the lenders for the court fees paid by the lender in commencing the court action.

In case of enforcement through judicial action, the court marshal is obliged under the law to conduct the auction and sell the collateral within four months after he received the relevant court order. This term may be extended in certain circumstances.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, security interest be established over future assets, rights and receivables of the borrower. With limited exceptions, the law does not limit the types of property that can be pledged. After-acquired assets may be pledged, as well as goods in turnover, such as inventories, raw materials, semi-finished goods, and finished products.

It is possible for a company to pledge its monetary claims under a contract (e.g., insurance agreement or off-take agreements) provided that such claims are

assignable. Where rights to receivables are pledged, the enforcement will be carried out by way of assignment of the relevant rights to the pledgee (i.e., without the public auction as it is with most other types of collateral).

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Final liquidation of a Kazakh legal entity upon bankruptcy involves a disposal of the debtor's assets and distribution of the proceeds to creditors in the payment order established in the Law on Rehabilitation and Bankruptcy.

A pledge would effectively be terminated in the event of bankruptcy of the pledgor. Creditors secured by a pledge become creditors of the second priority and unsecured creditors become creditors of the fifth (last) priority and their claims are satisfied only after settlement of all other claims.[10]

In order to become creditors of the second priority secured creditors must submit their claims to an interim manager within one month period from the day of announcement on receiving claims from creditors, otherwise they will become creditors of the fifth (last) priority.

Note that creditors having security other than a pledge governed by Kazakh law would be considered unsecured creditors in insolvency proceedings.

Technical insolvency (i.e., not associated with initiation of insolvency proceedings in the manner set out by Kazakh law) does not affect the steps to be taken by the lenders to enforce their security interest.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

While the concept of so-called 'co-pledgees' has been, arguably, recently introduced in legislation of the Republic of Kazakhstan in Article 305-1 of the Civil Code, in absence of court practice it is still fair to say that Kazakhstan does not recognise trusts and accordingly, security must be granted to the actual creditor, i.e., the creditor which advances the loan. Accordingly, as a matter of Kazakhstan law, a security trustee (who is not the actual creditor) cannot hold security and act as a pledgee on behalf of the creditors. Thus, if loan participation is transferred, any pledge or mortgage for that loan must be re-registered in the name of the new creditor.

Accordingly, it is uncertain whether any security arrangement whereby a security trustee acts as a holder of security on behalf of the creditors would be enforceable in Kazakhstan. Parallel debt structure seems to address above issue and shall be enforceable under Kazakh law. It shall be noted, however, that it has not been tested in the Kazakh courts and there is a theoretical risk that parallel debt structure may be challenged as sham transaction for the purposes of Kazakh law.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

There are no specific incentives and exemptions for project financing in Kazakhstan. However, some categories of projects may benefit from incentives and exemptions designed to encourage investments in certain industries.

For instance, so-called investment

10 Article 100 of the Kazakh Law on Rehabilitation and Bankruptcy dated 7 March 2014 No. 176-V (the "Law on Rehabilitation and Bankruptcy")

preferences are available to so-called investment projects, i.e., a complex of measures providing for investments in creation of new or expansion/renewal of existing production facilities[5]. To receive the benefits, the investor (which in most cases should be a Kazakhstani company, e.g., a local subsidiary of a foreign investor) shall sign an investment contract with the government.

In case of projects being implemented in the framework of the PPP Law or Concessions Law, an investor is entitled to get such measures of so-called 'state support' as state sureties for infrastructure bonds; state guarantees for loans, the proceeds of which are to be used for PPP/concession agreement purposes; transfer of the exclusive IP rights owned by the State; provision of so-called 'in-kind grants' (e.g., land, machinery); co-financing by the State; guaranteed offtake by the State of a certain amount of goods (works, services) to be produced by the PPP/concession facility, and/or some others[11].

Depending on the size of the project, an investor may get the following investment preferences: exemption from customs duties, exemption from import value-added tax (VAT) for certain specified products, state in-kind grants, i.e., assets; tax preferences in the form of corporate income tax and land tax exemptions, as well as a property tax exemption, stability of tax laws, stability of work permit laws; and/or some others.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Kazakhstan is a party to bilateral and multilateral investment treaties which provide for such commonly used protection of foreign investors as protection against expropriation without compensation and against discrimination, national treatment or most-favoured nation treatment of foreign investors, guarantees of fair and equitable treatment, etc.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency. However, currency control and regulation requirements may apply: e.g., if the amount of a loan to be granted from a foreign legal entity to a local legal entity exceeds 500,000 US dollars, then corresponding loan agreement is subject to record registration with the National Bank of Kazakhstan.[12]

**12. Are there any restrictions for foreign investments in your jurisdiction?**

There are restrictions on foreign ownership and/or control in legal entities operating in certain industries in Kazakhstan, for example, a 20% limit in mass media companies, a 49% limit in airline companies, a 49% limit in telecommunication companies being intercity and/or international operators; restrictions on foreign companies' participation in banks and insurance companies, etc.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There are no specific requirements for project financings.

11 Article 27 of the PPP Law, Article 14 of the Concessions Law

12 Paragraph 9 of the Rules for Monitoring Currency Operations in Kazakhstan approved by Resolution of the Management Board of the National Bank of Kazakhstan dated 10 April 2019 No. 64.

Requirements may apply in case of seeking so-called investment preferences under the Commercial Code. There are following minimum investment requirements in relation to investment projects[13]:

- around 16 million US dollars for priority investment projects on construction of new manufacturing objects;
- around 40 million US dollars for priority investment projects on expansion and/or modernization of existing manufacturing objects;
- around 60 million US dollars for conclusion of an investment agreement;
- around 600 million US dollars over 8 years for conclusion of an investment obligations agreement.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Normally the following registration and filing requirements may arise in a project finance transaction being implemented in Kazakhstan:

- registration of rights to and encumbrances on real estate (e.g., lease of a land plot);
- registration of pledge to ensure its first ranking (in case of most types of movable property) or to ensure its validity (in case of immovable property and some types of movable property);
- record registration of loan agreements for the amount exceeding 500,000 US dollars if a loan is provided by a foreign legal entity to a local legal entity;
- apostillization or legalization of documents issued abroad should the relevant document be submitted to a local state body.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Property interests located on the territory of Kazakhstan and belonging to a legal entity or an individual resident of Kazakhstan may only be insured by a local insurance company or a local branch of foreign insurance (reinsurance) company.[14]

Agreements between local residents shall be governed by Kazakh law. Therefore, local insurance agreements between local insurers and local residents shall be governed by Kazakh law. Should a foreigner be seeking a local insurance policy from a local insurer, generally it could be governed by a foreign law assuming that all Kazakh law requirements are met[15].

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

A policy holder or a beneficiary under an insurance policy must have insurable interest in the insured property.[16] Accordingly, where the lender has insurable interest in the insured property, the lender may be named as the beneficiary in the relevant insurance policy. However, where the lender does not have such interest, it may not be named as the beneficiary.

Accordingly, Kazakh legislation provides a pledgee with a priority right to receive insurance proceeds under an insurance contract relating to the pledged property.

13 Article 284, 295-2, 295-3 of the Kazakh Entrepreneurial Code dated 29 October 2015 No. 375-V

14 Article 5-1.1 of the Kazakh Law on Insurance Activity dated 18 December 2000 No. 126-II

15 Articles 1084 and 1112 of the Civil Code

16 Article 817 of the Civil Code

The pledgor will be entitled to the insurance proceeds only if the pledgee waives its priority rights to such insurance proceeds.[17] Thus, where the insured property is pledged in favor of the lenders, the lenders will have priority right to the insurance proceeds in respect of such property.

## E. Overview

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There are no issues in relation to the insurance provisions under the project financing documentation. As stated in question 14, it is worth mentioning that local insurance companies or local branches of foreign insurance (reinsurance) companies are allowed to insure risks in Kazakhstan (foreign reinsurance is widely used in projects with foreign investors).

## F. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, PPP is a permitted method of developing projects. Moreover, Kazakhstan has special PPP and Concessions Law and developed PPP legislation as well as political will to use the PPP tool to improve local infrastructure.

As of 1 August 2022, 1,357 PPP projects are being implemented in Kazakhstan which attracted more than 29 billion US dollars of investment. However, in practice most PPP projects are of small size, in the area of education, healthcare and transportation. The Big Almaty Ring Road, also known as "BAKAD" by its local abbreviation, is the only project that is considered to be an internationally tendered long-term PPP that has reached financial close with the involvement of foreign banks.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, direct agreements between the public authorities and the Lenders permissible are under the local law. However, they are not commonly seen in the Project Finance market in Kazakhstan as until recently they were available only for major PPP and concession projects.

Direct agreement with a lender of a private partner shall provide for the following conditions[18]:

1) obligation of a public partner to inform lenders of a private partner on material breach of obligations under a PPP agreement that could lead to default under a PPP agreement;

2) pledge of rights under a PPP agreement and (or) assignment of claims, or transfer of debt of a private partner shall be upon consent of a public partner;

3) right of creditors of a private partner to request replacement of a private partner in case of material breach of its obligations under a PPP agreement, which may lead to default under terms of a PPP agreement, as well as to nominate a new private partner;

4) procedure for replacement of a private partner;

17 Article 306.2 of the Civil Code

18 Article 47 of the PPP Law.

5) other conditions not contradicting the legislation of the Republic of Kazakhstan.

It should be mentioned that the Concession Law also stipulates the concept of direct agreement, but it is available only for the concession projects of special importance[19].

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The Concessions Law contemplates the following measures of state support for the concessionary to encourage private investments into the concession projects[20]:

(a) state sureties for infrastructure bonds issued and placed in accordance with the concession agreement on the Kazakh stock exchange;

(b) state guarantees for loans, the proceeds of which are to be used for concession agreement purposes;

(c) transfer of the exclusive IP rights owned by the state to the concessionary;

(d) provision of 'in-kind grants' (e.g., land, machinery);

(e) co-financing of concession projects by the state; and

(f) guaranteed offtake by the state of a certain amount of goods (works, services) to be produced by the concession facility.

A concessionary may be granted one or several of the above measures of state support, however, if the concession facility is to remain private property when completed, rather than being transferred to state ownership, the concessionary cannot expect state support in the form of state sureties for infrastructure bonds, state guarantees for loans and co-financing by the state[21].

The Concessions Law also provides the total amount of obligations of the concessor related to[22]:

(a) the compensation of investment expenses of the concessionary;

(b) state surety for infrastructure bonds;

(c) state guarantees for loans;

(d) transfer to the concessionary of exclusive rights for intellectual property that belongs to the state;

(e) provision of 'in-kind' grants; and

(f) co-financing of the concession project, shall not exceed the concessionary's total expenditures for construction or reconstruction of the concession facility or both, incurred under the relevant concession agreement.

The PPP Law provides measures of state support identical to the Concession Law, though, unlike the Concession Law, the list of these measures of the 'state support' in the PPP Law is not exhaustive[23]. Another difference is that unlike the Concession Law, the PPP Law does not require the infrastructure bonds to be placed on the Kazakhstan stock exchange only (i.e., they may be placed abroad). The PPP Law also provides that the total amount of measures of state support and payments from the state budget for the purposes of financing (recovery of costs) in relation to creation and (or) reconstruction of the PPP facility, cannot exceed the total amount of expenditures for construction and (or) reconstruction of the PPP facility.

19 Article 26-2 of the Concession Law.

20 Article 14 of the Concession Law.

21 Article 14.2 of the Concession Law.

22 Article 14.3 of the Concession Law.

23 Article 27.2 of the PPP Law.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

One of the main principles of the PPP is securing mutually beneficial balance of allocation of risks between public and private partners[24]. As a general principle of the PPP Law, risk should be placed where it is best managed and such allocation shall be stipulated in the PPP agreement[25]. Generally, political risk events usually are under the responsibility of the public party under the PPP agreements.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Both the PPP Law and the Concessions Law lack the 'stability clause' that is meant to protect the private party from possible changes in legislation. However, in both cases the private party may rely to certain extent on the general rule set out in Article 383 of the Civil Code which states that if, after the conclusion of the contract, the legislation establishes rules binding on the parties other than those that were in force at the time of the conclusion of the contract, the terms of the concluded contract shall remain in force unless the law establishes that its effect extends to relations arising from previously concluded contracts.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is specifically regulated under Kazakhstan legislation.

According to Kazakh law[26], an entity that has not fulfilled or improperly fulfilled its obligations shall be liable if it does not prove that proper performance was impossible due to force majeure, which includes emergencies and unavoidable circumstances (natural disasters, military actions, etc). However, Kazakh law emphasizes that such conditions do not include, in particular, a shortage of the items, works, or services required for the execution on the market. The agreement may allow for additional consequences of force majeure. There is also no remedy for any party to the contract, as in case of force majeure both parties suffer losses.

Entrepreneurs who are unable to meet their contractual duties due to an emergency must demonstrate how the incident affected their ability to fulfill each obligation in order to establish force majeure. They may submit an application to the Foreign Trade Chamber to support the force majeure situation. According to the terms of international agreements and foreign trade contracts, the Foreign Trade Chamber certifies the force majeure.

It is also worth mentioning that the term of the PPP agreement may be extended by a court decision in the manner prescribed by the PPP agreement in cases such as delays or suspension of the public-private partnership project as a result of circumstances beyond the control of the parties to the PPP agreement[27].

**24. What are the general environmental and social requirements in project financings?**

The Environmental Code regulates environmental use and protection issues. Facilities that have the potential to have an impact on the environment or human

24 Article 3.2 of the PPP Law.

25 Article 14 of the PPP Law.

26 Article 359 of the Civil Code.

27 Article 48.3 of the PPP Law.

health must conduct an environmental impact assessment ("**EIA**"). A thorough process for carrying out an environmental impact assessment is provided by the Code. Depending on the classification of the enterprise, the Code specifies the kind and specifics of the environmental licenses needed. Chapter 7 of the Environmental Code contains a section on EIAs, the circumstances in which they must be performed, and the procedure for conducting the EIA.

The Equator principles and the environmental, social, and governance safeguards which may be crucial for bankability are not specifically regulated under Kazakh law. Moreover, some requirements of the Equator principles related to the resettlement do not conform to the Kazakhstani legislation.

The State environmental inspectors of the Ministry for Environment Protection or its local territorial departments are entitled to carry out regular, annual environmental inspections of companies that are required to have environmental permits. If a company commits no environmental violations during three consecutive years, state environmental inspections may be conducted once every three years. However, in cases of environmental accidents, health, safety and other emergency situations, State environmental inspectors are empowered to carry out extraordinary inspections.

## G. Jurisdiction, Waiver of Immunity

### 25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

Even though the Concession Law does not specifically prohibit having a foreign law as the governing law of the concession agreement, our interpretation of the law suggests that only Kazakh law can be governing law of the concession agreements.

The PPP Law explicitly confirms that if a private sector partner under a PPP agreement is a non-resident, the parties shall have discretion to choose the applicable law of the PPP agreement.[28]

The state (represented by the government) takes part in relationships regulated by civil legislation on an equal basis with other participants and is liable for its undertakings with its own property. Therefore, if the government enters into commercial activity, it loses special treatment or sovereign immunity. The government, as a public person, waives its sovereign immunity.

The concept of waiver of rights is, generally, not recognised by Kazakh law, however, if the State enters, for instance, into an agreement governed by English law that provides for a waiver immunity and international arbitration, such a contractual arrangement shall be legal and enforceable from the Kazakh law perspective.

### 26. Can financing documents provide for arbitration clauses?

Yes, financing documents can provide arbitration clauses.

The PPP Law[29], as amended, extends the circumstances in which the parties to the PPP agreement may agree on Kazakhstan or international arbitration for dispute resolution purposes. In addition to the case where the private partner is a non-resident, the PPP Law allows for arbitration to be selected if at least one of the private partner's shareholders holding 25% or more of voting shares is non-resident in

28 Article 46.3 of the PPP Law.

29 Article 57.2 of the PPP Law.

Kazakhstan. However, this provision applies only to PPP projects costing more than four million times MCI (approx. US $30 million).

Only concession projects of special importance can benefit from an international arbitration clause in the concession agreement, even if all parties to it are residents of Kazakhstan, but at least one shareholder of the concessionary is a non-resident[30].

The Republic of Kazakhstan is not party to any multilateral or bilateral treaties with any Western jurisdiction or the United States for the mutual enforcement of court judgments. Consequently, should a judgment be obtained from a court in any Western jurisdiction or the United States, it is highly unlikely to be given direct effect in Kazakhstan courts.

## H. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

PPP projects in the field of education account for more than half (55%) of the total number of PPP contracts. In second and third place are the healthcare and utilities sectors, respectively. At the same time, the largest projects have been implemented in the field of transport and infrastructure.

It is expected that proper PPPs and project finance deals will finally take off in Kazakhstan in the near future, firstly because proper legislation on PPPs has been put in place, secondly, after decades of neglect, the government of Kazakhstan has finally not only declared, but seems to confirm its readiness to improve the investment climate and to attract private investments through PPPs (including into the housing and utilities sector) and decided to invest at least part of the wealth from commodity exports in long-postponed infrastructure projects, thirdly, following the coronavirus outbreak, the need to attract private investment in Kazakhstan's healthcare system, agriculture, utilities, and other public infrastructure becomes even more acute. Such IFIs as EBRD, ADB and IFC provide technical assistance in the development of projects in the mentioned areas.

**28. Are any significant development or change expected in the near future in the project finance market?**

Kazakhstan should tap into the huge potential of participating in China's One Belt and One Road Initiative by promoting PPP best practice to ensure high quality at lower costs.

Activation of PPP in infrastructure, energy, transport is expected. In June 2022, President Tokayev announced an investment package worth 20 billion USD until 2025 aimed at enhancing the diversification of transit and transport routes, as well as the implementation of integrated logistics solutions. Among the proposed projects, are upgrades to the Middle Corridor, which would help connect Kazakhstan to the Black Sea via Azerbaijan and Georgia.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

LIBOR is being replaced by such products as Sonia for British pounds, Tona for Japanese yen, Saron for Swiss francs, and others. In addition, interest rates may be calculated depending on the so-called base rate which is set out by the National Bank of Kazakhstan[31].

30 Article 27.2 of the Concession Law.

31 16.75% as of March 2023.

# KYRGYZSTAN

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The main legislation governing project financing in the Kyrgyz Republic includes:

Civil Code of the Kyrgyz Republic dated 8 May 1996 No. 15 (Part I);

Civil Code of the Kyrgyz Republic dated 5 January 1998 No. 1 (Part II);

Land Code of the Kyrgyz Republic dated 2 June 1999 No. 45;

The Law of the Kyrgyz Republic "On business partnerships and companies" dated 15 November 1996 No. 60;

The Law of the Kyrgyz Republic "On joint stock companies" dated 27 March 2003 No. 64;

The Law of the Kyrgyz Republic "On investments in the Kyrgyz Republic" dated 27 March 2003 No. 66;

The Law of the Kyrgyz Republic "On securities market" dated 24 July 2009 No. 251;

The Law of the Kyrgyz Republic "On public-private partnership" dated 11 August 2021 No. 98;

The Law of the Kyrgyz Republic "On Pledge" dated 12 March 2005 No. 49;

As for the international treaties, the following are relevant:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) dated 10 June 1958;

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) dated 18 March 1965;

In addition, The Kyrgyz Republic has entered into a number of bilateral treaties on mutual support, encouragement and protection of investment with the following countries:

The People's Republic of China (1995);
The Republic of Turkey (1996);
The Republic of Ukraine (1993);
The United States of America (1994);
The Republic of Armenia (1995);
The United Kingdom of Great Britain and Northern Ireland (1998);
The Republic of France (1997);
The Islamic Republic of Iran (2005);
The Republic of Azerbaijan (1997);
The Federal Republic of Germany (2006);
The Republic of Georgia (2016);
The Republic of India (2000);
The Republic of Kazakhstan (1997);
The Republic of Belarus (2001);
The People's Republic of Mongolia (1999);
The Swiss Confederation (2003);
The Republic of Tajikistan (2001);
The Kingdom of Sweden (2003);
The Republic of Moldova (2004);
The Republic of Finland (2004);
The Republic of Korea (2008);
The Republic of Latvia (2008);
The Republic of Lithuania (2009);
Denmark (2001);
Malaysia (1995);
The Islamic Republic of Pakistan (1996);
The Republic of Indonesia (1997);
The Republic of Uzbekistan (1997);
The United Arab Emirates (2014);
State of Qatar (2014);
State of Kuwait (2015);
The Republic of Austria (2016).

It is important to note that project financing in the Kyrgyz Republic may also be subject to various regulations issued by the National Bank of the Kyrgyz Republic and other regulatory bodies.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in the Kyrgyz Republic is relatively small and still developing. However, there have been some notable project financings in the country such as

- Construction of Upper Naryn hydropower plant cascade (still ongoing. The project provides for the construction of four HPPs with total installed capacity of 237.7 MW. The total cost of the project – 727 650 000 US dollars;
- Building infrastructure of information system for fee collection. The project provides for the set-up of infrastructure of the information system for fee collection that includes 42 control points, 2 user service centers, one of which will be combined with the service center for freight traffic on public roads using global navigation technologies (GPS, GLONASS, Galileo etc.) The total cost of the project – 58 200 000 US dollars;

Overall, while the project finance market in the Kyrgyz Republic is still developing, there are opportunities for financing in the country, particularly in the energy sector.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The types of security that may be used can vary depending on the specific circumstances of the project and the preferences of the parties involved. Some common types of security that may be used in project financings include:

- Mortgage: This is a form of security that involves the transfer of a property interest to the lender, which serves as collateral for the loan. If the borrower defaults on the loan, the lender may foreclose on the property and sell it to recover its investment.
- Pledge: This is a form of security that involves the transfer of possession of a movable asset, such as shares in a company or equipment, to the lender as collateral for the loan. If the borrower defaults on the loan, the lender may sell the pledged asset to recover its investment.
- Guarantee: This is a form of security that involves a third party (such as a parent company or a government entity) providing a guarantee to the lender that the borrower will repay the loan. If the borrower defaults on the loan, the guarantor is obligated to repay the loan on the borrower's behalf.
- Assignment of rights: An assignment of rights is a transfer of contractual rights from one party to another. In project financings in the Kyrgyz Republic, an assignment of rights is commonly used to transfer the right to receive payments from the project to the lender, thereby providing additional security for the lender.

It is important to note that the use of security in project financings can be complex and may involve a combination of different types of security. The specific security types used in a project financing transaction in the Kyrgyz Republic will depend on the nature of the project and the lender's requirements. Lenders typically seek to obtain as much security as possible to protect their investment in the project.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, the shares of the company can be pledged as security to the benefit of lenders.

There are specific requirements and procedures that must be followed for establishing or perfecting a share pledge in the Kyrgyz Republic.

Under the Kyrgyz legislation, a share pledge is established through a written agreement between the pledgor (the shareholder) and the pledgee (the creditor). The agreement must specify the number and type of shares being pledged, the amount of the secured debt, the duration of the pledge and other terms.

To perfect a share pledge, the pledge agreement must be registered with the Pledge Registration Department of the Ministry of Justice of the Kyrgyz Republic. The registration process involves paying state fee, submitting application and the original pledge agreement.

It's important to note that failure to register a share pledge with the authorized state body may result in the pledge being ineffective against third parties, so it's essential to follow the proper registration procedures to ensure the validity and enforceability of the pledge.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, private sale is a recognized method for enforcing a share pledge in the Kyrgyz Republic. The pledgor and pledgee can agree on the terms of the private sale in the pledge agreement, or the sale can be conducted through a court-approved public auction.

In the event of default by the pledgor, the pledgee may enforce the pledge by selling the pledged shares. The pledgee must provide the pledgor with notice of the intended sale, including the time, place, and method of sale, as well as the minimum price for the sale, which must be equal to or greater than the outstanding debt secured by the pledge.

If the pledged shares are sold for more than the outstanding debt, the excess proceeds must be returned to the pledgor. If the pledged shares are sold for less than the outstanding debt, the pledgor remains liable for the remaining debt.

As for the endorsement types used for the share certificates, on the territory of the Kyrgyz Republic, all emissive securities are issued in form of book entry securities.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, security interests can be established over future assets, rights, and receivables of the borrower in the Kyrgyz Republic.

Under the Kyrgyz legislation, a security interest can be established over future assets and rights by way of a pledge agreement. The agreement must specify the future assets and rights to be pledged. Similarly, security interests can be established over future receivables through a pledge agreement.

It is important to note that the specific requirements and procedures for establishing security interests over future assets, rights, and receivables may vary depending on the type of asset or right in question and the specific terms of the pledge agreement.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Regarding the steps to be taken by lenders to enforce their security interest in the event of the borrower's insolvency, technical insolvency, or composition process in the Kyrgyz Republic, there may be some variation depending on the specific circumstances and the terms of the security agreement. However, the general steps that may be taken are:

- Verify the security interest: The lenders should review the security agreement and ensure that it has been properly executed and registered, if applicable, to determine the validity and enforceability of the security interest.
- Assess the priority of the security interest: If there are multiple security interests over the same asset or property, the lenders should assess the priority of their security interest relative to other security interests.
- Notify the insolvency administrator: The lenders should notify the insolvency administrator or receiver of their security interest and provide evidence of the security interest, such as a copy of the security agreement and proof of registration.
- Participate in the insolvency proceedings: The lenders should participate in the insolvency proceedings and file a claim for the outstanding debt secured by the security interest.

Enforce the security interest: If the borrower's assets are insufficient to satisfy the outstanding debt, the lenders may enforce their security interest by selling the pledged assets or property through a public auction or private sale, as permitted by Kyrgyz legislation.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The concept of a security trustee is not specifically provided for in the laws of the Kyrgyz Republic. However, lenders (pledgees) can appoint a pledge manager to represent the pledgee in exercising all of the pledgee's rights to the pledged property.

Information on the appointment or termination of the powers of the pledge manager shall be sent to the pledger and in case of a registered pledge shall be submitted to the local body of the authorized state body for registration of rights to immovable property, if the subject of the pledge is immovable property, if the subject of the pledge is movable property, the information shall be reflected in the pledge notice as provided by the Kyrgyz legislation.

In terms of the use of a parallel debt mechanism, this is not expressly provided for in the laws of the Kyrgyz Republic.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The main incentives and exemptions for project financing in the Kyrgyz Republic include:

- Tax incentives: The Kyrgyz Republic offers a range of tax incentives to attract foreign investment, including exemptions or reductions in corporate income tax, property tax, and customs duties.
- Investment protection: The Kyrgyz Republic has signed bilateral investment treaties with a number of countries, which provide foreign investors with protection against expropriation and other forms of political risk. These agreements also typically include provisions for the settlement of investment disputes through international arbitration.
- Government guarantees: The Kyrgyz Republic government may provide guarantees for project financing, which can reduce the perceived risk of the investment and lower the financing costs. These guarantees typically cover political risks such as expropriation, breach of contract by the government, and transfer restrictions.
- Concessional financing: The Kyrgyz Republic is eligible for concessional financing from international financial institutions such as the World Bank, Asian Development Bank, and European Bank for Reconstruction and Development. This financing is typically offered at lower interest rates and longer repayment periods than commercial financing.
- Renewable energy incentives: The Kyrgyz Republic has significant potential for renewable energy development, and offers a range of incentives for projects in this sector. These incentives include feed-in tariffs, tax exemptions, and simplified licensing procedures.
- Infrastructure development: The Kyrgyz Republic government is actively promoting infrastructure development, including transport, energy, and telecommunications. Projects in these sectors may be eligible for government support, including tax incentives and guarantees.

It is important to note that the specific incentives and exemptions available for project financing in the Kyrgyz Republic may vary depending on the sector, size, and location of the project.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

There are several incentives and exemptions available specifically for foreign investors in the Kyrgyz Republic. Some of these incentives and exemptions include:

- National treatment of business activities, equal investment rights of domestic and foreign investors, no intervention into the business activities of investors, protection and restitution of infringed rights of investors in accordance with the laws of the Kyrgyz Republic;
- Export or repatriation of profit gained on investment, proceeds of investment activities in the Kyrgyz Republic, property, and information, out of the Kyrgyz Republic;
- Protection against expropriation (nationalization, requisition, or other equivalent measures, including action or omission on the part of authorized government bodies of the Kyrgyz Republic that has resulted in seizure of investor's funds or investor's deprivation of the possibility to use the results of their investment). In exceptional cases involving public interest, investments may be expropriated with concurrent state guarantees of appropriate coverage of damage incurred by the investor;
- The investor's right to freely use the income derived from their activities in the Kyrgyz Republic;
- The freedom to invest in any form into objects and activities not prohibited by the legislation of the Kyrgyz Republic, including the activities subject to licensing;
- Freedom of monetary transactions (free conversion of currency, unbound and unrestricted money transfers; should provisions restricting money transfers in foreign currency be introduced into the legislation of the Kyrgyz Republic, these provisions will not apply to foreign investors, with the exception of cases where investors engage in illegitimate activities (such as money laundering);
- The right to: establish legal entities of any organizational and legal form provided by the legislation of the Kyrgyz Republic; open branches and representative offices within the territory of the Kyrgyz Republic; select any organizational and managerial structure for the business entities, unless a different structure is explicitly required by law for the given organizational and legal form of a business entity; acquire property (except land plots), shares, other securities, including governmental securities; participate in privatization of state property, establish associations and other unions; hire local and foreign employees subject to the legislation of the Kyrgyz Republic; and engage in other investment activities not prohibited by legislation in the Kyrgyz Republic;
- Recognition by public authorities and officials of the Kyrgyz Republic of all intellectual property rights of foreign investors;
- In the event of amendments to the legislation on investments, or the tax legislation of the Kyrgyz Republic or the non-tax payments legislation, the investor and the investee who meet the statutory requirements have the right, during 10 years from the date of signing the stabilization agreement, to choose such conditions as may be most favourable to them for paying taxes including value added tax but excluding other indirect taxes, and

nontax payments (except fees and charges for public services) in the manner provided by the laws of the Kyrgyz Republic. The procedure and conditions for applying stabilization regime to tax and nontax legal relationships are established by the laws of the Kyrgyz Republic;

- Other guarantees specifically provided in bilateral and multilateral international treaties on the promotion and protection of investment, to which the Kyrgyz Republic is a party.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

No. There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Yes, there are restrictions on foreign investments in the Kyrgyz Republic. Below are some of the key restrictions on foreign investments in the Kyrgyz Republic:

Restrictions on foreign ownership: Certain sectors of the economy, such as media, broadcasting, and defense industries, may be subject to restrictions on foreign ownership.

Requirements for obtaining permits: Foreign investors may need to obtain permits or approvals from government authorities before making investments in certain sectors or industries. These requirements may vary depending on the nature and size of the investment.

Limits on land ownership: Foreign individuals and legal entities are not allowed to own land in the Kyrgyz Republic, except in limited circumstances such as transfer into ownership in case of foreclosure of mortgage loan with the obligation of subsequent alienation of the land plot within two years from the date of origination of ownership of land or long-term leasehold rights.

It is important to note that the regulations and restrictions on foreign investments in the Kyrgyz Republic are subject to change, and may vary depending on the nature and size of the investment.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no specific minimum equity requirement for project financing in the Kyrgyz Republic under the legislation. However, the actual equity requirement may vary depending on the type, size, and risk profile of the project, as well as the requirements of the lenders or investors involved.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

To be valid and enforceable in the Kyrgyz Republic, project finance documents may need to be registered or filed with various government authorities. The registration and filing requirements that are applicable will depend on the nature and structure of the project, as well as the type of document in question. Below are some of the common registration and filing requirements that may be applicable for project finance documents in the Kyrgyz Republic:

Registration of security documents: Security documents, such as mortgages or pledges, must be registered with the authorized state bodies. The registration

process involves filing an application and paying a registration fee. Once registered, the security document will be publicly recorded and enforceable against third parties.

Filing of corporate documents: Project companies may need to file corporate documents, such as articles of incorporation or bylaws, with the authorized state bodies. This filing is required to establish the legal existence of the company and ensure that it is registered and in good standing.

Compliance with licensing requirements: Certain projects, such as those in the energy or mining sectors, may require special permits or licenses from government agencies. Compliance with these licensing requirements may be a condition precedent to the validity and enforceability of project finance documents.

It is important to note that the specific registration and filing requirements applicable to project finance documents in the Kyrgyz Republic may vary depending on the type of project and the legal structure of the transaction.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

The insurance activity is mainly regulated by the Law of the Kyrgyz Republic "On organization of insurance in the Kyrgyz Republic" dated 23 July 1998 No. 96 ("**Insurance law**") and fundamentals are provided in the Civil Code of the Kyrgyz Republic dated 8 May 1996 No.15. In accordance with Insurance law the insurance policy should be governed by Kyrgyz laws, including the terms and conditions of the policy and the rights and obligations of the insurer and the insured. It's worth noting that insurance activity is subject to licensing in the Kyrgyz Republic.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Generally, the assignment of insurance and reinsurance proceeds under insurance or reinsurance policies to the benefit of the lenders is not prohibited under Insurance law. It's worth noting that this might be subject to certain restrictions and limitations. It's essential to review the terms and conditions of each insurance agreement.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

In Kyrgyzstan there might be several potential complications, concerns or issues in relation to the insurance provisions under the project financing documentation. Firstly, their compliance to project financing documentation under legal regulatory framework set forth by Kyrgyzstani legislation. Secondly, one of the key concerns with insurance provisions in project financing is ensuring that the insurance coverage is adequate to protect the project and its participants from potential risks and losses. The project documents may require certain types and levels of insurance coverage, and the insurance policies should be carefully reviewed to ensure they meet these requirements. Thirdly, insurance provisions of project financing documentation should clearly state and include events of force majeure defined by Kyrgyzstani legislation. Overall, it is essential for parties to carefully review and consider the insurance provisions in project financing documentation for compliance with legislation.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

In accordance with the legislation of the Kyrgyz Republic, **Public-Private Partnership ("PPP**") is a permitted method of developing projects. The PPP as a method of developing projects is regulated by the Law of the Kyrgyz Republic "On public-private partnership" dated 11 August 2021 No. 98.

The Kyrgyz Republic has been actively developing PPP projects. To date, there are 19 implemented PPP projects, 5 PPP projects at the competition stage, and 44 PPP projects are currently under preparation. Most PPP projects are developed in areas of transport, energy, social, and environment. Some of the prominent PPP projects developed in Kyrgyzstan are the following:

- Establishment of hemodialysis centers in Kyrgyz Republic;
- Electronic ticketing in public transport;
- Reconstruction of the cinema for children 'Kyzyl Kyrgyzstan";
- Modernization of airports of the Kyrgyz Republic;
- Bishkek city public transportation improvement;
- Installation of CT scanners in public healthcare institutions.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

In accordance with Kyrgyzstani legislation on PPP, direct agreements between the public authorities and the Lenders are permissible only in case the amount of investment is more than 1 billion Kyrgyz soms (approximately 11 439 278 USD). The PPP project is awarded through direct negotiations provided that the investment meets the set investment amount and the qualification requirements.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The government of the Kyrgyz Republic has demonstrated commitment to supporting PPP projects. There are several government supports available in the Kyrgyz Republic:

- Provision of guarantee for the fulfillment of obligations by the state partner.
- Provision of guarantee of minimum profitability of the PPP project;
- Provisions by the tax legislation of the Kyrgyz Republic;
- Provisions of preferential rental rates for the use of property owned by the state and/or municipality;
- Provision of state or municipal preferences under the PPP agreement;
- Provision of assistance in obtaining permits and licenses.

Some of the government guarantees available in the Kyrgyz Republic:

- Non-interference by the state partner in the economic activity of the private partner;
- Protection of property of a private partner from nationalization or other equivalent measures;
- Rightly to freely own, use and dispose of investments made to the PPP project and the income and profits received from it;

- Right to carry out operations on the sale and purchase of cash and non-cash national and/or foreign currency on the territory of the Kyrgyz Republic;
- Right to review the terms or early terminations of the PPP agreement and receive compensation for damage caused due to the adoption of legal acts deteriorating conditions of project implementation.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

The allocation of risk between partners is one of the most crucial ways to ensure the successful implementation of a PPP arrangement. Article 6 of the PPP law ensures principle of fair distribution of risks. In accordance with Article 14 of the PPP law, PPP agreement should include term on distribution of risks between the public and private partners.

The allocation of political risk in PPP agreements depends on the specific terms of the agreement, as well as the nature of the risk. Generally, political risks are shared between the public and private partners. In some cases, the public party may assume a greater share of the political risk, particularly in cases where the project involves a public service or infrastructure that is of critical importance to the government. On the other hand, in some cases, the private party may assume more political risk in exchange for greater potential rewards or as a condition of securing financing for the project. Therefore, the allocation of political risk in PPP agreements will depend on the specific circumstances of the project and the priorities and preferences of the public and private parties involved in PPP arrangements.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, in accordance with Article 6 of the PPP Law any laws and by-laws adopted after the conclusion of PPP agreement and affecting PPP issues are not applicable to existing project agreements. An exemption of applicability is illustrated in cases when the initiative to apply amended legal provisions or newly adopted laws comes from the private partner. In this case, amendments to existing agreements shall be made in accordance with the procedure stipulated by the relevant PPP agreement.

**23. Is force majeure specifically regulated under the local legislation?**

Generally, force majeure is regulated by the civil legislation of the Kyrgyz Republic. Para. 3 of Article 356 of the Civil Code of the Kyrgyz Republic defines force majeure and provides a respective regulation for its applicability. Para. 3 of Article 356 of the Civil Code provides a basis for exemption from liability in cases of force majeure. In accordance with the above-mentioned legal provision force majeure is extraordinary and unavoidable circumstances under the given conditions. Such circumstances, however, do not include a breach of duty on the part of the debtor's counterparties, the unavailability of goods on the market needed for the fulfillment of obligations, or the debtor's lack of the necessary funds.

It's worth noting that in accordance with provisions of the above-mentioned Article, the agreement may provide for other conditions of exemption from liability.

**24. What are the general environmental and social requirements in project financings?**

In accordance with Kyrgyz law, it's prohibited to finance and implement projects related to use of natural resources without a positive conclusion of the state's ecological expertise. Particularly, according to the Regulation on the procedure of environmental impact assessment in the Kyrgyz Republic projects should undergo the assessment process to consider the potential environmental impact of the project. Moreover, an environmental management plan should be designed to ensure that the project will be operated in an environmentally responsible manner. Regarding social requirements in project financing, there are general requirements to engage with local communities and stakeholders and ensure compliance with labor legislation of the Kyrgyz Republic.

## F. Jurisdiction, Waiver of Immunity

### 25. Are submission to a foreign law and the waiver of immunity provisions enforceable?

In accordance with the civil legislation of the Kyrgyz Republic, agreements can be governed by foreign law. The enforceability of a submission to a foreign law rather that Kyrgyz law should be clearly indicated or directly derived from the terms of the agreement. In accordance with Kyrgyz legislation, the freedom of parties to choose the governing law of their agreement is recognized. Waiver of immunity is generally recognized action which is subject to certain limitations under by legislation of the Kyrgyz Republic.

### 26. Can financing documents provide for arbitration clauses?

Yes, financing documents can include arbitration clauses in the Kyrgyz Republic. In accordance with Kyrgyzstani legislation, parties are free to agree to resolve any arising disputes through arbitration. The Kyrgyz Republic has adopted UNCITRAL Model Law on International Commercial Arbitration and ratified ICSID Convention.

For instance, Article 19 of the PPP Law states that any disputes arising between parties to the PPP agreement in connection with the conclusion, performance, and termination of said agreement shall be resolved through negotiations in compliance with the provisions of the PPP agreement. In case the parties cannot resolve a dispute amicably, the dispute shall be considered either by the state courts of the Kyrgyz Republic or the international court/arbitrational tribunal if the PPP agreement provides for it. Thus, the PPP agreement provides for arbitration clauses.

In order to ensure the enforceability of an arbitration clause in a financing document in Kyrgyzstan, parties should consider the following:

1. An arbitration agreement should be in writing and signed by the parties. It can be in the form of a separate agreement or as a clause within the financing documents.
2. The arbitration agreement should clearly identify the disputes that are subject to arbitration and the rules and procedures that will govern the arbitration.
3. The arbitration agreement should specify the seat or legal place of arbitration, which is the jurisdiction in which the arbitration will take place. Parties may choose a foreign seat of arbitration, but this may affect the enforceability of the award in Kyrgyzstan.
4. Parties should ensure that the arbitration agreement complies with any mandatory provisions of Kyrgyz law and does not violate public policy.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

The Kyrgyz Republic is currently at the stage of developing its economy and project financing overall. Some of the main trends in project financing include the following:

- Public-Private Partnerships (PPPs): PPP projects became one of the most popular methods of project financing in the Kyrgyz Republic. Particularly, PPPs are mainly used in infrastructure, transport and energy sectors. It's worth noting that renewable energy is a separate block of PPP projects that is highly supported and developing in the Kyrgyz Republic. For instance, IFC and the government of the Kyrgyz Republic will cooperate in the development of a solar plant under the Scaling Solar Program.
- Mining: The mining sector is a key driver of the Kyrgyz economy, and project financing in this sector is focused on the development of new mines and the expansion of existing operations. As of today, there were several big projects in mining sector.
- Islamic finance: Project financing based on Islamic principles has been actively developing in the Kyrgyz Republic. There are several banks, microfinance companies that support and provide financing on Islamic principles.
- Microfinance: Microfinance has become an important source of funding for small and medium-sized enterprises (SMEs) in the Kyrgyz Republic, particularly in rural areas.

Considering above mentioned developments and focus sectors, project financing is rapidly developing in the Kyrgyz Republic. The government of the Kyrgyz Republic tries to implement reforms and provide guarantees that will attract foreign investments into the country.

**28. Are any significant development or change expected in the near future in the project finance market?**

As mentioned earlier the project finance market is still developing in the Kyrgyz Republic. The government of the Kyrgyz Republic will likely to implement the following measures:

- Further support and development of PPP. The Kyrgyz government has expressed a strong commitment to developing PPP projects. Reviewing experience of our country PPP is a key mechanism for financing public infrastructure projects. It is expected that more PPP projects will be launched in the coming years and that the government will continue to implement legal and regulatory reforms to encourage private sector participation.
- Focus on renewable energy and mining sectors. As mentioned above, the Kyrgyz government actively participates in PPP projects focused on the renewable energy sector. The mining sector is a crucial area of development and our authorities will likely to implement new reforms to promote its development.
- The Kyrgyz government also stipulates on importance of digital transformation. In coming years there are expected more projects in digital infrastructure, e-commerce platforms and financial technologies.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

During the LIBOR transition period, the RFR rates is commonly used in the Kyrgyz Republic. Alternative rates are Secured Overnight Financing Rate (SOFR) for USD and Sterling Overnight Index Average (SONIA) for GBP.

# LIBYA

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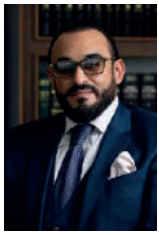

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

- Commercial code (for private projects)
- The Regulations Governing Administrative Contracts (if the Government is a party)

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance is undeveloped and uncommon practice in Libya as a result of political and economic instability.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

- Mortgages
- Personal guarantee

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, the shares of a company could be pledged as a security to the benefit of lenders. Article 140 requires the approval of the company for shares' pledge, it stipulates that "If the company approved shares' pledge, this will be considered as prior approval for transfer of the pledged shares to the buyer in case of execution on shares."

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Not applicable.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Not applicable.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

In case the borrower becomes insolvent, the creditors shall participate in what results from the liquidation of the company's liabilities, according to their order of date and priority in sharing the remaining funds, according to Articles 999-1031 of the Commercial Code.

And in case there is a mortgage with the bank, the bank can seize it immediately to collect the value of the loan in the event that the company becomes insolvent and is unable to pay its debts to the bank.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Not applicable.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

There are currently no incentives nor exemptions rendered for project financing in Libya.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Yes, foreign investors that come under Law No. 9 for the year 2010 Regarding Investment Promotion enjoy extensive privileges and exemptions. The incentives provided for by law can be encapsulated as tax customs exemptions on equipment, a five-ear income tax exemption, a tax exemption on reinvested profits and exemptions on production tax and expert fees for goods produced for export markets. Investors are also granted the privilege to transfer net profits overseas, defer losses to future years, import necessary goods, and hire foreign labor if local labor was unavailable. Foreign workers may acquire residency permits and entry reentry visas for five years and transfer earnings overseas.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Yes, there exists limited restrictions on borrowing bank loans and shareholder loads from abroad albeit in national or in foreign currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Yes, there are. Both Law No. 9 for the year 2010 Regarding Investment Promotion as well as Law No. 23 for the year 2010 Regarding Commercial Activities contain restrictions placed on foreign participation and investments in general that manifest in capital requirements and restricted types of activities.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

The minimum equity requirement is dependent on the particular type of the project concerned.

The following is an example for such: Decree 207 for the year 2012 Concerning Participation of Foreigners stipulates that when foreign contribution exists, the minimum project value for the following contracts is ought to be 50 million Libyan dinars: Building and construction, construction of roads, bridges and dams, marine constructions such as marine quays, break waters, dry docks and deepening ports, construction of airports and runways, Laying railways and construction of stations.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

The requirements are dependent on the particular nature of the project concerned; requirements are different across the different types of projects; i.e., it is on a case-by-case basis.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

No.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There are no other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Public-Private Partnership Projects are lack of sufficient regulation within the Libyan jurisdiction and therefore a seldomly used method of developing projects in Libya.

This is particularly as public procurement is more regulated and therefore more commonly used as a preferred method of project development.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

They are indeed permissible under Libyan law, but not commonly seen.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Libyan law does not permit governmental support in the form of debt assumptions or financial guarantees on a particular project.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

There is no straightforward answer due to:

i. The inexistence of sufficient regulation on Private-Public Partnership

ii. The uncommon nature of PPP projects means there are not enough cases and projects to safely conclude nor assume who 'usually takes' the responsibility'.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Protection against change in law is not guaranteed. This is predominantly dependent on contents of the newly passed law and whether it contains exceptions to its application. A predominate example of this within the Libyan jurisdiction is the passing of Law No.1 of 2013 Regarding the Prohibition of Interest-Based Transactions in Libya which had a retrospective effect and ended all interest-based transactions even if signed prior to the date of the passing of the legislation.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is regulated by virtue of Art.220 of the Libyan Civil Code.

**24. What are the general environmental and social requirements in project financings?**

Not applicable.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

This depends on whether the waiver of immunity is in relation to the right to not be sued or the seizure of public assets. As regards to the latter, the waiver of immunity in relation to the seizure of public assets will not be enforceable.

The submission to a foreign law, granted that is both agreed upon by the parties, can be indeed enforceable. This is contingent however on the public party obtaining the necessary approvals.

**26. Can financing documents provide for arbitration clauses?**

Libya law does not prohibit the inclusion of arbitration clauses in financing agreements, provided that the public party has obtained the necessary approval from relevant authorities prior to signing such agreements.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

The main current trend in Libya is the Public Funding and Loans.

**28. Are any significant development or change expected in the near future in the project finance market?**

To the best of our knowledge, there will be no significant development or change expected in the near future.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

Interest rates have been prohibited by law in all types of transactions since 2016.

# NETHERLANDS

## ORANGE CLOVER

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Dutch project finance transactions are generally regulated by the Dutch Civil Code (DCC). There are no specific regulations applicable to project finance in the Netherlands. Project finance transactions may fall within the scope of the Dutch Financial Supervision Act (DFSA) and may trigger the Dutch Competition Act.

Furthermore, depending on the type of project, various specific laws and regulations may apply, including laws relating to (among others): the environment, maritime constructions, mining, energy, health and public commissioning.

The Netherlands is also a party to several international treaties that may be relevant for project financings, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in the Netherlands is considered mature, with a strong track record of successful project financings across various sectors, such as renewable energy, infrastructure and transportation. Significant activity is involved in large scale offshore windfarms.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most commonly used security types in project financings in the Netherlands include mortgages, pledge of shares, pledge of movable assets, and pledge of receivables (including bank accounts and insurance and project contracts).

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities**

**or procedure to be followed for establishing or perfecting a share pledge?**

Shares of a company can be pledged as a security to the benefit of lenders. A Dutch notarial deed of pledge of shares is required.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Enforcement of a share pledge can take place by means of a private sale either (a) with the agreement of the pledgor provided as of the time enforcement becomes possible or (b) with the approval of the relevant Dutch court. Typically BV type of companies are used in project finance which only have registered shares and no share certificates.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

A pledge can be established over future movable assets. A pledge can be established over future receivables where the debtor has been notified of the right of pledge. An undisclosed pledge cannot be established over receivables (not arising out of an existing legal relationship). A mortgage cannot be established over future immovable property. A pledge can be established over future shares.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

In case of payment default (and in case of occurrence of any other additional agreed enforcement trigger), a pledgor or mortgagee can enforce its security interest by means of a (a) public auction sale, (b) private sale with the agreement of the security provider or (c) private sale with the agreement of the relevant court. The enforcement can take place regardless of the bankruptcy of the security provider (provided that the bankruptcy trustee may require the mortgagee/pledgee to apply a limited cooling-down period of maximum 4 months). In case of a pledge of receivables, the pledgee may notify the debtor to pay to its account and apply the receipts to its secured claim.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The security trustee concept is not considered enforceable in the Netherlands. The parallel debt structure is normally used in joint security arrangements.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The most widespread current incentive supporting Dutch project financings is the Dutch renewable energy subsidy scheme.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Not specific or relevant to project financings.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency in the Netherlands other than in respect of consumers, i.e., where amounts are greater than EUR 100,000.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Generally, there are no restrictions for foreign investments in the Netherlands. There are certain (limited) foreign direct investment screening and restriction mechanisms in place and coming into place.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no minimum equity requirement, under the legislation for project financings in the Netherlands. In practice, project financiers will have minimum equity requirements.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

There are only limited formal requirements for project finance documents in the Netherlands. These include amongst other (a) mortgages need to occur by means of a notarial deed of mortgage with registration in the Dutch land registry, (b) pledges of shares need to occur by means of a Dutch notarial deed and (c) non-possessory pledges of movable assets and undisclosed pledges of receivables need to be registered with the relevant Dutch tax authorities (for time-stamping purposes).

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Local insurance policies can be governed by a foreign law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Security assignments are not available under Dutch law. There is no Dutch law restriction on pledging insurance proceeds provided these do not insure liability towards third parties. Pledge or transfer restrictions in the insurance policies will limit the possibility to provide valid pledges thereover.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

No specific ones worth mentioning in our view.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

PPP is a permitted method of developing projects in the Netherlands and there have been several successful PPP projects developed in the country, particularly in the infrastructure and public services sectors.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between public authorities and lenders are permissible under local law and are commonly seen in the project finance market in the Netherlands.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Host government supports available in the Netherlands include Dutch development

bank financing, Dutch state backed export guarantee, and the renewable energy subsidy scheme.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Political risk events are usually the responsibility of the private party under PPP agreements in the Netherlands.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Investors and lenders are usually not protected against changes in law passing subsequent to the signing of the relevant concession agreement in the Netherlands. They may have certain protections under bilateral investment treaties.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is provided for under Dutch contract law, but can and is normally contractually agreed upon specifically.

**24. What are the general environmental and social requirements in project financings?**

The environmental and social requirements for project financings will depend on the specifics of the project financing. Generally, projects will need to be assessed to determine possible environmental effects. Before development consent is granted, projects likely to have significant effects on the environment by virtue of their nature, size or location must undergo an Environmental Impact Assessment ("EIA"). The developer will be required to submit an EIA to the competent authority when applying for development consent. Additional assessments may apply depending on the specifics. Specific environmental licences may apply depending on the project specifics.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Submission to a foreign law and the waiver of immunity provisions are generally enforceable in the Netherlands.

**26. Can financing documents provide for arbitration clauses?**

Yes.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Currently, the main trend in project financings in the Netherlands is a focus on renewable energy projects.

**28. Are any significant development or change expected in the near future in the project finance market?**

No.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

Dutch project financings are mainly EURIBOR based.

# NIGERIA

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## A. Overview

**1. What are the main legislation and international treaties governing project financing in your jurisdiction?**

There are no legislations that apply specifically or govern project finance in Nigeria. However, there are a plethora of laws and legal instruments that may apply to project finance and the list below is not exhaustive:

a. Business Facilitation (Miscellaneous Provision) Act
b. Companies and Allied Matters Act ("**CAMA**") 2020
c. Companies Income Tax Act
d. The Central Bank of Nigeria Act
e. Public Procurement Act 2007
f. Investment and Securities Act 2007
g. Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 2004
h. Infrastructure Concession Regulatory Commission (Establishment) Act 2005 (the "**ICRC Act**")
i. Conveyancing and Law of Property Act of 1881
j. Property and Conveyancing Law of 1959
k. Land Use Act, Cap L5, Laws of the Federation of Nigeria 2004
l. Mortgage and Property Law of Lagos State 2010
m. Registration of Titles Law
n. Stamped Duties Act
o. Secured Transactions in Moveable Assets Act 2017
p. Double Taxation Treaties

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The projects finance market in Nigeria is relatively mature, with significant activity in sectors such as oil and gas, power, infrastructure, and real estate. Despite economic challenges, there have been

some significant project financings closed in Nigeria over the last twelve (12) months some of which are:

a. The construction of a $1.5 billion deep seaport in the Lekki Free Trade zone, Lagos which is designed to handle four million (4,000,000,000) metric tons of dry goods a year.

b. A $2.5 billion financing deal for the development of a three million (3,000,000) tonnes Dangote Fertilizer Plant in Lagos.

c. The first phase of the Lagos Blue Line Rail Project.

d. The 32 metric ton per hour Lagos Rice Mill.

e. 18.75km 6 lane rigid pavement Eleko Junction to Epe Expressway.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most used security types in project financings in Nigeria are mortgage over project assets, bank account charge, share charge, all assets debenture, assignment of project revenues, lien, lease, guarantees (corporate, bank or personal), assignment of interest in contract and letters of credit amongst others**.**

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

The shares of a company cannot be pledged as a security by the mere deposit of a share certificate to a lender. This is because a share certificate is a document merely evidencing title and not an instrument conferring title. Thus, for the shares of a company to be effectively pledged as a security to the benefit of lenders, in addition to the deposit of the share certificate, the borrower must also deposit an executed but undated share transfer instrument (which the lender may file with the appropriate authority in the event of a breach) with the lender.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, private sale/private placement of shares is a recognized method for the enforcement of share pledge in Nigeria.

There are no endorsement types for share certificates in Nigeria. Share certificates (which are in registered form) is prima facie evidence of the title of a member to the shares of a company and contain terms such as name and number of shares held by a member. Upon the enforcement of a share pledge, the Lender will file the undated but executed share transfer instrument with the Corporate Affairs Commission ("**CAC**") and submit the acknowledgement from CAC as well as the share certificate of the borrower to the company. The company once satisfied that the interest in the shares has passed to the Lender will enter the name of the member in the register of members, cancel the previous share certificate of the borrower and issue a new certificate in the name of the Lender.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, security interests can be created over future assets, rights, and receivables of the borrower in Nigeria either by way of a

floating charge over a specified category of assets or fixed charge where the future assets in question are clearly identifiable.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Where the borrower becomes insolvent, is technically insolvent and/or commences composition process, the lender is only able to enforce its security interest in accordance with the enforcement provisions and other terms of the finance and security documents, and as provided by applicable law. Security documents governed by Nigerian law typically specify the events that allow the security interest to be enforced. Once the lender is entitled to enforce the security in accordance with its terms, the security documents typically provide for enforcement through either the: (i) creditor's or security trustee/agent's exercise of a power of sale to dispose of the secured assets; or (ii) appointment of a receiver or a receiver/manager in respect of the secured assets. If the power of sale has arisen and is exercised, the sale of the secured assets can be by public auction or, if expressly provided in the security document, by private sale. The appointment of a receiver or a receiver/ manager needs to be registered at the CAC.

However, where the security interest is a mortgage on a real property, the lender as mortgagee can also: (i) apply for a court order to extinguish the mortgagor's equity of redemption and vest the mortgagor's entire interest in the mortgagee; or (ii) enter into and take possession of the mortgaged property.

The lender is not obligated to maximise the proceeds from enforcement of the security, but must act in good faith in realising such proceeds. The lender also becomes a trustee of the borrower for any proceeds from the sale of the secured assets and has a duty to deliver to the borrower the balance of the proceeds of enforcement after deducting amounts required to discharge the secured obligations.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Yes, the concept of security trustee is enforceable in Nigeria. The trustee holds the securities created on a trust for the lender/ investors in project financing.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

There are several incentives and exemptions for project financing in Nigeria which are mostly designed to encourage investment in specific sectors of the economy, promote economic growth and create employment opportunities. The availability and applicability of some of the incentives and exemptions listed below may vary depending on the specific project, sector, and investor.

a. Tax holidays: pioneer companies in certain industries may on application be granted tax holidays for an initial period of three (3) years which may be extended for up to two (2) years. Companies engaged in gas utilization are also entitled to a tax-free period of up to five (5) years;

b. Export incentives: export processing zones and free trade zones are zones in Nigeria that are free of tax and foreign exchange restrictions. The Duty Draw Back scheme in the export processing

zone provides for fixed and individual draw-back facilities that provide for refund of duties and sub-charges on raw materials;

c. Gas utilization incentives: companies engaged in gas utilization are entitled to accelerated capital allowance after tax free period. Investors in gas pipelines can also obtain additional tax free period of five (5) years;

d. Road Infrastructure Development Scheme: participants in the scheme are entitled to recover the cost incurred by them in the construction or refurbishment of eligible roads as credit against company income tax payable; and

e. The Companies Income Tax Act ("**CITA**") specifies incentives that are applicable to the construction, ownership, and operation of power projects. CITA grants a maximum of seventy per cent (70%) tax exemption on interest on foreign loans where the repayment period of the loan is above seven (7) years and the moratorium period is not less than two (2) years.[32] Additionally, CITA prescribes incentives available to companies for the reconstruction or replacement of plants and machinery and grants an investment allowance to a company that has incurred expenditure on plant and equipment at the rate of ten percent (10%)[33] amongst others.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Please refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions for borrowing bank loans and shareholder loan from abroad and in a foreign currency. However, for a company accessing foreign currency to be able to repatriate the same to the country of source at the Central Bank of Nigeria ("**CBN**") official exchange rate, the company is required to bring in its foreign currency into Nigeria through an authorized dealer using a Certificate of Capital Importation ("**CCI**"). An authorized dealer must issue the company an electronic CCI ("**E-CCI**") within twenty-four (24) hours of capital importation. The e-CCI allows the company the right to the repatriation of capital and access to foreign exchange ("**FX**") at the CBN official exchange rate.

It is important to note that in recent times, the CBN is finding it very difficult to make FX available to businesses including companies that imported foreign currency into the country through an authorised dealer and have a valid e-CCI due to the shortage of foreign currency in Nigeria.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Yes. a foreigner who intends to invest directly in Nigeria is required to incorporate a company except he falls within the exemptions listed in Section 80 of CAMA as amended by the Business Facilitation Act 2022 which includes a company invited into Nigeria to execute any specified individual project, foreign companies in Nigeria for the execution of specific individual loan projects on behalf of a donor country, foreign government owned companies engaged solely in export promotional

32 Third Schedule Table I (as amended by the Finance Act, 2019).

33 See Section 32 of CITA.

activities, engineering consultant and technical experts engaged by any government agency for the execution of a specified individual project, and any other company exempted by other Acts of the National Assembly.

Further, foreign investors are prohibited from incorporating a company that will venture into businesses listed as the 'negative list' under the Nigerian Investment Promotion Commission Act. These businesses are as follows:

- production of arms and ammunitions.
- production of and dealing in narcotic drugs and psychotropic substances.
- production of military and para-military wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services.
- such other items as the Federal Executive Council may, from time to time, determine.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no minimum equity requirement for project financing in Nigeria.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Project Finance documents are generally not required to be registered and filed in Nigeria to be valid and enforceable in Nigeria. However, where any legislation requires any document forming part of project finance documents to be registered and filed, such document must be registered and filed to be valid and enforceable. Examples of such requirements are outlined below:

**Concession Agreement**: The Infrastructure Concession Regulatory Commission, under the ICRC Act, is required to take custody of every concession agreement made under the Act and monitor compliance with the terms and conditions of such agreement.

**Foreign Technology Transfer Agreement**: the National Office for Technology Acquisition and Promotion Act requires that all contracts and agreements for the transfer of foreign technology to Nigerian partners be registered with the National Office for Technology Acquisition and Promotion.

**Security Document relating to Immoveable Property such as Land**: For security interests created on land such as a mortgage and assignment amongst others to be valid, the consent of the appropriate regulatory authority must be first be sought and obtained, the document must be stamped at the Federal Inland Revenue Services (FIRS) and registered at the relevant land registry (to constitute a valid notice of any encumbrance created on the land to the public).

**Finance Documents such as loan agreements and security documents:** Our law particularly, Section 22 of the Stamp Duties Act, Cap. S8, Laws of the Federation of Nigeria (LFN), 2004, requires that instruments executed in or outside Nigeria to be stamped in order for the same to be admissible in evidence before Nigerian courts and to be enforceable by the said courts. Thus, the Finance Documents will be liable to stamp duty and are required, where they are executed in Nigeria, to be stamped within forty (40) days from the date they were executed in Nigeria and where they are executed outside Nigeria, to be stamped within thirty (30) days from the date they are first received in Nigeria, in order to render them enforceable and admissible in evidence in Nigerian courts.

Generally, not stamping an instrument that is required to be stamped will not render it or the security interest created thereunder void or invalid. However, a court in Nigeria may not admit an unstamped instrument for the purpose of proving the content of such document and any security document that is required to be registered with the CAC (as further discussed below) must be stamped prior to its submission for registration.

Similarly, Section 222 of CAMA provides that any security document or instrument under which a company creates a charge must be registered with CAC. Any registrable charge that is not registered with the CAC within ninety (90) days of its creation will be void against a liquidator (appointed for the company) and any creditor of the company. In other words, the risk of not registering any registrable security document is that the security purported to be created in the document would be void against a liquidator appointed for the chargor and any other creditor of the chargor. Also, the registration of a charge with the CAC serves as constructive notice to a third party that intend to take security over an asset of a company.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Similar to a simple contract, local insurance policies may be governed by a foreign law if agreed by the parties and the law has some form of connection with the local policies. However, where policies have no connection with any other country or law (such as where the insurer and reinsurer is a Nigerian company, the insurance product is local and the contract is expected to take effect in Nigeria), the policies shall be governed by Nigerian law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Insurance proceeds are usually assigned by way of security for the benefit of the lenders, with a provision for reassignment to the assignor after the secured obligations have been discharged. The Central Bank of Nigeria prohibits a Nigerian resident (whether a corporate or a natural person) from assigning Nigerian residents' annuities and insurance policies to non-residents. If a non-resident lender proposes to take security over residents' insurance policies, that lender would either: (i) appoint a local security agent to which the insurance proceeds are assigned on the lender's behalf, or (ii) require the borrower to establish an insurance proceeds account into which all insurance proceeds are paid, and then take security over that account.

The National Insurance Commission prohibits the assignment of reinsurance policies generally.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There are no other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, PPP is a permitted method of project development in Nigeria. PPP has been adopted in developing several

projects in Nigeria including the recently commissioned Lekki Deep Sea Port, the 30KM long Lekki-Epe Expressway, Lagos, the 614-kilometre Ajaokuta-Kaduna-Kano natural gas pipeline being developed by the Nigerian National Petroleum Company Limited (NNPC Limited), the integrated refinery and petrochemical complex being constructed by Dangote Group in the Lekki Free Zone, Build Operate and Transfer (BOT) Public Private Partnership arrangement with AJW Consortium for the establishment of a Maintenance Repairs and Overhaul (MRO) centre on a 30-year concession, the Federal Executive council approved project for the construction and management of 9 highway corridors as part of the Highway Development and Management Initiative (HDMI) for a concession period of 25 years amongst others.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, there are direct agreements between public authorities and the Lenders in Nigeria and these forms of arrangements are commonly seen in the project finance market, particularly where it relates to public or social infrastructures.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The types of government support available in Nigeria under PPP include sovereign guarantees and a debt assumption which may be in the form of an irrevocable standing payment order amongst others. However, certain regulatory approval must be obtained prior to the host government providing any support. For instance, the ICRC Act mandates any Federal Government Ministry, agency, corporation or body seeking to give any guarantee, comfort or undertaking in respect of any concession agreement to obtain the prior approval of the Federal Executive Council.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Parties to PPP Agreements ensure that risks are properly allocated to the parties that can best manage them. As such, political risk events are usually allocated to the government (by extension, the public party).

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, investors and lenders are protected against change in law subsequent to the execution of a concession agreement. Situations such as this are referred to as political force majeure events which are typically included in project finance documents.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not specifically regulated by any legislation in Nigeria. Force majeure is rather contractual terms which must be expressly included in any agreements for them to be enforceable.

**24. What are the general environmental and social requirements in project financings?**

One of the social issues that have adverse effect on investment and doing business in Nigeria is corruption. However, there have been intentional steps in the

country to wage war against corruption. New laws have been passed to combat mismanagement of public funds, bribery, corruption, money laundering and aspects of modern slavery; institutions are being revamped and there have been extensive reforms in the administration of justice to expedite the eradication of corruption.

Another notable initiative implemented in Nigeria in line with the strategic public sector transformation initiatives is the Treasury Single Account Policy. This policy requires ministries and government agencies to consolidate and pay all funds due to them into a single account from which funds can be disbursed on demand subject to certain rules and procedures. This policy has significantly strengthened the efforts against bribery and corruption in Nigeria.

Further, there are certain environmental considerations such as atmospheric emission, air pollution and so on. The Environmental Impact Assessment Act ("**EIA Act**") is the principal legislation relating to environmental issues in Nigeria. The EIA Act restricts both the public and private sector from undertaking or embarking on projects without considering the effect of the project on the environment.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Choice of law and waiver of immunity provisions included in project finance documents are generally enforceable and the Nigerian court will give effect to the provisions of any project finance document except where such will lead to absurdity and contravene public policy.

**26. Can financing documents provide for arbitration clauses?**

Yes, financing documents can expressly provide for dispute resolution mechanisms which may include arbitration and such dispute resolution mechanisms are enforceable.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

One of the main trends in project finance in Nigeria is infrastructural deficit and the need for more public-private partnership to bridge the gap. There are also certain fiscal policies (such as capital control and taxation) which pose some challenges to project finance. For example, all exporters are required to repatriate and credit all export proceeds into their domiciliary account opened with a bank in Nigeria within ninety (90) days (for oil and gas export) and one hundred and eighty (180) days (for non-oil export) from the date of export proceeds. Also, the tax environment in Nigeria is constantly evolving and new structuring challenges are sometimes triggered by changes in the tax regimes.

**28. Are any significant development or change expected in the near future in the project finance market?**

Yes, ethical funds such as Islamic finance are increasingly being utilized for project financing.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

The Secured Overnight Financing Rate (SOFR) is now commonly used as an alternative to LIBOR.

# QATAR

## SULTAN AL-ABDULLA & PARTNERS

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

There is no specific legislation and international treaties that governs project finance, *per se*. Provisions that deal with aspects of project finance arrangements may be picked up from, *inter alia*, Law No. 22 of 2004 ("**Civil Code**"), Law No. 11 of 2015 ("**Commercial Companies Law**"), Law No. 27 of 2006 ("**Trade Law**"), Law No. 13 of 2012 ("**QCB Law**"), and Law No. 8 of 2012 (QFMA Law), Law No. 16 of 2021 (Movable Assets Security Law), Law No. 12 of 2020 ("**PPP Law**") along with the other legislations.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

It is relatively mature considering the development of large-scale energy, oil and gas, infrastructure, construction, leisure and hotels, etc. projects that have been carried out in the past decade in preparation for hosting the FIFA World Cup Qatar 2022™, and which are currently being carried out to achieve the Qatar National Vision 2030.

In Qatar, there is no official platform or source that publishes reports pertaining to project financings that have been closed.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Based on our experience, the form of the assignment of contractual rights such as receivables in favor of a lender is the most commonly used security type. Mortgages of real estate, bank account pledges, LCs, bank guarantees, PCGs are also common in the Qatari market.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes.

Pledge of Shares of Companies not Listed on the Qatar Stock Exchange ("**QSE**")

We set out below the steps required for registering a pledge of shares of a company in the Commercial Register at the Ministry of Commerce and Industry ("**MOCI**"):

An application to pledge the shares of the company should be submitted to the MOCI. Along with the application, a shareholder's resolution unanimously approving the registration of the pledge, a letter from the chairman or vice-chairman or delegated member requesting the registration of the pledge with the approval of the Corporate Affairs Department at the MOCI should be submitted for joint-stock companies, a letter from the pledgor consenting the registration of the pledge, copies of IDs of partners, authorised signatories and the applicant, should also be submitted.

After obtaining MOCI's approval, a request to attest the shares pledge agreement would need to be submitted online to the Attestation Department of the Ministry of Justice ("**MOJ**") via SAK Portal (an e-services platform of the MOJ that provides, among other things, registration and authentication services) ("**SAK Portal**"). Information including the relevant parties (i.e., the pledgor and pledgee), contract details (i.e., commercial registration number, company name, P.O Box number, telephone number, expiry date, pledge period from, pledge period to, pledge value, MOCI's approval, etc.), proof of shares ownership, is required.

Pledge of Shares of Companies Listed on the Qatar Stock Exchange

First, the pledgee bank should register as a member of the Qatar Central Securities Depository ("**QCSD**") – an entity established by the Qatar Central Bank. Subject to registering as pledgee member with the QCSD, any financial institution, including non-Qatari entities, can register pledges over securities listed on the QSE.

Second, the share pledge contract must be attested before the Attestation Department of the MOJ. The contract must include provisions pertaining to dividends, voting rights, etc.

As per the guide issued by QCSD ("**Guide**") that sets out the procedures to pledging of securities (including shares), a shareholder (pledgor) can submit to the pledgee a pledge application of some or all of his securities. Such application shall include the following documents:

· Pledge contract attested by the Attestation Department at the MOJ.

· In case of companies:

a- A true copy of valid Commercial Registration / Establishment Card.

b- An approval of all the shareholders on the securities pledge operation or an authorization made by the shareholders to one of them.

· The pledge contract should be signed by the chairman or all members of the board of directors, or one of them shall be authorized to perform the pledge operation under the approval of the chairman and board members.

The pledgee shall submit a letter to QCSD requesting the pledge of securities subject to the pledge contract. Such letter shall be signed by the authorized signatories, stamped by the seal of the entity, and shall include the number of securities to be pledged, company name if applicable, and shareholder's number. The application shall be accompanied by the shareholder's (pledgor) approval of the pledge, a copy of his ID, and a copy of the pledge contract, if applicable.

QCSD will register the pledge details on the electronic system of the company in case the securities are sufficient upon the request of the pledgee and the approval of

the pledgor. The pledgee shall be informed in writing thereof.

If the securities to be pledged are found in the shareholder (pledgor) accounts with any of the members, this member shall be contacted for transferring such securities to the shareholder's account with QCSD so as to be pledged. In case that the securities subject to the pledge are offered for selling in the market, the system shall approve the pledge operation only if the member cancels the selling order.

QCSD administration will keep the application and pledge documents in the relevant file. QCSD shall notify the pledgee in writing of registering the pledge operation on its system.

*Note: Under Article 24 of the PPP Law, the shares of the project company (i.e., a company established by virtue of the PPP Law) may not be pledged for any other than the purpose of financing or refinancing the partnership project, any action to the contrary shall be null and void.*

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

No. In Qatar, enforcement of share pledge may only be carried out through court proceedings. Article 247 of the Trade Law prescribes that "*any agreement concluded at the time of the mortgage decision or after the decision shall be invalid. In the event of failure to pay the debt at maturity, the mortgagee shall have the right to own the mortgaged property or sell the same without reference to the procedures set out in Articles 241 to 243 herein.*

*However, after the debt or an installment thereof becomes payable the creditor may agree with his debtor that the mortgaged property or part thereof may be credited against the debt, and the court may order that the mortgagee owns the mortgaged property or part thereof in payment of the debt provided that its market value is estimated by an expert.*"

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes. This can be contractually arranged by entering into the assignment of rights legal instruments.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

As per Articles 606 *et seq.* of the Trade Law, any creditor, can request from the competent court to issue a judgement declaring the debtor as bankrupt in the event the latter ceases to pay its commercial debts. The creditor may request declaring the bankruptcy of the debtor by the normal procedures of filing a lawsuit. Where urgency is called for, an order on petition may be submitted to the President of the Court containing evidence of the failure to pay and the grounds for urgency.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Yes. A security trustee concept is recognized and enforceable in Qatar.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Pursuant to Article 36 of Law No. 24 of 2018 (Income Tax Law), an application for a tax exemption may be made for

certain projects that are considered to be strategically significant to the Qatar economy. The exemptions are generally granted for a period of five or ten years. Applications for an exemption are assessed based on certain criteria set out in the Qatar tax law.

Other than the mainland, there are two special jurisdictions in Qatar that provide for tax exemptions subject to fulfilling certain criteria, these are the Qatar Science and Technology Park ("**QSTP**") and Qatar Free Zones ("**QFZ**"). For example, entities set up in the QFZ can benefit from 20-year tax holiday.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Yes. Please see our response to question 9 above.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

No. We do not foresee any legal impediments in this regard.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Yes. Law No. 1 of 2019 ("**Foreign Investment Law**") and its Executive Regulations No. 44 of 2020 ("**Executive Regulations**") contemplate that foreign investors can hold up to 100%, of the shareholdings in Qatari company. Under the Foreign Investment Law and Executive Regulations, the following sectors are excluded: professional firms (e.g., engineering and law firms), banks, insurance companies, commercial agents, and any other industry as decided by the Council of Ministers.

MOCI is considering applications on an *ad hoc* basis and, accordingly, there remains uncertainty as to what commercial activities the MOCI will permit to be conducted by a 100% foreign owned Qatari company and whether any conditions or restrictions might apply.

Companies established in the Qatar Financial Centre, QSTP or the QFZ can be 100% foreign-owned.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

No. It depends on the requirements of the bank (i.e., lender)

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Finance documents are not required to be registered or filed in Qatar in order to be valid and enforceable.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

There is no specific legal provision that prescribes the obligation that local insurance policies should be governed by local laws. However, the insurance sector is regulated in Qatar and insurance and reinsurance companies and transactions are dealt with by the Civil Code, Trade Law and QCB Law. Under Article 95 of the QCB Law, it is not permissible to insure outside the State on funds or properties located within the State or on responsibilities arising therein, and it is not permissible to mediate insurance on these funds, properties or responsibilities except with one of the authorized and companies subject to this law.

Further, Article 103 of the QCB prescribes that insurance and reinsurance companies are obligated to obtain QCB's approval on the forms of insurance policies that they wish to issue, as well as on every amendment that occurs to them.

In light of the foregoing, and based on our experience with the authorities and regulators in Qatar, we find it very difficult, if not impossible, that the QCB approves that local insurance policies be governed by a foreign law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes. We do not foresee any issues in this regard.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

We do not foresee any issues.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes. PPP is a permitted method of developing projects and is regulated by the PPP Law. In Qatar, there is no official platform or source that publishes reports pertaining to PPP projects that have been developed to date in Qatar.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

No. However, indirect agreements can be carried out pursuant to Article 20 of the PPP Law which stipulates that the project company may, after the approval of the contracting party and the provision of sufficient guarantees, obtain a loan from banks operating inside or outside the State by guaranteeing its contractual rights and assets.

Further, quasi-governmental entities or companies that are mostly established by virtue of the Commercial Companies Law can enter into direct agreements with lenders.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

- *Government Bonds* are considered as one of the major government debt instruments used by the government to provide the necessary liquidity for project funding. They are considered one of the monetary policy instruments and low-risk investment instruments as well. These are issued with medium to long-term maturities.
- *Treasury Bills (T-Bills)* are government debt instruments issued with maturities ranging from 3 months to one year. T-Bills are known as low-risk financial instruments, i.e., they are easy to operate without causing any capital loss to their holders. T-Bills are usually sold at discount, i.e., at lower price than their nominal value. Upon maturity, the government is committed to pay the nominal value of those T-Bills. They are considered as one of the monetary policy instruments for domestic liquidity management.
- *Sukuk* is considered as one of the major government debt instruments used by the government to provide the necessary liquidity for project funding. Sukuk is considered as one of

the monetary policy instruments and low-risk investment instruments as well. These instruments are issued with medium to long-term maturities.

- Debt assumption is also available in Qatar. For example, under Emiri Decree No. 61 of 2020, the Government of Qatar guaranteed the financial obligations arising from the loans and financial facilities agreements executed by Qatar Airways with banks and financial institutions.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

It should be agreed to by the public party and the private party in the PPP agreement. Article 17 of the PPP Law prescribes that the PPP agreement must include, *inter alia*, types and amounts of project insurance, the risks of its operation or exploitation, execution guarantees issued in favor of the contracting party, and provisions and procedures for recovering them. It should also determine the bases for distributing risks associated with amending laws, sudden accidents, or force majeure, and the prescribed compensations, as the case may be.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, provided that the provisions of the new law relate to public policy. Article 3(2) of the Civil Code prescribes that the effects of acts shall remain subject to the law applicable at the time on which it was concluded, unless the provisions of the new law relate to public policy, it shall then apply to such effects after the date on which it becomes effective.

**23. Is force majeure specifically regulated under the local legislation?**

There is no expressly specific definition of force majeure in the Qatari legislation, however the force majeure principle is recognized in the Civil Code. Article 188 of the Civil Code reads as follows:

"*1. In the contracts which are binding on both parties, if the performance of the obligations of one of the contracting parties becomes impossible for an extraneous cause beyond his control, this obligation shall extinguish together with its corresponding obligations. The contract shall be per se dissolved.*

*2. If the impossibility is partial, the creditor as per the circumstances may depend on the contract with regard to the remaining obligation which can be performed, or request the dissolution of the contract.*"

Further, Article 402 of the Civil Code reads as follows:

*"The obligation shall be extinguished if the debtor proves that its performance by him has become impossible for an extraneous cause beyond his control."*

**24. What are the general environmental and social requirements in project financings?**

In addition to the international treaties that relates to the environmental protection that Qatar is a party to, such as the United Nation Framework Convention on Climate Change (UNFCCC), Vienna Convention for the Protection of the Ozone Layer (1985), etc., Article 6 of Law No. 3 of 2002 (Environment Protection Law) provides that "*all administrative and private agencies are obligated to include the condition of protecting the environment and combating pollution in all local and foreign agreements and contracts whose implementation may result in harmful effects on the environment.*

*These contracts must include penalty clauses and undertakings to pay the costs of removing environmental damage and compensation therefor.".*

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Yes. Qatari law upholds the general principle of the sanctity of contracts. Article 171 of the Civil Code describes the contract as the law of the contracting parties. Qatari law respects the will of the parties and enforces their agreement to the extent that it is neither prohibited by law nor conflicts with the public order in Qatar.

Additionally, Article 38 of the Civil Code provides that for a court to apply a foreign law, the relevant law must not violate public order and morals in Qatar. In such case, the court will apply Qatari law.

**26. Can financing documents provide for arbitration clauses?**

Yes. There is no legal impediment in the Qatari legislation that precludes incorporating arbitration clauses in financing documentation.

It is worth mentioning that the State of Qatar is a party to the New York Convention and does recognize arbitral awards and enforce them pursuant to the New York Convention and the procedures set forth in Law No. 13 of 1990 (Civil and Commercial Procedures Law) as amended by Law No. 2 of 2017 (Civil and Commercial Arbitration Law).

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Qatar is expecting to host, amongst other events, AFC Asian Cup 2023, Formula 1 Qatar Grand Prix 2023 Expo 2023 Doha; Category A1 International Horticultural Exhibition, and the 2030 Asian Games.

To accommodate the various upcoming events, PPP entities, governmental-owned companies and private companies are generally conducting studies and analyses, and approaching local and international banks and other lenders to fund major projects based on several project financing structures.

Project finance is currently being utilized for, amongst others, large-scale energy, oil and gas, infrastructure, construction, telecommunications, and more specifically, leisure and hotel projects.

**28. Are any significant development or change expected in the near future in the project finance market?**

We are not aware of any expected changes in the project finance market in the near future.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

Secured Overnight Financing Rate (SOFR).

# ROMANIA

## ȚUCA ZBÂRCEA & ASOCIAȚII

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The main local legislation for project finance is the Romanian Civil Code (which regulates the civil and commercial contracts, including loan agreements and security agreements) and to some extent, the banking legislation (including professional lending and FX regulations, etc.). For cross-border financing transactions, there are certain EU directives and regulations which may apply, such as with regard to passporting baning licenses across EU Member States, eldas (with regard to using electronic signatures, etc.).

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The Romanian banks and the EU banks which are lending to Romania are financing on a project finance basis for almost 20 years. From this perspective, the market is mature and there are established players lending by way of club lending or syndicated lending. The financing documentation is aligned, to a large extent, with LMA standards.

In the past 12 months, we have advised the lenders (and in a few cases, the borrowers) in project financing in several fields, such as healthcare, energy, agriculture and real estate.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The standard security package for a project finance transaction includes: (i) a pledge on the shares of the project company; (ii) a pledge on the accounts of the project company; (iii) a pledge on the receivables, insurances and other contractual rights of the project company; (iv) a mortgage on the real estate owned by the project company; (v) a subordination agreement; and (vi) sponsors' undertakings or guarantees, which may vary in scope and coverage.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, the shares of the project company are typically pledged in favor of the lenders. The share pledge must be signed as a private deed and then it must be registered with the shareholders' register and with the National Register for Secured Transactions (a public electronic register which is used for publicity and security ranking purposes).

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Generally yes, the share pledge may be enforced by way of a private sale, if the share pledge agreement gives the security creditor such a right. The method for transferring ownership over the shares of a company depends on the type of company. For example, for limited liability companies, the shares are transferred by way of a private agreement or an enforcement deed, which must be registered in the shareholders register and the Trade Registry. However, in the case of a limited liability company, any shares transfer must be approved in advance by a certain majority of the existing shareholders.

Bearer shares are not very common in Romania.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, the Romanian Civil Code expressly allows the creation of security interests on future assets, including on future contractual rights and future receivables.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Any enforcement proceedings are suspended on the date when the insolvency proceedings are opened against the security provider. Thus, the secured creditors may only pursue their rights within the insolvency proceedings, by register their claim as a secured claim, voting in the creditors assembly, etc.. Prior to the opening of the insolvency proceedings, the creditors may enforce their security according to the security agreements and the applicable legislation (Civil Code, Civil Procedure Code, etc.).

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The concept of security agent is used in our jurisdiction on a regular basis. The Romanian Civil Code regulates the "security agent" concept with regard to movable security rights but not with regard to immovable security rights. The "trustee" concept is also regulated but not used in practice. We would not give a clean legal opinion on a parallel debt structure created under Romanian law but we have worked in transactions where the parallel debt structure was created under a different law (such as English law) while the security agreements were governed by Romanian law (such a structure would work as long as the parallel debt is created under a law which recognizes the concept).

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Romania provides certain incentives and exemptions for businesses, such as:

(i) tax exemption for reinvested profits - the profit invested in technological equipment, computers, software used for the purpose of pursuing the economic activity of the company is tax exempt under certain conditions;

(ii) 50% deduction of eligible expenses for R&D activities;

(iii) full exemption from profit tax for ten years for companies that exclusively perform innovation and R&D activities on scientific research and technological development;

(iv) local tax exemption for immovable assets and lands related to industrial parks.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Exemptions specifically applicable to foreign investors are tax credits for taxes paid to a foreign state. Such tax credits may be obtained only if the Double Taxation Treaty concluded between Romania and that foreign state is applicable.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

No, the Romanian law does not provide for such restrictions regarding loans and movement of capital. Loans which are borrowed by Romanian entities from foreign companies must only be notified to the National Bank of Romania, for statistical purposes. Restrictions related to AML and international sanctions do apply.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Generally, there are no restrictions on foreign investments in Romania. However, Romania applies sanctions adopted at the level of the European Union, as well as anti-money laundering procedures. The foreign investment must comply with such requirements.

Moreover, the legal regime of foreign direct investment ("**FDI**") in Romania significantly changed in 2022. A new commission was created within the Competition Council – which is aimed at examining the foreign direct investments. The elements taken into consideration for the purpose of the FDI screening are related to the national security (e.g., security of citizens, the energy security, the security of critical infrastructure, the security of information). There is a fine of 10% of the total worldwide turnover if a transaction falling under the FDI scope of application is implemented without the FDI approval.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

No, we are not aware of such a requirement.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

The security rights must be registered in order to make that security enforceable against third parties and for ranking purposes.

The movable security rights must be registered with the electronic Publicity Register (the costs for such registration are not high and they are not calculated by reference to the amount secured by the hypothec).

The immovable security rights must be registered with the relevant Land Book. The authentication and registration costs are

calculated by the notary who authenticates the mortgage agreement and on average are amounting to approximately 0.3% of the amount secured by the hypothec.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Yes, there is no restriction with respect to the law chosen by the parties for the governing of the insurance policy.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes, the Romanian law allows for the proceeds of the insurance and reinsurance policies to be assigned to third parties, such as the lenders. This is a market practice in project financing transactions.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

We are not aware of any complications or concerns in relation to insurance provisions under project financing documentation in Romania.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, there is a PPP law in force, which sets out in detail the legal framework applicable to PPP projects. However, despite the existing legal framework and the fact that, at a political level, there have been numerous intentions expressed with regard to PPP projects, in reality only a few projects have been actually approved and realized.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, direct agreements are permitted, and such agreements have been used in PPP and Project Finance. The international standards for direct agreements have been generally observed, especially in Project Finance which does not have a public element.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

There are various types of public support that may be used in PPP Projects. For instance, the public partner may contribute to the financing of the development phase of the project from public funds (including EU funds) up to 25% of the value of the investment. Also, another public authority than the public partner (such as the Ministry of Finances) may undertake various forms of support (direct payment obligation to the project company, issuance of sovereign guarantees or letters of comfort etc.). This is subject to such other public authority entering into the PPP agreement/an addendum to it, pursuant to the terms of the tender documents for the award of the PPP agreement.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Usually, political risks are borne by the public partner under PPP agreements.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

While, generally, the risk of specific changes of law affecting projects of certain types or various sectors of economy is borne by the public partner, the risk of general changes in law may be either taken by the private partner (given that such change in law would affect the private partner in the same manner as any other entity doing business in the country) or by the public partner, depending on the particular features of each PPP Project.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is regulated by the Romanian Civil Code and it is customary to have force majeure provisions in the commercial contracts (but not so much in loan agreements).

**24. What are the general environmental and social requirements in project financings?**

ESG standards are becoming more and more relevant, however there are numerous steps to be made until such ESG standards are consistently applied. In terms of environmental requirements, depending on the project, general legal obligations apply in terms of permitting and monitoring of projects.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

The submission of an agreement to a foreign law is permissible and enforceable. Typically, the agreements concluded between Romanian entities are governed by Romanian law, while the foreign law (such as English law) is most commonly used for transactions involving a foreign entity. The security documents over assets located in Romania (regardless of the nationality of the parties) are also governed by Romanian law.

The waiver of immunity provisions (which are applicable in respect of the Romanian state and its authorities) is permissible to the extent the Romanian state is acting in a commercial nature. In cases where the Romanian state is acting in its sovereign capacity, the waiver of immunity provisions are not enforceable.

**26. Can financing documents provide for arbitration clauses?**

Yes, financing documents may provide for arbitration clauses.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

In terms of PPP projects, Romania still lags behind other European countries. Efforts have been made on the legislative level in order to offer a proper legal basis for project-financed PPP projects, but such efforts should be completed by the preparation of a robust project of a medium size which, if successful, will pave the way for the implementation of additional project-financed PPP projects.

**28. Are any significant development or change expected in the near future in the project finance market?**

Following the crisis generated by the 2020 pandemic, Romania adopted its National Recovery and Resilience Plan consisting of 107 investment measures and 64 reforms. They will be supported by an estimated **€14.24** billion in grants and **€14.94** billion in loans. **41%** of the plan will support the green transition and **20.5%** of the plan will support the

digital transition. It is expected that this will also have an effect on project financing, given that the PPP eligible sectors are all included in the National Recovery and Resilience Plan.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

The most commonly used reference interest rates in Romania are EURIBOR and ROBOR, both of which are not affected by the LIBOR transition. In instances where parties were using the LIBOR reference rate, the parties are switching to risk-free rates, such as SOFR.

# SENEGAL

## GENI & KEBE

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

There is no main legislation or international treaties governing the project financing in Senegal.

Usually referring to the financing of assets, the development or exploitation of natural resources, project financing applies to different sectors like the energy, telecom, agricultural, Transportation / infrastructure & public private partnerships, mining, oil & gas…sectors.

The laws applicable to different sectors will apply, it is sector based.

Project financing in Senegal is governed by the following legislation and international treaties:

- Senegalese Banking Law No. 2008-26 of 28 July 2008 on banking regulation (Law of 2008).
- Uniform Act on Commercial Companies and Economic Interest Groups, 2014
- PPP Law no 2021-23 dated 2 March 2021
- Senegalese Investment Code Law No 2004-06 of February 6, 2004
- Regulation No. 09/2010/CM/UEMOA/ on external financial relations for Member States of the West African Economic and Monetary Union, entered into force on October 1st, 2010
- Senegalese Investment Code
- Anti-money laundering Law
- Uniform Act on Securities
- Uniform Act on Bankruptcy Proceedings, 25 September 2015
- The new General Tax Code (GTC) was published under Law No. 2012/31 of 31 December 2012

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in Senegal is at its infancy. It's not really a mature market.

The most significant project financings closed during the last 12 months are:

the Dakar - Diamniadio toll motorway, the Taïba Ndiaye Wind Farm ("**PETN**") and the Blaise Diagne International Airport.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most commonly used security types in project financings in Senegal are personal securities, transferable securities and mortgages.

- Personal securities as they apply to project finance consist of autonomous guarantees.
- Transferable securities consisting of possessory lien, assets held or transferred as security, pledge of real property, pledge of intangible assets and privileges.

Transferable securities refer to title retention and property transferred as Security consisting of an assignment of a debt as security and the fiduciary transfer of money.

They also consist of pledge of tangible property and intangible property.

Pledge of tangible property may consist of pledge of professional equipment and motor vehicles and pledge of stocks

The pledge of intangible property shall mean a contract whereby existing or future intangible property is allocated as security for one or more existing or future debts on condition that the said debts are certain or ascertainable.

Such pledge may be by agreement or imposed by the court.

The following may be pledged:

- Debts;
- Bank accounts;
- Partnership rights, transferable securities, Portfolios
- Business property;
- Intellectual property rights.

Preferential rights consist of general and special liens.

A general lien shall confer on the holder a right of preference in accordance with the provisions of articles 225 and 226 of the Uniform Act.

The special law creating general liens shall specify their ranks while classifying them in relation

to the dispositions of article 180 of this Uniform Act. Failing that, these liens shall be ranked lowest following the said article 180 of this Uniform Act.

As for special liens, any creditor who holds a special lien shall have a right of preference over any asset legally transferred to him as a base which he shall exercise upon distrain in conformity with the measures provided for in article 226 below.

As long as the insured amount of the asset is unpaid the right of preference may also be exercised

by subrogation of that amount where the asset has perished or disappeared (ARTICLE 182).

– Mortgages

There are two main types of mortgages: contractual mortgages and forcible mortgages.

A mortgage is the transfer of any determined or determinable real property belonging to a settlor to secure one or more existing or future debts provided said debts are certain or ascertainable.

A mortgage may be legal, conventional or judicial.

**4. Can the shares of a company be pledged as a security to the benefit of lenders?**

YES. The shares of a company be pledged as a security to the benefit of lenders.

If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?

The transferee shall consent to the transfer of shares in case of the compulsory liquidation of regularly pledged company shares.

Instead, the company may prefer, after the transfer, to immediately redeem said shares in order to reduce its capital.

In order to render the share pledge binding on third parties, the pledging of shares may be established by notarial deed or by private deed notified to the company and published in the Trade and Personal Property Rights Register (ARTICLE 322 of the Uniform Act on Commercial Companies).

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, a private sale is a recognized method for the enforcement share pledge. Such a possibility is provided for under, among others, article 104 of the UAS which provides that the lack of payment by the due date allows the pledgee-creditor, in possession of a writ of execution, to proceed to the forceful sale of the collateral eight days after notice has been duly served on the debtor and, where necessary, on the third party settlor under the conditions laid down by the provisions organizing measures of execution from which no pledge may derogate. Under such a situation, he can exercise his preference right on the price of the collateral sold based on article 226 of this Uniform Act.

The endorsement types typically used for the share certificates are the bearer or registered forms.

Shares and bonds shall be in the form of bearer bonds or registered securities irrespective of whether they are issued against non-cash contributions or cash contributions. However, registered securities may be the exclusive form imposed by the provisions of this Uniform Act or by the Articles of Association (ARTICLE 745).

The owner of securities which are part of an issue comprising bearer bonds shall have the option, notwithstanding any clause to the contrary, to convert his bearer bonds into registered securities and vice-versa (ARTICLE 746).

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

YES. This is reflected in the definition of mortgage where the possibility to transfer any determined or determinable real property belonging to a settlor to secure one or more existing or future debts provided said debts are certain or ascertainable has been provided for.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Security interests are registered against third parties by filing at the appropriate RCCM and for mortgages in accordance with local laws. To enforce their security interest, lenders may take the following steps:

Where there is a default, non-payment by a pledgor, a secured creditor can resort to forced sale at a public auction or can request the judicial attribution of the pledged assets up to the amount of the secured obligations.

The pledge being binding on third parties either by its registration in the Trade and Personal Property Rights Register or by the handing over of the collateral to the pledgee creditor or any third party agreed upon by the parties, the pledgee-creditor may pursue the collateral in their hands for the enforcement of its claim.

Moreover, in the case of a financial bond and any sum of money appearing in the pledged account, a secured creditor, holder of an unquestionable liquid and due claim may liquidate the security within eight days or at the expiration of any other time limit it and the holder of the account had beforehand agreed upon.

The secured creditor may do so after notice is served personally or by registered mail on the debtor.

Said notice shall also be served on the settlor of the pledge where it is not the debtor and to the keeper of the account where the latter is the secured creditor of the pledged debt.

Where not being the keeper of the pledged account the secured creditor considers that all the

requirements have been met for the liquidation of the security, he shall in writing ask the keeper of the account to proceed with the liquidation as provided for in article 154 of this Uniform Act (ARTICLE 155).

Where a business property is sold or liquidated, any unsecured creditor may obtain, through a court, the foreclosure of the debt and obtain the distribution of the proceeds from said liquidation (ARTICLE. 174).

The registered creditor shall be entitled to:

- A right to pursue in accordance with article 97(2) of this Uniform Act;

- A right to liquidate in accordance with article 104(1) of this Uniform Act;

- A right of preference in accordance with article 226 of this Uniform Act (ARTICLE 178).

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The security trustee concept is not, per se, enforceable in Senegal, under OHADA.

The concept of security agent is used instead. That security agent's function is provided for under article 5 of the U.A.S as follows: "Any security or other guarantee to secure the discharge of an obligation may be made, registered, managed and executed by a financial institution or a national or foreign credit company acting in its own name and as surety agent appointed for that purpose by the creditor of the secured debt".

A parallel debt concept exists as an alternative mechanism. It produces, pretty much, the same result.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The Investment Code provides for exemptions from customs duties, value added tax (VAT) exoneration for a three (3) year period. The General Tax Code also

provides for tax benefits subject to a certain number of conditions.

Incentives and exemptions can be also sector-based. The Free Export Enterprise Status is granted to certain specific entities. Companies in the agricultural, telecoms industry sectors can benefit from incentives and/or exemptions when they export at least 80% of their production.

That status also allows those companies to benefit from a reduction of corporate tax (15%), an exemption from registration fees, stamp duty and subscription to business licenses, and an exemption from the duties and taxes levied on production equipment and raw materials. An exemption from wage tax is also granted.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

The main incentives and exemptions for project financing in Senegal are mainly tax incentives and exemptions. They can be sector specific or usually granted through Double Tax Treaties (DTTs) that Senegal may have signed with foreign partners. Please also refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

We have not identified any general provision of the law which prevents a company incorporated under Senegalese law from contracting debts abroad.

Moreover, this possibility of contracting is even indirectly provided for under *Regulation No. 09/2010/CM/UEMOA/ on External Financial Relations of the Member States of the West African Economic and Monetary Union*, in its article 12.

This article stipulates that: "loans contracted by residents from non-residents must unless specifically decided by the Minister in charge of finance, be carried out through approved intermediaries in all cases where the borrowed sums are made available to the borrower in the country. The approved intermediaries, who are thus called upon to intervene, will ensure the regularity of the operations.

However, some minor restrictions for borrowing bank loans from abroad, that may be characterized as procedural include:

-the mandatory declaration to the External Finance Directorate (Ministry of Finance) and the BCEAO (the Waemu Central Bank).

All foreign loans are subject to a mandatory declaration to the External Finance Directorate and the BCEAO, for statistical purposes as provided for under Article 11: Loan transactions (Regulation No. 09/2010/CM/WAEMU/ on External Financial Relations of the Member States of the West African Economic and Monetary Union ("**WAEMU**").

The repayment of any foreign loan, either by purchase and transfer of foreign currencies or by crediting foreign accounts in Francs or in Euros, must be declared for statistical purposes to the External Finance Directorate and the BCEAO and said transactions must be carried out through a licensed intermediary. (Article 11: Loan transactions (Regulation No. 09/2010/Cm/WAEMU/ on External Financial Relations of Member States of the WAEMU.

There are no restrictions for borrowing in a foreign currency except as provided for under Regulation No. 09/2010.

Receivables and debts denominated in foreign currencies are converted into the monetary unit having legal tender in the State party, on the basis of the exchange rate on the date of formalization of the agreement by the parties on the operation, when it's about commercial transactions,

or on the date on which the currencies are made available when it's about financial transactions (Article 52, Uniform Act relating to Accounting Law and Financial Reporting).

**12. Are there any restrictions for foreign investments in your jurisdiction?**

The Senegalese Investment Code provides for equal treatment of foreign investors. Foreign investors are granted equal access to ownership of property and no general limits on foreign control of investments exist.

In principle, there is no problem with a 100% ownership by foreign investors.

There are, however, some exceptions for a limited number of sectors such as the electricity distribution, port and water services.

There are some restrictions on foreign capital applicable to specific sectors.

The Oil and Gas sector provides for some main limitations on foreign participation in the capital of an oil or gas company. There is, for example, a 10% free carried interest to the national oil company, Petrosen, during the exploration phase of projects and up to 30 percent interest in the development and exploitation stage projects.

Restrictions do also apply for certain aspects, areas such as local content requirements.

Oil companies have to use local labor and materials and provide training funds for local workers. A local content requirement does exist, however, the regulating decrees are yet to be promulgated.

The participation percentage in the capital of a printing media company is set at 51% by one or more national public or private persons. Moreover, the foreign company may not directly or indirectly hold more than 20% of the capital of a printing media company.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no minimum equity requirement for project financings in Senegal.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

The registration and filing requirements applicable for project finance documents to be valid and enforceable in Senegal depend on the types of projects.

It is necessary to have a legal status, to create a local entity.

The most commonly created forms of company are the Limited Liability Company (SARL) and the Limited Company (SA).

The statutes of the company to be created are signed before a notary to whom the capital is paid.

The notary carries out the registration of the company and proceeds to the publication of the notice of creation after the withdrawal of the registration documents.

The investor will open a bank account as soon as he receives the registered documents from the notary.

In land acquisitions, for example, foreign investors may have to deal with property titles and registration systems that exist in Senegal.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Some aspects of local insurance policies are governed by the Code of the Inter African Insurance Market Conference ("**CIMA**").

Some re-insurance aspects can be governed by a foreign law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes, insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

There is a minimum percentage that must be insured within the CIMA Zone.

There are obligatory cessions with state owned insurers that apply in Senegal provided for during the FINAL COMMUNIQUÉ OF THE 10th GENERAL ASSEMBLY OF THE MEMBER STATES OF THE COMMON REINSURANCE COMPANY OF THE MEMBER STATES OF CIMA ("**CICA-RE**")"

They reorganized the legal transfer to the CICA-RE, as proposed by the Board and consisting of the reduction of the transfer rate on the treaty from 15% to 10% combined with the institution of a transfer on the first franc at the rate of 5% for all insurance companies, with the exception of the health branch and savings premiums in life insurance. Final statement from the member states of CICA-RE.

In Senegal, there is an obligatory cession on the premiums and treaties of insurance companies under Senegalese national law and on the premiums of foreign companies, in favor of the Senegalese reinsurance company ("**SENRE**").

The mandatory cessions with the state-owned (and /or sub-regional) insurer apply in Senegal to the benefit of the African Reinsurance Corporation (Africa-Re), the regional reinsurance company (CICA-RE) and the SENRE. The mandatory cessions with the state-owned insurer apply in Senegal to the benefit of SEN-RE.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, PPP is a permitted method of developing projects.

Some PPP projects have been developed in Senegal, among which we can name projects such as the Dakar - Diamniadio toll motorway, PETN and the Blaise Diagne International Airport.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, a direct agreement procedure is provided for in the PPP law (provisions of article 28 of Law 2021-23 on public-private partnership contracts). It is one of the derogatory procedures, the conditions and modalities of which are set by decree.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The types of host government supports available in Senegal are:

- Sovereign guarantees exist mainly under articles 39 to 49 of the Uniform Act on Securities (U.A.S.).
- Host Government Agreement (HGA)

An agreement between a foreign investor and a local or host government governing the rights and obligations of the foreign investor and the host government with respect to the development, construction, and operation of a project by the foreign investor.

A public-private partnership support fund has been created to support and finance the preparation, procurement and implementation of PPP projects.

Also, the holder may, with the authorization of the contracting authority and in compliance with the legal provisions in force, grant securities to the financing organizations on the assets acquired or realized in the context of the execution of the PPP contract, by pledging the proceeds and receivables arising from the contract or by constituting any other appropriate security, without prejudice to any legislative provision prohibiting the constitution of a security on a public asset or part of the public domain (art. 16 of the law on PPPs).

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

In general, it is the contract that sets out the conditions under which the sharing and transfer of risk between the contracting authority and the contractor are established.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

The change of law has no effect on the contract which continues under the same conditions and according to the legislation in force at the time of its conclusion.

Changes in law will not have retrospective effect unless stated expressly in the law itself.

The legislator may expressly provide that the new law will be of immediate application.

The judge can also rule out the survival of the old law in contractual matters when he considers that:

- the particularly imperative nature of public order of the new law justifies its immediate application to the future effects of the contract.

- or that the content of the contract is so imperatively fixed by law, that the contract must be assimilated to a legal situation justifying that its effects are governed by the new law.

Investors and lenders may seek compensation if the change of law is applied against them.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is expressly provided for by law. It is defined as an extraneous cause that led to the occurrence of the damage. It may be due to a third party or any situation.

In any event, force majeure must be an unforeseeable, insurmountable and irresistible event. It constitutes a cause of total exemption.

**24. What are the general environmental and social requirements in project financings?**

The environmental requirements are that in accordance with the provisions of the Environmental Code: "any development project or activity, likely to harm the environment, as well as policies, plans, programs, regional and sectoral studies must be subject to an environmental assessment.

In its provisions relating to health also, Law No. 97-17 of 1 December 1997 establishing the Labor Code sets working conditions,

in particular with regard to working hours, which must not exceed 40 hours per week, working of night, the contract of the women and children and the weekly rest which is obligatory. The text also deals with Hygiene and Safety in the workplace and indicates the measures that any activity must take to ensure hygiene and safety guaranteeing a healthy environment and safe working conditions.

## F. Jurisdiction, Waiver of Immunity

**25. Are submissions to a foreign law and the waiver of immunity provisions enforceable?**

Yes, subjection to foreign law and waiver of immunity provisions are enforceable subject to compliance with public order.

**26. Can financing documents provide for arbitration clauses?**

Yes, financing contracts may include arbitration clauses.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Public-private partnership contracts are the main trend in project financing by the State and other public entities.

A public-private partnership contract is a written contract concluded for consideration for a fixed period between a contracting authority and an economic operator, which is, according to its purpose, the terms of remuneration of the holder and the risks transferred, qualified as a public partnership contract -private with public payment or public-private partnership contract with payment by users.

A public-private partnership contract with public payment is a public-private partnership contract by which a contracting authority entrusts, to an economic operator, whose remuneration comes mainly from payments from the contracting authority throughout the duration of the contract, all or part of the missions having for the object, the design, the construction or the transformation, the upkeep, the maintenance, the exploitation or the management of works, services, equipment or immaterial goods necessary for the general interest of which the contracting authority is responsible for, as well as all or part of their financing.

A public-private partnership contract payable by users is a public-private partnership contract by which a contracting authority entrusts the management of a service of general interest for which it is responsible, or the design, financing, implementation, rehabilitation, operation, upkeep and maintenance of works, equipment or intangible assets to an economic operator whose remuneration comes mainly from user payments. The concession, leasing and management concerned are public-private partnership contracts paid for by users.

A concession is a contract by which a contracting authority entrusts the concessionaire with the mission either to carry out a public work or to make investments relating to such a work and to operate it with a view to providing a service of general interest. In all cases, the concessionaire operates the service in its name and at its own risk and peril by collecting remuneration from the users of the structure or the beneficiaries of the service granted. (Law n°2021-23 of March 02, 2021, relating to Public-Private Partnership contracts - Decree n° 2021-1443 of October 27, 2021, implementing Law n°2021-23 of March 02, 2021 - Decree n°2014-1212 of September 22, 2014, on the public procurement code – Code of Administration obligations).

The transfer methods are as follows:

- Common law procedures:

- Open tender procedure in 1 stage, preceded or not by prequalification;
- Open bidding procedure in 2 stages, preceded by prequalification.

- Exceptional procedures:

- Restricted tender procedure;
- Tender procedure with competition;
- Competitive dialogue procedure;
- Direct agreement procedure.

**28. Are any significant development or change expected in the near future in the project finance market?**

No, to our knowledge an evolution or a significant change is not expected in the near future on the market for financing the projects of the State and other public persons.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

As a country previously covered by LIBOR, alternative rates like ESTER, SARON, SONIA and SOFR are used.

# TAJIKISTAN
## GRATA

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The most relevant act is the (i) Civil Code (Part 1, 2 and 3), (ii) Tax Code, (iii) Registration of Legal Entities and Individual Entrepreneurs Act, (iv) Public Private Partnership Act, (v) Limited Liability Companies Act, (vi) Joint Stock Companies Act.

Tajikistan has entered into a number of bilateral treaties related to investment protection. That said, international treaty applicability for the time being is left to be desired.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

In Tajikistan, the market for project financing is continually growing but is still quite small.

Yet, there are a number of project funding options accessible to those who are interested; additional details may be found at http://ppp.tj/ppp-database/ and http://www.eprocurement.gov.tj/en/searchanno. The majority of these financing options are tied to the infrastructure or energy industries.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Depending on the particulars of the project and the interests of the parties involved, different methods of security may be utilized. In project financings, common security types that might be employed include:

Mortgage: This type of security entails the sale of a property interest to the lender in exchange for loan collateral. The lender may foreclose on the property and sell it to recoup its investment if the borrower defaults on the loan.

Pledge: This type of security entails giving the lender possession of a moveable item, such as equipment or stock in a corporation, in exchange for a loan. The lender may sell the pledged asset to recoup its investment if the borrower fails on the loan.

Guarantee: This type of security entails a third party (like a parent business or a government body) assuring the lender that the borrower will pay back the loan. The guarantor is responsible for repaying the loan in the event that the borrower misses a payment.

Assignment of rights: A rights assignment is the transfer of a party's contractual rights to another party.

It is important to note that the use of security in project financings can be complicated and may require the blending of many types of protection. It will depend on the nature of the project and the lender's criteria as to which specific security types are employed in a project financing transaction. To preserve their investment in the project, lenders often attempt to get the highest level of security.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Shares can be pledged under an agreement. A written agreement between the pledgor and the pledgee is required under Tajik law. The number and kind of shares being pledged, the size of the secured debt, how long the pledge will last, and other terms must all be specified in the agreement.

The pledge agreement must be registered with the Ministry of Justice of Tajikistan for the share commitment to be perfected. Getting a login and password and filling out the necessary information online is required for the registration procedure. If the pledge is not registered, it would not provide for priority over unregistered pledge.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Yes, private sale is a legitimate way to enforce a share agreement.The terms of the private sale can be agreed upon by the pledgor and pledgee in the pledge agreement.

The pledgee may enforce the pledge by selling the pledged shares in the event of the pledgor's default. The pledgee must notify the pledgor of the planned sale, including the date, location, and manner of sale as well as the minimum selling price, which must be equal to or higher than the total amount of the debt that is being pledged as security.

The surplus proceeds from the sale of the pledged shares must be given back to the pledgor if they exceed the amount of the outstanding obligation. The pledgor is still responsible for paying the balance of the obligation even if the shares are sold for less than the whole amount owed.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Tajik law permits the inclusion of clauses establishing security interests over future assets, rights, and receivables.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

Any claims in the event of insolvency must be made through an external manager. Additional measures and steps are decided upon and disclosed by an external management on a case-by-case basis and are not governed by laws.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Tajik law does not envision a security trustee. However, lenders (pledgees) have the option of designating a pledge manager to act on their behalf while exercising all of their rights to the pledged property.

Tajikistan legal system does not clearly permit the implementation of a parallel debt mechanism.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Tax, customs and other benefits are provided to investors in the manner and on the terms established by laws, investment agreements, treaties and international legal acts recognized by Tajikistan.

It must be noted that specific incentives and exemptions will depend on the sector, size and project location.

That said, in some cases, obtaining such incentives can be challenging.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Please refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no limitations on taking out shareholder loans and bank loans from abroad or in a foreign currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

With the exception of activities where investment activities are restricted or forbidden due to the necessity to protect national interests, investors have the freedom to invest in objects and types of business activities. The law does go into more detail about this, and there is no information on public sources. Therefore, an investor must personally communicate with the state agencies about a specific investment project.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no minimum equity requirement.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Project finance documentation may need to be registered with or submitted to several government agencies in order to be enforceable and valid. The nature and structure of the project, as well as the type of document in question, will determine the registration and filing procedures that apply. Regrettably, because the laws are vague, it is necessary to discuss specifics with the state agencies for each individual project.

It must be noted that depending on the type of project and the legal structure of the transaction, different registration and filing procedures may apply to project finance documents.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

The Civil Code gives the parties the choice to choose the applicable law, but because of the nature of the Insurance Activities Act, we infer that the policies must be governed by Tajik law despite the fact that the law is silent on the subject.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

In general, insurance law does not restrict the assignment of insurance and reinsurance proceeds under an insurance or reinsurance policies to the benefit of lenders. It's important to keep in mind that there can be limitations and restrictions on this. Reviewing the terms and conditions of any insurance contract is crucial.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

We do not foresee any complications or issues. The parties must carefully review and consider the insurance provisions in project financing documents.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

The PPP method is permitted and governed by the Private Public Partnership act.

There are numerous PPP projects, however, information about the completed projects is not published and is not available for third parties. PPP Authority's official website is available at http://ppp.tj/homepageen.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements are permissible:

- if there is an urgent need for the continuous provision of services, as well as in the case when the implementation of the norms established by chapter 3 of the PPP Act is inappropriate, provided that the circumstances that caused this urgent need could not be foreseen by the contracting authority, and these circumstances are not the result of slowness of the contracting authority;
- for a short term partnership project and when the expected initial investment amount does not exceed the specified amount;
- when the partnership project affects issues of national defense or public safety;
- if there is only one source capable of providing the required service, including the use of intellectual property, trade secrets or other exclusive rights that are owned or controlled by a certain person(s);
- when pre-qualification tender documents or a request for proposals have been issued but no responses have been received, or when all proposals have failed to meet the evaluation criteria specified in the request for proposals, and if, in the opinion of the contracting authority, the issuance of new preliminary tender documents selection and a new request for proposals will not result in a contract being awarded within the required time frame;
- in other cases where the PPP council approves such an exception for compelling reasons of national or public interest or in cases of recognition in the interests of a local public authority.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The PPP list can be found at http://ppp.tj/ppp-database/.

Some of the government guarantees:

- equality of investor rights;

- investor legal protection;
- right to use profits;
- investor's participation in the privatization of state property;
- investor's rights in case of expropriation and requisition;
- investor's right to export property and information abroad;
- additional guarantees and protection measures may be provided for investments, the total amount of which is the equivalent of $5 mil in national currency.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

One of the most important measures to guarantee the proper implementation of a PPP arrangement is the distribution of risk among parties. The PPP Act's Article 9 guarantees the principle of equitable risk distribution. A PPP agreement must include provisions for the division of risks between the public and private parties in accordance with Article 29 of the PPP Act.

The distribution of political risk in PPP agreements is based on both the nature of the risk and the agreement's specific conditions. Political risks are typically shared by public and private partners. In some circumstances, the public party may take on a larger portion of the political risk, especially when the project includes a public asset or function that is crucial to the government. On the other hand, in some circumstances, the private party may be required to take on greater political risk as a condition of receiving funding for the project or in exchange for bigger potential gains. As a result, how political risk is distributed in PPP agreements will vary depending on the project's unique conditions as well as the interests and preferences of the public and private parties involved.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

PPP Act provides for that the agreement specifies the private partner's right to compensation in the event that, compared to the originally estimated costs, the costs of the private partner's performance under the agreement have significantly increased or the value of such performance has substantially decreased due to changes in legislation or other measures of state regulation directly related to the partnership project.

Likewise, the PPP Act provides for re-review (revision) of the agreement in the event of changes in law or regulation that are not directly applicable to the ongoing project, provided that economic, financial, legislative or regulatory changes:

a. take place after the conclusion of the Agreement;

b. are outside the control of the private partner;

c. are of such a nature that the private partner is not able to reasonably assume and take them into account at the time of concluding the Agreement or avoid or overcome their consequences.

**23. Is force majeure specifically regulated under the local legislation?**

Generally, this issue is defined and regulated by a clause of an agreement. That said, paragraph 3 of article 356 of the Civil Code establishes a foundation for responsibility exclusion in the event of a force majeure. According to the aforementioned legal definition, force majeure refers to unusual and unavoidable events that happen under specified circumstances. These conditions

do not, however, include the debtor's counterparties breaching their duties, the lack of sufficient finances for the debtor to fulfill its obligations or the absence of necessary commodities from the market.

**24. What are the general environmental and social requirements in project financings?**

Tajik legislation states that it is forbidden to fund and carry out initiatives involving the utilization of natural resources without first receiving approval from the state's ecological experts. In particular, projects should go through the assessment procedure in accordance with the Environmental Impact Assessment Procedure to take potential environmental impacts into consideration.

There are general obligations to interact with local stakeholders and communities and to guarantee that labor laws are followed when it comes to social criteria for project finance.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Yes, according to civil laws, foreign law, arbitration provisions are enforceable.

The generally accepted action of waiving immunity is subject to some restrictions under Tajik law.

**26. Can financing documents provide for arbitration clauses?**

Yes, according to civil laws, financing documents can provide an arbitration clause.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Tajikistan's economy and overall project funding are currently in the process of development. The following are some of the major trends in project financing:

- PPPs: In Tajikistan, PPP initiatives have emerged as one of the most widely used forms of project finance. PPPs are particularly common in the infrastructure, transportation, and energy industries. Renewably sourced energy should be noted as a distinct category of PPP projects that is now being examined and elevated to the top of the priority list.
- Mining: The mining industry makes up a significant portion of the Tajik economy, however project financing in this industry is typically conducted on a one-on-one basis, discreetly, and with little access to information.

We anticipate further projects and favorable future changes to the investment climate because Tajikistan's government, and particularly its president, is a strong supporter of foreign investment.

**28. Are any significant development or change expected in the near future in the project finance market?**

As mentioned above, the project financing is actively developing and further development and implementation of PPP projects in Tajikistan remain an important item on the Government's agenda. Likewise, renewable energy is gaining traction and is most likely to be a crucial item on the agenda and will gain the most attention in the future.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

During the LIBOR transition period, the Secured Overnight Financing Rate (SOFR) rates are commonly used in Tajikistan.

# TÜRKİYE

## ERGÜN AVUKATLIK BÜROSU

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Project financing matters under Turkish law are mainly governed by the Turkish Civil Code numbered 4721[34] ("**Turkish Civil Code**"), Turkish Code of Obligations numbered 6098[35] ("**TCO**") and Turkish Commercial Code numbered 6102[36] ("**TCC**"). In addition, the establishment and enforcement of security interests are governed by the provisions of the Enforcement and Bankruptcy Law numbered 2004[37] ("**Enforcement and Bankruptcy Law**") and the Law numbered 6750 on Pledge over Movable Assets in Commercial Transactions[38] ("**Movable Pledge Law**").

Any borrower or security provider which is a "public company" (*halka açık anonim ortaklık*) or any project financing through capital markets instruments, are governed by the Capital Markets Law numbered 6362[39] ("**Capital Markets Law**") and its secondary legislation issued by the Capital Market Board.

Banks and lending institutions are governed by the Banking Law numbered 5411[40] and its secondary legislation issued by the Banking Regulation and Supervision Agency (*Bankacılık Düzenleme ve Denetleme Kurulu*).

34 Published in the Official Gazette dated December 8, 2001 and numbered 24607.
35 Published in the Official Gazette dated February 4, 2011 and numbered 27836.
36 Published in the Official Gazette dated February 14, 2011 and numbered 27846.
37 Published in the Official Gazette dated June 19, 1932 and numbered 2128.
38 Published in the Official Gazette dated October 28, 2016 and numbered 29871.
39 Published in the Official Gazette dated December 30, 2012 and numbered 28513.
40 Published in the Official Gazette dated November 1, 2005 and numbered 25983 (Duplicate).

Further to the above, borrowers or security providers which operate in certain sectors are subject to sector-specific laws, such as in the energy sector, where the financing is subject to the restrictions imposed by the Law numbered 6446 on Electricity Market ("**Electricity Market Law**") and the Law numbered 5346 on the Utilization of Renewable Energy Sources for the Purposes of Generating Electrical Energy ("**Renewable Energy Law**").

Project financing in Türkiye is also subject to some international treaties, including mainly:

(i) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention);

(ii) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and

(iii) Bilateral investment treaties (BITs), double tax treaties (DTTs) and trade facilitation agreements (TFAs) with various jurisdictions.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The Turkish project finance market started to evolve following the long-term delegation of public infrastructure services to the private sector, as a result of economic liberalization movements in the late 1980s. Especially following the adoption of various public-private partnership ("**PPP**") models around 1990s and introduction of PPP projects in the transportation, healthcare and energy sectors after 2000s, the number of foreign investments and project financings swiftly increased in Türkiye. Accordingly, both Turkish banks and the investor companies established their internal project finance departments and started gaining experience in that field. Therefore, Türkiye may currently be considered as a developed project finance market.

Some of the significant project financings in Türkiye, which achieved financial closing over last 12 months include the followings:

- Financing of the Aydın-Denizli Build-Operate-Transfer Motorway Project;
- Restructuring of the Gaziantep Integrated Health Campus PPP Project;
- Financing of the Kütahya Integrated Health Campus PPP Project;
- Financing of construction of Sasa petrochemical plant for the production of purified terephthalic acid in Adana, Türkiye; and
- Financing of Mersin-Gaziantep High Speed Railway Project.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most commonly used security types in project financings in Türkiye include the followings:

- Assignment of the project receivables of the project company;
- Assignment of insurance proceeds of the project company;
- Assignment of subordinated receivables of the shareholders of the project company;
- Assignment of the receivables of the insurance companies under the reinsurance policies;
- Mortgage on immovables and usufruct rights of the project company related to the immovables;
- Movable asset pledge on the movables which are owned by the project company;

- Pledge on the project accounts of the project company;
- Pledge on the shares of the project company;
- Usufruct right establishment on the shares of the project company;
- Guarantee and/or suretyship given by the shareholders, the parent companies, or the host government.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, the shares of a company can be pledged as a security to the benefit of lenders with the execution of a "share pledge agreement". If the borrower has physical share certificates, then following the execution of the share pledge agreement, the relevant share certificates are endorsed by recording a blank or pledge endorsement and delivered to the lenders. The pledge shall also be recorded in the share ledger of the company. In limited liability companies (*limited şirket*), the share pledge shall be established with the execution of a share pledge agreement before a notary public.

**5. Is private sale a recognized method for the enforcement of share pledge? What are the endorsement types typically used for the share certificates?**

Some of the security agreements provide the option for private sale, in which case, the pledged asset is offered to an individual or group of individuals by the pledgee, instead of an execution office conducting a public auction to the general public. However, the implementation of private sale mechanism is not expressly regulated under the Turkish law and may not be enforceable in practice.

On the other hand, with the new amendments in the Enforcement and Bankruptcy Law, published on 30 November 2021, the concept of "private sale though court approval" was introduced as another foreclosure method . According to this new mechanism, as opposed to public auction, the debtor may request the authorization of the court for the sale of a pledged asset within seven days from the notification of valuation. If there is no valuation, then the debtor may request a valuation from the court. It is worth noting that, although these changes aimed to enable the sale of seized goods with the least cost and the highest price, this cannot be deemed as a private sale in the most classical sense, given that the person initiating the private sale process can only be the debtor.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes. It is possible to establish a security interest over future assets, rights and receivables, as long as these are determinable.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

The enforceability of the finance documents and/or judgment from the foreign courts and/or of the securities provided under the finance documents may be limited by insolvency or technical insolvency of the Borrower, its affiliates or its shareholders and/or commencement of composition process.

If a borrower is declared insolvent/ technically insolvent or if a borrower is undergoing a composition process (even though it would typically be an event of default under the finance documents), the lenders may not be able to enforce their security interests and collect their debts by themselves.

If the borrower becomes insolvent before fully performing its secured obligations, then all the movable and immovable assets of the borrower, which can be seized, will form the bankruptcy estate (*iflas masası*). The bankruptcy estate will be liquidated, for the payment of creditors' receivables, through a sale by the execution office. The lenders will be entitled to enforce their security interest through the insolvency estate. Since the pledgee lenders have pre-emptive rights as the secured creditors, they will be entitled to receive their receivables from the foreclosure of the pledged assets before other creditors.

Article 376 of the TCC regulates technical insolvency, which is a balance sheet insolvency. If the borrower is technically insolvent, under certain circumstances it may be required to apply to a competent court for declaration of its bankruptcy.

Moreover, pursuant to Article 296 of the Enforcement and Bankruptcy Law, which is a mandatory provision under the Turkish law, contractual provisions stating that submission to concordat (*i.e.,* composition) is a ground for breach, acceleration or termination of a contract, are void.

In the foregoing scenarios, a competent court may, at its sole discretion, order protective measures to protect creditors until a finalized bankruptcy decision. Such protective measures may include: (i) notification to the bankrupt's debtors to the effect that they should not pay due debts directly to the debtor, but instead either to the commercial court or to the bankruptcy administration (*iflas idaresi*); (ii) notification to the land registries to prevent the transfer of the debtor's immovable property to third parties, etc.

There are also several other considerations that the finance parties should be aware of, such as the followings:

- there is a total block on creditors enforcing their security, during bankruptcy proceedings; and
- there is a mandatory statutory preference to certain categories of creditors.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The security trustee concept is not recognized under Turkish law. The security agent and parallel debt mechanisms are frequently used in project finance documents which are governed by a law other than Turkish law. However, these concepts are not expressly regulated under the legislation and neither of these concepts have been previously tested before Turkish courts. Eventually, if there is a dispute about either of these concepts before Turkish courts, there may be questions on the applicability of both the security agent and the parallel debt mechanisms. Moreover, it is worth noting that in the event of bankruptcy of the security/collateral agent, the securities created under the finance documents and the proceeds thereunder could fall under the security agent's bankruptcy estate and the lenders' remedy against the security agent or its bankruptcy estate would be the remedies available to the other contracting parties.

In order to avoid such risks, the lenders generally prefer to establish a joint creditor mechanism, in Turkish law governed

project financing projects, as such mechanism is accepted under the Turkish legislation. As per the provisions of the joint creditorship between the finance parties and the security agent, the security agent is authorized to claim and collect all the secured obligations in the name and account of the finance parties and commence the liquidation procedure for the security interests for the full amount; and the security agent is authorized to exercise the clearing/set-off rights on account of all the finance parties.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The Ministry of Industry and Technology of the Republic of Türkiye provides investment incentives with various elements such as VAT exemption, customs duty exemption or tax discount, depending on the region and sector and/or the subject of the investment type.

The Priority Investment Incentive Program includes some incentives regardless of the region, for companies operating in the natural resources and the energy sectors such as mining and mineral exploration, natural gas storage, nuclear power plant investments, investments in turbine and generator for renewable energy production and blade manufacturing used in wind energy production.

The requirement for foreign currency earnings shall not be applicable for foreign-currency loans extended to persons residing in Türkiye and borrowing loans in accordance with its investment incentive certificate and for loans extended for purchase of machinery and equipment (excluding the used ones, appurtenance, component, and accessories) listed in a certain customs tariff statistics position.

Additionally, according to the Stamp Tax Law numbered 488[41], all loan and security documentation in relation to the loans granted by banks, foreign credit institutions or international finance institutions are exempt from stamp tax.

Finally, there is a specific provision in the Moveable Pledge Law numbered 6750[42], setting forth that the pledge agreements and transactions conducted before the movable pledge registry are exempt from taxes, duties, fees and valuable paper fees.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

As the incentives are not granted based on the nationality of the investors, foreign investors may also benefit from the incentives. Please see further explanation on the incentive regime on Answer 9 above.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Turkish Government took various steps in the recent years, for the purposes of procuring that Turkish Lira gains its strength and enforced some additional restrictions for such purposes. The government implemented additional foreign currency borrowing restrictions, with recent amendments on the Decree numbered 32 on Protection of the Value of Turkish Currency ("**Decree numbered 32**") and the Turkish Capital Movements Circular. These amendments, in principle, prohibit legal entities from obtaining foreign currency loans from abroad or domestically

41 Published in the Official Gazette dated July 11, 1964 and numbered 11751.

42 Published in the Official Gazette dated October 28, 2016 and numbered 29871.

if they are not generating any foreign currency income. However, there are also several exemptions for this prohibition, such as having more than USD 15 million credit balance, or the utilization of the loan for the financing of a PPP project.

Under the foreign exchange legislation, all loans borrowed from abroad by a Turkish borrower must be utilized through a Turkish bank acting as an intermediary.

Additionally, pursuant to the Communiqué numbered 2008-32/34 on Decree numbered 32, the banks must notify Turkish Central Bank within 30 days on any wire transfers to abroad in relation to import/export activities and invisible transactions, with a balance equal to USD 50,000.

It should also be noted that the foreign currency loans, which the project companies obtain from abroad, are subject to payment of a fee called Resource Utilisation Utilization Support Fund ("**RUSF**") if the average term of the loan is less than three years. In addition, TRY loans obtained by the project companies outside the Republic of Türkiye are also subject to the RUSF, if the average term of the loan is less than one year. The applicable RUSF rate depends on the average term of such loans.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

According to the Direct Foreign Investments Law numbered 4875[43], the equal treatment principle applies to the foreign investors. Therefore, there is no extra restriction for the foreign investors based on their nationality.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is a 20% minimum equity contribution requirement for the Build-Operate-Transfer projects developed in accordance with the BOT Law numbered 3996[44] and the healthcare PPP projects developed in accordance with the Healthcare PPP Law numbered 6428[45]. Other than those, we are not aware of any minimum equity requirement for project financings. However, the general practice in Turkish market is to maintain a maximum debt (70-80%) to equity (20-30%) ratio.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Turkish law provides for certain filing or registration requirements for project finance documents, including, among others:

- Pledge on movable assets is perfected with the registration of the pledge agreement in the movable asset pledge registry, which is an online database named TARES. The pledge agreement must be either (i) in written form and signed before a TARES official or certified before the notary public; or (ii) in electronic form and signed with a secured electronic signature. This registration through TARES is required for (i) the perfection, monitoring and the public disclosure of pledged assets; (ii) the determination of the priority among the pledgees; and (iii) the registration of disposals of the pledged

43 Published in the Official Gazette dated June 17, 2003 and numbered 25141.

44 Published in the Official Gazette dated June 13, 1994 and numbered 21959.

45 Published in the Official Gazette dated March 9, 2013 and numbered 28582.

movable assets. Establishment of a pledge on motor vehicles, aircrafts, ships and mining rights requires a written agreement and registration of the pledge with the relevant authorities.

- Mortgage on immovables / usufruct rights is perfected with the execution of a mortgage deed before the land registry office and making a record of such mortgage in the relevant land registry.
- If a Turkish resident issues a guarantee/ surety in favor of foreign person residing abroad, that person should notify the Ministry of Treasury and Finance. This is a notification requirement solely for information purposes; there is no requirement to obtain any permits and/or approvals therefrom.

## D. Insurance

### 15. Can local insurance policies be governed by a foreign law?

According to Article 15 of the Insurance Law No. 5684[46], local insurance policies which secure insurable interests of the Turkish residents in Türkiye are to be provided by local insurence companies.

There is no restriction under the Insurance Law regarding the applicable law for insurance and/or reinsurance policies. However, in line with the above-mentioned Article 15, when both parties are Turkish companies and the insured property is located in Türkiye, some argue that the choice of law to be applied to these policies should be Turkish law, since there is no foreign element in the relevant insurance policies. Although this is debatable in doctrine and Court of Appeal decisions, according to prevailing views, there is no need for an additional foreign element other than the choice of foreign law, which itself provides this foreign element. Therefore, according to the prevailing view, the parties should be free to determine the law applicable to insurance and/or reinsurance policies, such as English law.

As a general observation, while reinsurance policies used to be more subject to English law in the past, they are more and more subject to Turkish law over the recent years.

### 16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?

Insurance proceeds under the insurance and reinsurance policies can be assigned to the benefit of the lenders through the execution of an assignment of receivables agreement in accordance with the provisions of the TCO. In addition, the lenders usually expect the project company to annotate the lenders as co-insured and loss payee under the insurance/reinsurance policies.

### 17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?

From a lenders' perspective, insurance is one of the key elements of a security package. The responsible party for arranging and maintaining the insurance differs in construction and operation phases of a project. During the construction phase, all risks are generally insured by the contractor with the contractor's all risk insurance policy, whereas during the operation phase, operational risks such as business interruption or physical damage to project assets are insured by the operation company or the project company itself.

46 Published in the Official Gazette dated June 14, 2007 and numbered 26552.

Please be informed that in large-scale projects the preference is to re-insure the insurance policies in Türkiye, as in some circumstances the local insurers may not meet the credit ratings of international financiers or the parties prefer double protection against any risks in the project.

Another important consideration in relation to the insurance provisions are the "reinstatement test" and "uninsurability" provisions included in some PPP agreements to increase the bankability of the projects.

The reinstatement test provision provides a mechanism whereby the proceeds of insurance policies are used to reinstate the project facilities provided that (a) such damaged part(s) of the project assets/facilities can be duly repaired and reinstated in accordance with the project documents and relevant legislation, (b) the project company has duly performed all of its obligations (including payment obligations) until that date and has the ability to repay the loan on the repayment dates in full until the final maturity date and (c) the project company receives enough insurance proceeds to make the necessary payments mentioned under limb (a) above.

The non-insurability provision increases the bankability of the projects by providing a mechanism whereby an non-insurability event is accepted as a force majeure event by the relevant administration in PPP projects. In circumstances where (i) the project company is unable to obtain, to maintain or to renew insurances (which it is required to obtain, to maintain and/or to renew under the financing documents or pursuant to the project agreements) in the international insurance market on commercially reasonable terms; (ii) the premia in respect of the insurance under limb (i) are, or have become, economically unreasonable, or (iii) the project company is unable to obtain offers on commercially reasonable terms from a number of insurance companies in respect of the insurances under limb (i).

Both concepts are commonly seen in Turkish PPP projects, such as the Build-Lease-Transfer **("BLT")** model healthcare projects and the Build-Operate-Transfer ("**BOT**") model motorway projects.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

PPP model is a permitted and preferred method for developing transportation, healthcare, and energy sectors. Under Turkish Law, there is no single PPP model or a PPP framework law which is applicable to all PPP projects operating in all industry sectors. Instead, there are various pieces of legislation which envisage different PPP models (i.e., BOT, BLT, Transfer of Operation Rights (TOR) and Build-Operate (BO)) in different industry sectors. As of the date of this questionnaire, Türkiye has invested in more than 260 PPP projects as also stated in Answer 20 below.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements are permissible under the Turkish law. In most of the PPP projects, the project company, the lenders and the relevant third party (which may be an administrative body in the case of implementation contract direct agreements or private company in the case of EPC/O&M direct Agreements) sign direct agreements to have control over certain actions of such third parties which may impact the project, through the step-in and substitution rights.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The PPP projects in Türkiye are supported by the relevant public institutions through different types of government guarantees or debt assumption mechanism. As per the data published on the website of the Presidency of the Republic of Türkiye Presidency of Strategy and Budget[47], more than 260 PPP projects, using four different PPP models, were completed in Türkiye since 1986. Among these models, the most frequently used model is Build-Operate-Transfer (BOT) model with 123 projects, followed by the Transfer of Operation Rights (TOR) model with 116 projects, the Build-Lease-Transfer (BLT) model with 18 projects and the Build-Operate (BO) model with five projects.

- ***Transportation Projects***:

In motorway projects which are structured through the BOT model, the project companies are granted with minimum traffic guarantee by the General Directorate of Highways (KGM) of Türkiye.

The details of such guarantee are included in the project agreement between the project company and the relevant public institution. In addition to the traffic guarantee, the project company executes a debt assumption agreement with the lenders and the relevant public institution (i.e., the Ministry of Treasury and Finance and/or the Ministry of Transportation and Infrastructure) for the purposes of setting forth the terms and conditions in relation to public institution's debt assumption or debt payment undertaking upon termination of the underlying project agreement.

- ***Healthcare Projects***:

In healthcare projects, the Ministry of Health, which is the relevant public institution, guarantees the availability payments and the service payments, and a termination compensation, which includes both the equity and the senior debt as well as all financing costs in all termination scenarios including project company default termination.

- ***Energy Projects***:

Renewable energy generation companies (wind power, solar power, biomass) benefit from a specific support mechanism, called as YEKDEM (Renewable Energy Sources Support Mechanism – *Yenilenebilir Enerji Kaynakları Destekleme Mekanizması*). Under the YEKDEM scheme, EPİAŞ (Energy Market Operations Co.) acts as the market operator and organizes the balance between the supply and demand in the electricity market. Any company which is an actor in the electricity market (as a generator, supplier, buyer, distributor etc.), may be registered with this mechanism, which provides comfort for (i) the sellers by means of a guaranteed market price and (ii) for the buyers by means of sufficient energy to continue their business without enfacing any energy shortages.

YEKDEM has helped the energy market become more stabilized and predictable. The payments made to the generation companies were denominated in USD until recently, nevertheless it is now denominated in Turkish Liras.

In addition to the YEKDEM mechanism, Türkiye also adopted the "Regulation on Renewable Energy Resource Area" scheme (*Yenilenebilir Enerji Kaynak Alanları* or "YEKA Regulation") in 2016 to further incentivise the renewable energy and to encourage the development and use

47 Available at https://koi.sbb.gov.tr/, updated as of November 2022.

of domestic manufacture of equipment required for large scale renewable energy generation facilities. While the YEKDEM scheme has encouraged local of equipment manufacturing by offering an increase in feed-in tariffs for projects that utilise local equipment, the YEKA scheme goes one step further by mandating the use of local equipment in projects that are tendered under the YEKA regulation. The YEKA regulation introduced two types of YEKA models: (a) the YUKT ("Allocation in Exchange for Domestic Production") model, in which the investor is granted with the right to construct and operate renewable energy generation facilities and to sell, at a guaranteed price, the electricity produced by such generation facilities provided that the equipment used in the facilities is also manufactured by the investor, and (b) the YMKT ("Allocation in Exchange for Use of Domestic Products") model, in which the investor is granted with the right to construct and operate renewable energy generation facilities and to sell, at a guaranteed price, the electricity produced by the generation facilities provided that the equipment used in the facilities is domestically sourced (not manufactured by the investor).

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Political risks arise from events, such as governmental actions which may jeopardize the bankability or commercial viability of the projects (e.g., expropriation, nationalization or restrictions on foreign currency income or change in law which prevents the project to continue with the agreed terms or causes an increase in the project costs), or political force majeure events such as wars, riots, civil disturbances, terrorist attacks or nationwide strikes.

As such risks are mostly related to the competence of the public party and the public party is more capable of minimizing such risks rather than the private party, these risks are generally undertaken by the public party under the PPP agreements (or the direct agreements to such PPP agreement) and the private party is protected. Political risks are also sometimes named as non-natural force majeure event.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

The lenders and investors are usually protected against the risk in change in law, falling within the scope of political risk, which is more likely to be attributable to the public party, as explained under Answer 21.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not specifically regulated under the Turkish legislation (other than some sector specific regulations such as the Renewable Energy Resource Area (YEKA) Regulation[48]). However, the concept is defined within the framework of the doctrine and decisions of the Supreme Court. A force majeure event may be described as an event which cannot be prevented or avoided by a party exercising reasonable and prudent care. Force majeure events refer to the events which occur due to a natural cause or human act or omission beyond control on a non-exhaustive basis. The most common force majeure event examples listed in Turkish law governed project financing documents are acts of God, pandemics and epidemics, wars, legal strikes, public uprisings, declaration of mobilization and sabotage.

48 Published in the Official Gazette dated October 9, 2016 and numbered 29852.

**24. What are the general environmental and social requirements in project financings?**

Pursuant to Article 10 of the Environmental Law numbered 2872 (the "**Environmental Law**"), "institutions, organizations and establishments which may cause environmental issues because of their scope of activity, are under the obligation to prepare an Environmental Impact Assessment (EIA) Report or a project information file. Unless an EIA Affirmative Decision or EIA Not Required Decision is obtained, then other approval, consent, incentive, construction and use permits are not granted for the projects and investment cannot be commenced or tendered". Therefore, the project companies cannot commence construction until the EIA process is finalized. The Environmental Impact Assessment Regulation regulates the administrative and technical procedures and principles to be followed in the EIA process. The Environmental Law stipulates certain measures and penalties for the projects of which construction and/or operation phase commences before the finalization of the EIA process. Pursuant to Article 15 of the Environmental Law, the activities initiated without conducting EIA inspection or preparing the project information file, shall be suspended.

The project companies should also act in accordance with occupational health and safety provisions under Law numbered 6331 on Occupational Health and Safety (the "**Occupational Health and Safety Law**"). Preventing occupational risks, taking all kinds of measures, (such as training of its employees, monitoring whether the occupational health and safety measures are taken in the workplace), adapting health and safety measures to the changing conditions in the workplace, are some of the obligations of the employers, arising from the Occupational Health and Safety Law.

Other than these general provisions, there are secondary legislation with special requirements as well which is applicable to specific type of the project financings.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Pursuant to the International Private and Procedural Law numbered 5718[49], parties may agree on a foreign law as the governing law, as long as the relevant agreement embodies a "foreign element" and unless the subject matter of the dispute is within the exclusive jurisdiction of the courts of Türkiye.

According to prevailing opinion in the doctrine and the Court of Appeals (*Yargıtay*), the selection of a foreign law by the parties of a contract, is deemed as a foreign element and there is no need for other (objective) foreign elements such as foreign party, foreign location, etc. However, there are exceptional court precedents suggesting the opposite too. Therefore, if there are no objective foreign elements in an agreement, but nevertheless foreign courts' jurisdiction is stated, it is still allegeable that there is foreign element based on the selection of foreign law. However, it is worth putting a qualification saying that there are exceptional court precedents on the opposite view as well.

Waiver from immunity clauses is valid under Turkish law. However, there is a certain restriction regarding the seizure of public assets under the Enforcement and Bankruptcy Law, which are considered as

49 Published in the Official Gazette dated December 12, 2007 and numbered 26728.

related with public order, and therefore, cannot be waived. In very broad terms, assets of the public entities which are allocated to the performance of a public service (as opposed to commercial assets) cannot be seized.

**26. Can financing documents provide for arbitration clauses?**

Yes. The validity of arbitration clauses in finance documents shall be interpreted in accordance with the governing law of the relevant finance document. Turkish law shall only become applicable if there is a public policy concern.

Türkiye is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides that an arbitral award issued outside Türkiye and within the territory of a state which is a party to such convention, will be recognized and enforced by the Turkish courts, without re-examination of the merits of the case, subject to the criteria and the procedures set forth in the said Convention.

The Turkish Court of Appeals (*Yargıtay*), in its reviews of Turkish law governed arbitration clauses, previously indicated that the choice of arbitration in an agreement shall be exclusive, not an alternative.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

In order to reduce the nation's greenhouse gas emissions, Türkiye is highly focused on increasing the renewable energy supply. The renewables are expected to supply almost a quarter of the nation's energy by 2035 according to the Government's expectation. In particular, sustainability and other environmental and social concerns are expected to be the driving factors in the project financing over the coming years in Türkiye.

**28. Are any significant development or change expected in the near future in the project finance market?**

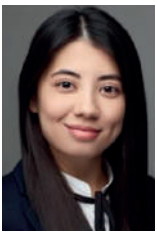
Currently, there are ongoing discussions in relation to the alternative project financing sources, such as the project finance funds introduced under the Capital Markets Law and the Communiqué on Project Finance Funds and Bonds issued by the Capital Markets Board, in order to differentiate the available funding sources for project financings in Türkiye.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

SOFR is considered as the main alternative reference rate during the LIBOR transition period.

# TURKMENISTAN

## CENTIL



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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The legislation of Turkmenistan does not provide for a single specific legislative act which regulates the project financing in the country. Turkmen legislation contains several legal acts that regulate the main aspects of project financing.

- Civil Code of Turkmenistan;
- Law of Turkmenistan "On Public – Private Partnership No. 379-VI dated 5 June 2021;
- Law of Turkmenistan "On Foreign Investments" No. 184-III dated 3 March 2008;
- Law of Turkmenistan "On Pledge" No. 862-XII dated 1 October 1993;
- Law of Turkmenistan "On Currency Regulation and Currency Control in Foreign Economic Relations" No.230-IV dated 1 October 2011;
- Law of Turkmenistan "On Investment Activity" No.698 dated 19 May 1992.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market of Turkmenistan remains at a very low level among other Central Asian countries. General political and investment environment of Turkmenistan is still underdeveloped and need more consistency and stability.

Most significant projects closed over the past 12 months are green energy and manufacturing projects.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

The most commonly used security types in project financing in Turkmenistan are:

– Mortgage;

– Pledge of movable property (vehicles, equipment);

– Pledge of Contractual Rights;

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, in accordance with the Law of Turkmenistan "On pledge" shares of a company can be pledged as a security to the benefit of lenders.

The following registration procedures shall be executed for establishing and/or perfecting a share pledge:

– Pledge of shares agreement should be notarized;

– Registration of pledge agreement with the Tax Department of the Ministry of Finance and Economy of Turkmenistan;

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Private sale is not recognised as a method for the enforcement of share pledge under Turkmen law. Enforcement of the share pledge is executed only through the public online-auction, via stock exchange.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, Turkmen legislation allows to establish security interest over future assets, rights and receivables in case if such future assets, rights and receivables can be clearly identified and categorized (type of the rights/property, location, serial/inventory number, number of the contract and etc.).

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

The concept of technical insolvency is not defined and recognized under Turkmen laws. Thereby, enforcement of security in such cases should be agreed by the parties under the security documents.

Enforcement of security interest in case of insolvency of the borrower.

Under Turkmen laws, the legal entity can be declared as bankrupt (insolvent) only upon the decision of a court. After the bankruptcy procedures have been commenced by the court, all further actions on behalf of the creditors are carried out only by the winding-up commission[50]. The creditors shall register themselves in the registry of creditors, where all claims of the creditors are reflected.

The process of enforcement of the security interest shall begin upon the relevant decision of the court has been issued.

Settlements with the creditors are conducted by the winding-up commission in accordance with the register of creditors in the order, established under the Law of Turkmenistan "On Insolvency".

Claims of secured creditors are satisfied from the funds received after the sale of the secured property.

50 Law of Turkmenistan "On Enterprises" No. 28-II dated 15 June 2000.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The concept of the security trustee is not recognized under Turkmen legislation. Turkmen law requires that only the lender (creditor) can act as a pledgee. In case if there are several creditors under the same facility agreement, one of the creditors (agent) can act as a security agent (pledgee) on behalf of other secured creditors.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Incentives and exemptions depend on the types of the projects which are being financed. There are several government support programs which provide incentives in different areas, such as agriculture, textile, green energy and etc. Mainly, the incentives are provided in the form of tax and customs exceptions.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Yes, the Law of Turkmenistan "On foreign Investments"[51] provides for the incentives and exemptions specifically applicable to foreign investors:

- Customs exemptions;
- Tax exemptions;
- Exemption for obtaining the license on importing goods/services for their own needs, and exporting goods/services of their own production;
- Land lease incentives on land plots, located on the territories of Free Economic Zones;
- Exemptions from several types of registration and certification fees/state duties;

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Yes, Turkmen law establishes the limits on foreign investments in certain areas of economy, which are considered as strategically and economically significant areas.

Such limitations apply to the amount of equity participation of foreign investors/citizens. In addition, foreign investors/citizens are not allowed to privatize the land plots located in the territory of Turkmenistan.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

Turkmen laws do not provide for the minimum equity requirement for project finance.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Following registration and filing requirements are applicable for project finance documents to be valid and enforceable in Turkmenistan:

51 Law of Turkmenistan "On Foreign Investments".

– Registration of loan agreement with Central Bank of Turkmenistan;

– Depending on the type of security – registration with the relevant authority and register;

– Registration of onshore export and import contracts under the project with the State Commodity Exchange.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

No, local insurance policies may not be governed by a foreign law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes, insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders if such assignment clause is provided under the insurance.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Following requirements of local legislation should be considered:

- Insurance of the property interests of a legal entity - resident of Turkmenistan located on the territory of Turkmenistan can be insured only by an insurance company - resident of Turkmenistan, except otherwise explicitly provided under the law;

- Authorized state authority has a right to provide minimum requirements and conditions to insurance contracts;

- Prior to the assignment of insurance obligations for reinsurance to foreign insurance companies, the reinsurer (reinsurance broker) is obliged to offer proposals to conclude reinsurance contracts in the amount of at least 50 percent of the obligations to local insurance companies.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, PPP is a permitted method of developing projects in Turkmenistan. However, the PPP is a relatively new concept under Turkmen law, since the law defining and regulating the PPP projects has been adopted only in 2021.

In 2021 PPP project for development of solar and wind power stations with capacity of 10 MW between the government of Turkmenistan and private foreign investor has been implemented.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Turkmen laws do not explicitly provide for possibility of direct agreements between the public authorities and the Lenders. However, the Law of Turkmenistan "On Public-Private Partnership" allows the direct PPP agreements between the public authorities and private parties.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The following types of host government support are available under PPP:

– subsidies to insure a guaranteed minimum income of a private partner from implementation of PPP project;

- contributions in the forms of assets and property necessary for the implementation of PPP project;
- provision of financial support in form of loans, subsidies;
- provision on guarantees;
- tax, customs preferences/exemptions[52];

Local legislation does not provide for exhaustible list of host governmental support for private parties under PPP. Host government support can also be provided in other forms, which are not prohibited under Turkmen laws.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Political risk events under the PPP agreements are usually under the responsibility of the public party.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Investors and lenders under PPP projects are protected against the changes in law passing subsequent to the signing of the relevant PPP agreement if such amendments worsen the investment conditions for the private party. In such cases, the legislation of Turkmenistan which was in force at the moment of signing of the PPP agreement shall be applicable for ten years from the date of signing of the PPP agreement[53].

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not specifically regulated under the local legislation. Turkmen legislation provides only for the general reservation, which states that the party has a right to terminate the long-term agreement prior its expiration date in case of force-majeure circumstances if such affected party is not able to performs its contractual obligations[54].

**24. What are the general environmental and social requirements in project financings?**

Investment projects with foreign investments are subject to mandatory state environmental expertise[55].

In addition, under the Law of Turkmenistan "On environmental safety"[56] certain types of activities established by the regulatory authorities require the positive conclusion of state environmental expertise on the environmental impact assessment.

Turkmenistan has no specific legislation governing social matters under project financings. Social requirements are mainly provided under the relevant PPP agreements. Usually, such requirements include creation of new workplaces for local citizens, training/educating the local personnel, development of local infrastructure and etc.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

52 Law of Turkmenistan "On Public-Private Partnership".

53 Law of Turkmenistan "On Public-Private Partnership".

54 Civil Code of Turkmenistan.

55 Law of Turkmenistan "On Foreign Investments".

56 Law of Turkmenistan "On environmental safety" No. 569 – V dated 3 June 2017.

Yes, submission to a foreign law and the waiver of immunity provisions are enforceable under Turkmen law.

However, there are several mandatory provisions mainly provided under the Civil Procedural Code of Turkmenistan and other legislative acts, which may not be governed by foreign laws. In such cases, only provisions of Turkmen laws shall be applied.

For example, enforcement procedure of the pledge, bankruptcy procedures, mandatory requirements for registrations/ fillings, form of agreements, issues related to land, immovable property located on the territory of Turkmenistan and etc.

**26. Can financing documents provide for arbitration clauses?**

Yes, the Law of Turkmenistan "On International Commercial Arbitration"[57] allows to provide for arbitration clauses in financing documents in case if one of the parties to the agreement is a non-resident of Turkmenistan.

Turkmenistan is a party to several international conventions on recognition and enforcement of foreign arbitral awards, including the ICSID Convention and New York Convention (1958).

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

The main current trends in project financing in Turkmenistan are concentrated on agriculture, manufacturing and green energy projects.

**28. Are any significant development or change expected in the near future in the project finance market?**

The Turkmenistan government never publicly discloses its programs and roadmaps on development of certain industries and regulatory areas.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

Alternative reference interest rate is the refinancing rate of the Central Bank of Turkmenistan.

57 Law of Turkmenistan "On international Commercial Arbitration" No. 101-V dated 16 August 2014.

# UNITED ARAB EMIRATES

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The main legislation governing project financing in the United Arab Emirates (the "**UAE**") is the Federal Law No. 50 of 2022 regarding the Commercial Transactions Law.

There are no international treaties specifically dealing with project financing transactions, although various treaties (i.e., such as bilateral investment treaties and free trade agreements that the UAE has signed with other countries) cover general areas that may be of relevance. In particular, the UAE is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), which can be of relevance to project financing transactions as it allows the enforcement of international arbitral awards in the UAE.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in the UAE is considered to be well-established and mature. The UAE has a well-developed infrastructure, a stable legal and regulatory framework, and a thriving economy, which make it an attractive destination for project finance. Over the years, the country has attracted significant investment in various sectors, including energy, real estate, transportation, and healthcare, among others.

Some of the most significant project financings in the UAE in the last 12 months include:

- the financing of the Dubai Electricity and Water Authority's (DEWA) solar projects expected to power 270,000 homes and offset carbon emissions amounting to 1.18 million tons per year in Dubai

- the financing of Zayed City Schools PPP project in Abu Dhabi relating to the design, build, finance, maintenance and transfer of three school campuses with a capacity of over 5,000 students, the first social infrastructure project in the UAE to achieve financial close under Abu Dhabi's new PPP regulatory framework
- the financing of a high voltage direct current offshore power transmission project involved the construction, ownership and operation of a system linking two offshore production facilities owned by the Abu Dhabi National Oil Company (ADNOC) with the Abu Dhabi onshore power grid

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

In the UAE, the most used security types in project financings are:

- **Mortgage**: a mortgage is a common form of security in project financing in the UAE. It is typically used to secure a loan by granting the lender a lien on the property that is being financed.
- **Pledge**: a pledge is a security interest in specific assets, such as inventory, accounts receivable, or equipment, that is granted to the lender to secure a loan.
- **Guarantee**: a guarantee is a promise by a third party to repay the loan if the borrower defaults. In project financing, a guarantee is often provided by a parent company or a wealthy individual to support the project.
- **Escrow**: an escrow arrangement is a contract between the lender and the borrower that requires the borrower to deposit funds into an escrow account to secure the loan, and released to the lender in the event of default by the borrower.
- **Assignment of Contracts**: assignment of contracts is a common security type in project financing in the UAE, in which the borrower assigns certain contracts or revenues (such as insurance proceeds) to the lender as collateral for the loan.

These security types are not mutually exclusive and may be used in combination in a project financing transaction to provide the lender with a comprehensive package of security. The type and extent of security required for a project financing will depend on various factors, including the nature of the project, the creditworthiness of the borrower, and the lender's risk tolerance.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, shares of a company can be pledged as security to the benefit of lenders in the UAE. A pledge of shares is a common form of security in project finance transaction. In terms of formalities and procedure, specific formalities and procedure vary based on the jurisdiction within the UAE and the specific requirements of the lender.

To establish and perfect a share pledge in the UAE, the following steps are typically followed:

1) The pledgor (i.e., the owner of the shares in the company) and the lender must enter into a share pledge agreement, setting out the terms and conditions of the pledge, including the obligations of the pledgor and the rights of the lender.

2) The pledgor must execute and deliver a pledge certificate to the lender, which evidences the pledge of the shares and the transfer of the right to vote and receive dividends to the lender.

3) The pledge certificate must be registered with the relevant regulatory authority, such as the Dubai Financial Services Authority (the "**DFSA**") in the Dubai International Financial Centre (the "**DIFC**") or the Financial Services Regulatory Authority (the "**FSRA**") in the Abu Dhabi Global Market (the "**ADGM**").

4) The pledge must be noted in the register of shareholders maintained by the company.

5) In some cases, the pledge agreement may also require the pledgor to provide additional documentation (such as proof of ownership of the shares and evidence of the compliance with any regulatory requirements).

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

In the UAE, private sale is a recognized method for the enforcement of a share pledge. If the borrower defaults on its obligations, the lender can enforce its rights under the pledge agreement by selling the shares pledged by the pledgor in a private sale to a third party.

The endorsement types typically used for share certificates in the UAE depend on the jurisdiction within the UAE and the specific requirements of the lender. In Dubai, for example, share certificates can be endorsed either in "bearer" or "registered" form.

In the case of a "bearer" endorsement, the share certificate can be transferred by delivery alone, without the need for any further endorsement or registration. This type of endorsement is often used in project finance transactions, as it allows for the quick and easy transfer of ownership of the shares.

In the case of a "registered" endorsement, the share certificate must be registered with the relevant regulatory authority, such as the DFSA or the FSRA, and any transfer of ownership must be recorded in the register of shareholders maintained by the company. This type of endorsement is often used for more complex transactions, as it provides greater protection to the lender and increases the transparency of the transaction.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, security interests can be established over future assets, rights, and receivables of a borrower in the UAE. In a project financing context, a security interest in future assets, rights, and receivables of the borrower can be a useful tool for lenders, as it allows them to secure their interests in the project and protect their loan against the risks associated with the borrower's operations.

To establish a security interest in future assets, rights, and receivables of the borrower, the following steps are typically followed:

- the borrower and the lender must enter into a security agreement that sets out the terms and conditions of the security interest, including the scope of the assets, rights, and receivables that are subject to the security interest
- the security agreement must be registered with the relevant regulatory authority, such as the DFSA or the FSRA, to ensure that it is legally binding and enforceable

- the borrower must take all necessary steps to ensure that the security interest is reflected in its books and records and that it does not take any actions that would undermine the validity or enforceability of the security interest

The specific requirements and procedure for establishing a security interest in future assets, rights, and receivables of the borrower may vary based on the jurisdiction within the UAE and the specific requirements of the lender.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

In general, the following steps may be taken by the lenders to enforce their security interest:

- **Notification**: in the event of a borrower default, the lender will typically send a notice of default to the borrower, outlining the breach and, if applicable, giving the borrower a specified period of time to cure the breach.
- **Enforcement**: if the breach is not cured within the specified time period (if applicable), the lender may enforce its security interest by selling the collateral to a third party. In some cases, the lender may also have the right to take possession of the collateral and sell it without the need for a court order.
- **Receiver**: in some cases, the lender may appoint a receiver to manage the collateral and sell it on its behalf. The receiver will be appointed by the lender and will have the power to take possession of the collateral and sell it to a third party.
- **Legal proceedings**: if the borrower becomes insolvent, is technically insolvent, or commences a composition process, the lender may commence legal proceedings to enforce its security interest. The specific legal proceedings will depend on the jurisdiction within the UAE and the specific terms of the security agreement.

It is important to note that the process for enforcing a security interest in the UAE may be complex and may take a significant amount of time.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The common law concept of trust is not legally recognised in the UAE, and an instrument purporting to create a trust might be construed by the UAE courts as giving rise to an agency, bailment, or other relationship. The concept of a local security agent (i.e., an agent holding security for the benefit of third parties), however, is recognised (as the equivalent to a security trustee in another jurisdiction) and enforceable.

As an alternative, paralegal debt structures may be used in the UAE, although they may be subject to regulatory approval and may be subject to specific legal requirements. In a parallel debt structure, multiple lenders provide financing to the borrower, and each lender takes a separate security interest in the same assets. This structure provides each lender with its own separate and distinct security interest and allows the lenders to enforce their security interests in the event of a borrower default.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

The main incentives and exemptions for project financing in the UAE vary by jurisdiction within the country, but generally include the following:

- **Tax exemptions**: the UAE offers tax exemptions on corporate income and personal income for a specified period of time for certain types of projects and investors.
- **Infrastructure support**: the UAE government provides infrastructure support to help companies and investors establish and operate their businesses in the country, including access to transportation, energy, and other essential services.
- **Guaranteed returns**: in some cases, the UAE government may guarantee a minimum return on investment for certain projects or investors.
- **Loan Guarantees**: the UAE government may also provide loan guarantees to help investors secure financing for their projects.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Foreign investors are eligible for most of the same incentives and exemptions as local investors in the UAE, although the specifics may vary by jurisdiction.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

In the UAE, borrowing bank loans and shareholder loans from abroad and/or in a foreign currency may be subject to restrictions and regulatory requirements.

- **Foreign currency loans**: borrowing in a foreign currency is generally allowed in the UAE, but the Central Bank of the UAE (the "**CBUAE**") regulates the foreign currency transactions, and there may be restrictions on the amount of foreign currency that can be borrowed.
- **Bank loans from abroad**: borrowing bank loans from abroad are generally permitted in the UAE, but may be subject to regulatory requirements and restrictions, including the need for prior approval from the CBUAE.
- **Shareholder loans**: borrowing shareholder loans from abroad may be subject to restrictions and regulatory requirements, including restrictions on the amount that can be borrowed, the use of the loan proceeds, and the requirement to provide security or collateral.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

The UAE generally has a welcoming attitude towards foreign investment and provides a supportive environment for foreign investors. However, there may be some restrictions on foreign investment in certain sectors, including:

- **Strategic sectors**: foreign investment in certain strategic sectors, such as military equipment, may be restricted.
- **Ownership restrictions**: in some cases, foreign ownership of businesses may be limited to a specified percentage, depending on the sector and the jurisdiction within the UAE.
- **Capital requirements**: certain sectors may require foreign investors to meet minimum capital requirements.
- **Approvals**: foreign investment in some sectors may require prior approval from the relevant authorities, such as the Department of Economic Development or the CBUAE.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

In the UAE, there is no specific minimum equity requirement under the legislation for project financings. However, in practice, most project financings involve a certain level of equity participation from the project sponsors or developers. The amount of equity required for a particular project financing will depend on various factors, such as the size and complexity of the project, the creditworthiness of the sponsors, and market conditions.

In general project financiers and lenders will require some level of equity participation from the project sponsors to demonstrate their commitment to the project and to provide a cushion against potential losses. This equity participation can take the form of cash equity, shareholder loans, or other forms of contributions to the project.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In the UAE, project finance documents are subject to various registration and filing requirements in order to be valid and enforceable. Some of the key requirements are as follows:

- **Offshore**: if the project is located within the DIFC or the ADGM, the project finance documents must be executed in accordance with the DIFC or ADGM law (as applicable) and must be registered with the DIFC Companies Registrar of the ADGM Companies Registrar (as applicable).
- **Onshore**: the project finance documents must be executed in accordance with the applicable laws and regulations of the relevant Emirate, and may need to be registered with the relevant authorities, such as the Department of Economic Development.
- **Security documents**: security documents, such as mortgage or pledge agreements, must be registered with the relevant authorities in order to be enforceable against third parties.
- **Notarization**: certain project finance documents, such as power of attorney or security documents, may need to be notarized by a public notary in order to be recognized and enforceable in the UAE.
- **Translation**: if the project finance documents are executed in a language other than Arabic, they may need to be translated into Arabic and notarized by a public notary to be recognized and enforceable in the UAE.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

In the UAE, the law applicable to insurance policies is determined by the law of the jurisdiction in which the policy is issued. If the policy is issued by a local insurance company, it will typically be governed by the laws of the UAE. However, if the policy is issued by a foreign insurance company, it may be governed by the laws of the jurisdiction in which the insurance company is located.

In practice, insurance policies issued by foreign insurance companies are typically governed by the laws of the jurisdiction in which the insurance company is located, regardless of the location of the policyholder or the insured property. The governing law will be specified in the policy terms and conditions and may be subject to change if the policyholder and the insurance company agree to a different governing law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes, insurance proceeds under insurance and reinsurance policies can be assigned to the benefit of lenders in certain circumstances. The assignment of insurance proceeds is generally governed by the terms and conditions of the policy and may also be subject to any applicable laws and regulations.

If the assignment of insurance proceeds is permitted under the policy, it typically requires the consent of both the policyholder and the insurer. The assignment may also require the execution of a written agreement between the policyholder, the insurer, and the lender, and the agreement may need to be registered with the relevant authorities to be enforceable.

Assignment of insurance proceeds is a common feature in project finance transactions and is used to provide additional security for the lenders by allowing them to receive the insurance proceeds in the event of a loss or damage to the insured property.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

In the UAE, there are several complications, concerns, and other issues that may arise in relation to insurance provisions under project financing documentation. Some of these include:

- **Regulatory compliance**: insurance policies and the assignment of insurance proceeds may be subject to regulation by the local insurance authorities, and it is important to ensure that the insurance provisions comply with all applicable regulations and laws.
- **Choice of law and jurisdiction**: the laws of the jurisdiction in which the insurance policy is issued may govern the interpretation and enforcement of the insurance provisions. It is important to consider the choice of law and jurisdiction carefully in order to minimize the risk of disputes and ensure that the insurance provisions are enforceable.
- **Insurance coverage**: there may be limitations on the type and amount of insurance coverage that is available for a particular project. It is important to review the policy and ensure the coverage is adequate for the risks involved.
- **Claims handling and payment**: the process for handling and paying insurance claims may vary depending on the policy and jurisdiction, and it is important to understand the process and ensure that the insurance provisions provide for an efficient and effective claims handling and payment process.
- **Premium payment and renewal**: The payment of insurance premiums and the renewal of insurance policies are critical to ensuring that the insurance coverage remains in force. It is important to ensure that the insurance provisions provide for the payment of premiums and the renewal of policies in a timely and efficient manner.
- **Assignment of insurance proceeds**: the assignment of insurance proceeds may be subject to restrictions under the laws of the jurisdiction in which the policy is issued, and it is important to ensure that the assignment of insurance proceeds is valid and enforceable.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, Public-Private Partnerships ("**PPPs**") are permitted as a method of developing projects in the UAE, and the UAE has a long-standing commitment to promoting PPPs as a means of delivering high-quality infrastructure and services to its citizens and businesses.

Several PPP projects have been developed in the country in recent years. Some of the key sectors in which PPPs have been used in the UAE include:

- **Energy**: the UAE has implemented a number of PPPs in the energy sector, including the development of power plants, renewable energy projects, and energy transmission and distribution networks.
- **Transportation**: PPPs have been used to develop transportation infrastructure in the UAE, including highways, bridges, ports, and airports.
- **Healthcare**: the UAE has implemented a number of PPPs in the healthcare sector, including the development of medical facilities, hospitals, and clinics.
- **Education**: PPPs have been used to develop educational facilities in the UAE, including schools and universities.
- **Tourism**: the UAE has implemented a number of PPPs in the tourism sector, including the development of hotels, resorts, and theme parks.

The UAE continues to promote PPPs as a means of delivering high-quality infrastructure and services, and it is expected that PPPs will play an important role in the development of the country's infrastructure and services in the years to come.

**19. Are direct agreements between the public authorities and the lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between public authorities and lenders are generally permissible under UAE law, and they are not uncommon in the project finance market in the UAE. These types of agreements are used to provide lenders with additional comfort and security in relation to the project and the public authority's obligations.

Direct agreements typically set out the terms and conditions under which the public authority will provide support to the project and may include provisions relating to the project's revenue streams, the public authority's obligations to maintain the infrastructure and services provided by the project, and the public authority's guarantees and indemnities to the lenders. In some cases, they may also include provisions that allow the public authority to take certain actions in the event of the borrower's default, such as the appointment of a receiver or the transfer of the project assets to a new operator, however the terms of the agreements are subject to negotiation between the public authority and the lenders, and dependent on the circumstances of the project.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

In the UAE, the types of host government support available for project financing may include:

- **Treasury Guarantees**: the government may provide a guarantee in support of the project's debt, which means that the government agrees to repay the debt if the borrower is unable to do so.
- **Debt Assumption**: the government may take on the project's debt as its own, which means that the government is responsible for repaying the debt.

- **Revenue Sharing Agreements**: the government may agree to share a portion of the project's revenue with the lenders, which can provide additional security for the lenders.
- **Off-take Agreements**: the government may agree to purchase a portion of the project's output, which can provide additional security for the lenders and help to ensure that the project has a steady source of revenue.
- **Tax Incentives**: the government may provide tax incentives, such as tax holidays or reduced tax rates, to encourage investment in the project.
- **Land Concession Agreements**: the government may provide land to the project developers, either through a lease agreement or a concession agreement.
- **Other**: the government may provide other forms of support, such as infrastructure improvements or regulatory changes, to support the development and operation of the project.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

In the UAE, the allocation of responsibility for political risk events under Public-Private Partnership (PPP) agreements is typically subject to negotiation between the public party and the private party. In some cases, the public party may assume the majority of the risk for political events, such as changes in laws or regulations that impact the project. In other cases, the private party may assume a significant portion of the risk and be responsible for managing and mitigating the effects of political risks.

The allocation of political risk can have a significant impact on the structure and financial viability of a PPP project, and careful consideration should be given to this issue during the negotiation process.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

In the UAE, the protection of investors and lenders against a change in law is typically addressed in the concession agreement between the public authority and the private party, however the terms and conditions of the change in law clause can vary widely between concession agreements, and the specific provisions will depend on the circumstances of each project. Such a clause may include provisions for compensation, termination or amendment of the agreement, or other remedies.

In general, the UAE has a stable and predictable legal and regulatory framework, and changes in law are relatively rare. However, it is still important for investors and lenders to consider the risk of changes in law as part of their due diligence and risk assessment process when evaluating potential investment opportunities in the UAE.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, the UAE Civil Code includes provisions for force majeure, which are generally applicable to contracts governed by UAE law. Force majeure is defined as an extraordinary event or circumstance that is beyond the control of the parties and that makes it impossible for one or both parties to fulfill their obligations under the contract. In practice, force majeure clauses are included in many contracts in the UAE, including project financing agreements, to address the risk of events such as natural

disasters, epidemics, or other events that may disrupt the performance of the contract.

The application of force majeure provisions will vary depending on the specific terms of the contract and the circumstances of the case. Parties to a contract should carefully consider the specific language used in the force majeure clause and the relevant provisions in the UAE Civil Code to ensure that their rights and obligations are protected in the event of a force majeure event.

**24. What are the general environmental and social requirements in project financings?**

In the UAE, there are limited environmental and social requirements applicable to project financings, although these requirements may vary depending on the specific nature of the project. In general, project sponsors and developers are required to comply with relevant local and federal environmental laws and regulations, including those related to waste management, air and water pollution, and the protection of wildlife and natural resources.

In terms of social requirements, project sponsors and developers are expected to comply with local labor laws and regulations, including those related to the employment of workers, safety and health conditions, and working hours. They are also expected to respect the rights of local communities, including the right to land, water, and other resources, and to avoid causing harm to the environment or local communities.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

In the UAE, it is possible for parties to a contract to agree to have their agreement governed by a foreign law and to submit to the jurisdiction of foreign courts, provided that the foreign law does not conflict with the laws of the UAE. It is, however, important to note that the UAE's courts will apply UAE law in the event of any disputes, and that any foreign judgments or arbitral awards must be recognized and enforced by the UAE courts.

With regard to waiver of immunity provisions, sovereign states and state-owned entities are generally immune from the jurisdiction of foreign courts, except in limited circumstances. Waiver of immunity provisions can be enforceable in the UAE, but they are subject to the principles of sovereign immunity under UAE law and must not be contrary to public policy.

**26. Can financing documents provide for arbitration clauses?**

Yes, financing documents in the UAE can provide for arbitration clauses. The UAE is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which means that arbitration awards made in other signatory countries will be recognized and enforced in the UAE. The UAE has also enacted its own arbitration law, known as the UAE Federal Law No. 6 of 2018 on Arbitration (the "**Arbitration Law**"), which governs arbitration in the UAE and is based on the UNCITRAL Model Law. The arbitration clause should be drafted in compliance with the Arbitration Law, and that the arbitration clause should be clear, specific and should indicate the rules of arbitration that will be followed.

Arbitration is a commonly used dispute resolution mechanism in the UAE, and parties to financing documents are free to agree to resolve disputes through arbitration, either in the UAE or in another

jurisdiction. The inclusion of an arbitration clause in a financing document is often seen as a way of avoiding lengthy and costly court proceedings and ensuring a more efficient and effective resolution of disputes.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

In the UAE, some of the current trends in project financing include:

- increased focus on sustainability and environmentally friendly initiatives
- increased use of alternative financing sources, such as Islamic finance and private equity
- shift towards public-private partnerships (PPPs) and concession agreements
- expansion into new sectors, such as healthcare and renewable energy
- increasing interest in infrastructure development projects

It is worth noting that the COVID-19 pandemic has had an impact on the project finance industry, causing some delays and adjustments in funding and investment.

**28. Are any significant development or change expected in the near future in the project finance market?**

Yes, some significant developments and changes are expected in the near future in the project finance market in the UAE, being:

- continued growth in alternative financing sources, including green financing and impact investing
- expansion into new sectors, such as technology and innovation, with a focus on digitization and automation
- increased emphasis on risk management and due diligence, as investors seek to minimize exposure to uncertainties and fluctuations
- growing interest in cross-border investment, as the UAE aims to position itself as a hub for global trade and investment

These trends are expected to shape the future of project finance in the UAE and influence the financing and investment landscape in the region.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

In the UAE, the alternative reference interest rates most used during the LIBOR transition period are:

- Emirates Interbank Offered Rate (EIBOR): a benchmark rate set by the Central Bank of the UAE and used by banks in the country for interbank lending.
- Secured Overnight Financing Rate (SOFR): a benchmark rate developed by the Federal Reserve Bank of New York as an alternative to LIBOR, based on the cost of borrowing or lending collateralized by Treasury securities.

The transition away from LIBOR is a global effort and financial institutions in the UAE are being encouraged to adopt alternative reference rates in line with international best practices.

# UNITED KINGDOM

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

There is no specific legislation governing project finance. Laws relating to finance and insolvency are generally applicable, although there are some project finance specific provisions that apply some modifications to the more general legislation, for example in relation to the insolvency of project finance companies.

In terms of insolvency, the core corporate insolvency procedures are found in the Insolvency Act 1986 (as amended), which is supplemented by a set of detailed rules (the Insolvency (England and Wales) Rules 2016) and the Companies Act 2006. English law restructuring and insolvency procedures may be divided, broadly, into two classes: first, procedures which are designed for a reorganisation or rescue, and, secondly, those which are designed to liquidate the company, sell the business or assets, and return the proceeds to the company's creditors. There are a number of procedures that fall into the first category, including schemes of arrangement, restructuring plans, and company voluntary arrangements. Administration can be used for either rescue, or (as is often the case) liquidation. Winding-up is a procedure for liquidation. Finally, administrative receivership is an enforcement process enabling the holder of security over the whole or substantially the whole of the company's assets which includes a floating charge to appoint an administrative receiver to realise the company's business and assets to repay the secured debt.

Administrative receivership is considered to be an attractive enforcement mechanism

for lenders since it is straightforward to initiate (through an out of court appointment). Administrative receivers have similar powers to administrators but owe their primary duties to their appointing creditors rather than to creditors as a whole (as is the case in administration). However, there is a restriction on floating charge holders appointing an administrative receiver under the Insolvency Act, unless one of the limited statutory exemptions applies. One of these is for project finance transactions where the project company incurs a debt of at least £50 million for the purposes of carrying out the project and where the financiers have step-in rights.

There is also a special administration regime which applies in respect of energy assets; this was established through the Energy Act 2004. A special administration regime is a procedure based on the ordinary administration regime, but with a special purpose in line with the relevant public policy objective. The aim of the energy administration regime is to ensure that essential services to consumers remain secure and uninterrupted if a protected energy company (which notably includes offshore transmission licensees) becomes insolvent. The regime provides the Secretary of State (or Ofgem with the consent of the Secretary of State) power to appoint a special administrator. Notably, the special administrator has an obligation to consider consumers' interests as well as those of the energy company's creditors.

The Energy Act 2004 also requires that the Secretary of State be given at least 14 days notice of any security enforcement against a protected energy company. In practice, this means that, even if one of the administrative receivership exemptions applies, the Secretary of State will be able to pre-empt the appointment of administrative receivers by applying for a special administration order.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in Great Britain is very mature and continues to be able to draw on over 40 years of experience since it was first used to finance oil and gas developments in the North Sea. The sophisticated nature of this market has enabled banks, funds, advisers, and developers in England and Wales to use the tools across various asset classes and also help develop other markets and jurisdictions using the same principles.

The busiest sectors for project finance within England and Wales are focused on renewables and energy transition projects. PPPs have dwindled over recent years given changing Government policies and subsidy regimes.

Whilst project finance principles apply across many sectors, the terms offered by banks will vary depending on the perceived risk profile of the underlying technology and revenue streams. For example, offshore electricity transmission assets (OFTOs) are perceived as a low risk technology with a stable, availability based revenue stream and therefore can obtain a leverage of up to 90:10. Batteries on the other hand have a highly merchant revenue stream and therefore leverage on battery projects is lower at 50/60:50/40.

Notable deals Ashurst has advised on in the past year are as follows:

- Advising lenders on the 882MW Moray West offshore wind project, which is expected to provide 30% of Scotland's power.
- Advising Fortum on the c.45Mwe gross South Clyde Energy from Waste Plant in Glasgow, Scotland. When built it is expected to process up to 350,000 tonnes per annum of residual waste.

- Advising Conrad Energy on the £85m financing of a portfolio of eight battery storage sites across the UK.
- Advising lenders on the refinancing of the 50MWe Rookery South energy from waste facility, which is expected to process over 545,000 tonnes of non-recyclable residual waste into baseload electricity which powers local homes and businesses.
- Advising Low Carbon on the £230 flexible financing facility to construct 1GW of solar PV capacity in the UK. The senior debt facility will enable the construction of large-scale renewable energy projects in the UK and the Netherlands. It is anticipated that the projects will result in the creation of at least 1GW of capacity, with the potential to provide clean, affordable power to more than 360,000 homes and avoid 308,000 tonnes of CO2e.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Typically, project financings are structured as follows:

1. a special purpose vehicle ("**SPV**") borrower grants all asset security to the finance parties. The all asset security will typically be taken by way of a debenture, which grants a fixed and floating charge over all (or substantially all) of the assets of that entity and an assignment of any contractual and other rights (including insurances) (to the extent possible). A fixed charge will be taken over specific assets, such as shares, investments, land (which is often also charged by way of legal mortgage) and any fixed assets such as heavy machinery. A floating charge is taken over all of the assets of the company. A key feature of the floating charge is that it allows the charged assets to be bought and sold without reference to the chargeholder, until the floating charge is crystallised, which will occur if there is an event of default or enforcement event. At that stage, the floating charge is expressed to be converted to a fixed charge over the assets which it covers at that time. Note, however, that the primary finance documents will govern to what extent the borrower is allowed to deal with the assets which are the subject of the debenture, and the procedures (if applicable) for the same.
2. the borrower's shareholder(s) grant a share pledge over the shares in the SPV borrower and an assignment of any shareholder loans.

Guarantees are also commonly used where the borrower is part of a broader group (for example if subsidiaries hold specific licences), with the borrower and any project companies granting guarantees in favour of the finance parties.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes. A share pledge (and any other form of security document) must be executed as a deed. For an English company formed under the Companies Act 2006, this involves execution by way of either (a) a director and a witness, (b) two directors or (c) a director and a company secretary, subject to any specific requirements set out in the company's articles of association. For overseas companies, pursuant to the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009/1917, the method of execution of a deed is determined by the law of the territory in which the overseas company is incorporated.

The share certificates for the shares pledged are typically delivered to the lender/security trustee for the duration of the pledge, and the company that holds the pledged shares will execute a stock transfer form (with transferee details left blank) which is also delivered to the lender/security trustee, to enable the security trustee to take possession of and sell the shares in an enforcement scenario. For English listed entities, the share certificates must also be endorsed and the security registered at Companies House.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

A share pledge permits the Security Trustee to take ownership of the pledged shares and transfer those shares, which may be by private sale if the shares are in a private company (i.e., a company that is not listed on a stock exchange). Special rules apply for sales of listed shares, including the relevant listing rules.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, with the exception of legal mortgages which can only be granted over property that the security provider currently owns (an equitable mortgage can however be created over future property).

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences a composition process with creditors?**

If the borrower becomes insolvent but has not yet commenced insolvency proceedings, it would typically be an event of default under an English law facility agreement (which normally includes both cashflow and balance sheet insolvency triggers), entitling the finance parties to demand repayment of all sums due and to enforce the security.

In a syndicated facility, certain of the finance parties will vote as to whether they wish to demand repayment of the outstanding amounts and enforce the security. If such vote is passed, typically a facility agent serves a notice on the borrower demanding that all amounts are immediately repaid in full.

The question of how the finance parties must enforce security is normally determined by the terms of the relevant security document. If the security document is silent on enforcement (which would, in practice, be rare), there are various common law and statutory rights that confer enforcement rights depending on the type of security involved. Even if a security document sets out enforcement rights, it will be subject to any mandatory overriding rules of law.

In addition, there may be various factors that restrict or limit the finance parties' ability to enforce the security such as intercreditor arrangements, the statutory moratorium in administration and the existence of a standstill agreement.

The main methods of enforcing security are the following:

- appointing a receiver to take possession of, and sell, assets secured by a fixed charge; and
- appointing an administrator or (in certain limited circumstances) an administrative receiver.

It is worth noting that a lender is only likely to consider enforcing security after it has exhausted other options, particularly if the event of default in question is only a minor one or is capable of being cured easily (unlike the scenario where the borrower is already insolvent or subject to insolvency proceedings). Even if the event of default is more serious, a lender is still likely to explore other avenues, such as restructuring the debt, before enforcing its security.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

Yes, a security trust as a structure can be used under English law. This is a common feature of project finance transactions (the security trustee holds security for the benefit of a group of lenders).

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

There are no incentives and exemptions targeted specifically at foreign investors in the energy and infrastructure sectors. However, historically various incentive schemes have been made available to incentivise investment in renewable energy and decarbonisation technologies. In the past, the Renewables Obligation regime, the small-scale Feed-in Tariff scheme and the Renewables Heat Incentive were the main forms of incentives available to investors in low-carbon projects. These schemes have now closed to new projects, although they still offer support to projects previously accredited pursuant to them.

Currently, for low-carbon energy projects, the Contracts for Difference ("**CfD**") regime is the main form of support available. Under the CfD regime, eligible projects can participate in annual allocation rounds, which involve a competitive process for the allocation of CfDs to successful projects. A CfD is a bilateral private law contract for a 15 year term, between a low-carbon generator and the CfD counterparty. The CfD counterparty is a limited company wholly owned by Government (though not, in most respects, financially supported by it). Under a CfD, the generator is paid the difference (intended to be a price "top up") between a "strike price" – a price for electricity intended to reflect the cost of investing in a particular low-carbon energy technology – and the "reference price" – a measure of the average market price for electricity in the UK wholesale market. Significantly, under the CfD, where the reference price is higher than the strike price, the generator is required to pay the difference back to the CfD counterparty.

The Capacity Market regime, introduced at the same time as the CfD regime, as part of the Government's Electricity Market Reform initiative, is designed to ensure that there is sufficient electricity capacity available to meet customer demand. The Capacity Market is seen as playing a particularly important role in the context of an electricity generation mix involving an increasing proportion of intermittent generation such as wind and solar. It involves annual auctions (1 year ahead and 4 year ahead auctions) under which capacity agreements are awarded to successful capacity providers. A wide variety of projects can participate in these auctions, including existing and prospective or refurbishing generators, battery storage projects and demand side-response. Existing projects are only eligible to apply for a capacity agreement for a 1 year term, but new build projects can apply for a 15 year term if they meet the relevant criteria. Under the agreements, capacity providers are paid to ensure they are available to respond when called upon to do so when there is a "system stress event".

The Government is currently implementing various other policy initiatives, involving incentives, to achieve two objectives: increasing energy security, while achieving the UK's net carbon zero objectives. In particular, the following initiatives are being taken forward to encourage investment:

- For new-build nuclear projects, a nuclear regulated asset base ("**RAB**") model is in the process of being implemented under the Nuclear Energy (Financing) Act 2022. Nuclear projects are seen as key to the Government's energy strategy as their benefits are two-fold: (a) they can assist the UK to reach its targets for reducing carbon emissions, and (b) they support energy security and independence in the UK by reducing reliance on fossil fuels. Under the RAB model, a company receives a licence from an economic regulator to charge a regulated price to consumers in exchange for providing the infrastructure in question.
- A new regulatory regime is currently being developed for carbon capture and storage. The Energy Bill 2022-23 will provide for a new licensing regime for carbon dioxide transport and storage networks, which will be regulated in a way similar to gas and electricity networks. A combination of an economic licence, which will allow the networks to recover their allowed revenue from users (carbon dioxide emitters), as well as a government support package, are intended to make carbon dioxide transport and storage networks economically viable. The carbon dioxide emitters who are expected to connect to these networks include gas-fired power generators, low-carbon hydrogen producers and industry (e.g., cement or fertilizer manufacturers). These carbon dioxide emitters will also be incentivized, under support contracts currently being developed, which will be similar to the CfDs currently being offered to low-carbon generators (which are discussed above).
- The Government is also developing a regime for the support of investment in low-carbon and renewable hydrogen.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

In terms of exemptions and incentives specifically applicable to foreign investors, there are currently no tax, or other incentives, which are provided preferentially to foreign investors or creditors.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are currently no exchange controls or restrictions in England and Wales which lead to restrictions on borrowing in foreign currencies or from abroad.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

In terms of exemptions and incentives especially applicable to foreign investors, there are currently no taxes or other incentives, which are provided preferentially to foreign investors or creditors.

While there are no blanket restrictions on foreign ownership of a project in England and Wales, there are nuances or additional requirements within industry specific legislation or regulations that apply to companies under foreign ownership.

For example, the introduction of the National Security and Investment Bill in May 2021 provides the UK government with stronger ability to investigate and

intervene in mergers, acquisitions and other deals which could threaten national security. The Act applies to 17 areas of the economy, notably including energy and transport.

Further, the Electricity Directive and the Gas Directive required Member States to implement a special certification process for transmission system owners and transmission system operators controlled by a person from a non-EU country. These directives have, following Brexit, been retained in the UK under domestic legislation. As part of the certification process in Great Britain, Ofgem must make an assessment, about whether foreign ownership or control of the transmission system would give rise to any risk to security of supply.

UK withholding tax (currently with a rate of 20 per cent) may be imposed on interest payments to parties in other jurisdictions, though the application and rate of any withholding tax will depend on whether there is a double taxation treaty with the other jurisdiction. The UK has double taxation treaties with over 100 countries. Where a suitable double taxation treaty is available, a foreign investor would often seek to apply for a so-called double tax treaty passport to allow it to receive without suffering withholding (https://www.gov.uk/guidance/double-taxation-treaty-passport-scheme).

It should be noted that withholding tax does not apply in a number of scenarios, mainly (subject to certain conditions) interest paid to or by a 'bank' (as defined in the Finance Act 2008, a wide definition including many UK banks, European banks permanently established in the UK and non-EU banks operating in the UK with permission to accept deposits).

The availability of those exemptions means that many lenders will, subject to completion of relevant procedural formalities, be able to receive interest without suffering any withholding tax. Any withholding risks (particularly change of law risks) would generally be addressed through appropriate "gross-up" provisions in the relevant loan facility agreement.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There are no general minimum equity requirements under legislation for project financings in England and Wales, however, lenders will typically expect 15 – 30% of the equity for a project to be contributed by its sponsors, depending on the risk profile of the asset being financed. For projects with merchant revenues (such as battery storage), we have seen as much as 50% equity required.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

Generally, there are no special filings required for project finance documents, and typically the filings required are those required for the security documents.

With very limited exceptions, charges (and mortgages) created by a company or limited liability partnership incorporated in England and Wales (regardless of the governing law of that charge) must be registered with the jurisdiction's registrar of companies, Companies House, within 21 days from the date of the creation of the security interest. Otherwise, the security interest will be void against a liquidator, administrator or creditor, and the debt secured by that charge becomes payable immediately. Security interests over some assets (such as land, intellectual property rights, ships and aircraft) are registrable in

specialist registers (where registration fees apply), and priority is generally established by the order of such registration. Security assignments must be perfected by providing the third party with notice.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

Yes as a general rule, although in practice policies taken out in England will be governed by English law.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes and it is typical for insurance policies to be assigned by way of security for the benefit of the finance parties in project finance transactions.

Facility agreements will also often include provisions requiring insurance proceeds (with some exceptions, including the proceeds of third party liability insurances which are required to be paid to a third party) to be applied in reinstatement of the secured project asset if reinstatement is possible, and otherwise applied in prepayment of the outstanding debt.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Typically, the lenders to a project will appoint an insurance advisor who will advise them as to which insurances are required for a project, the duration of those insurances, the policy limits for those insurances, the scope of any deductibles or exclusions and also any specific conditions which should apply to the insurance. The lenders will also typically request an undertaking to be given by the borrower's insurance broker, who will give certain undertakings in favour of the lenders.

Some of the commonly requested insurance conditions and provisions are set out below:

- *Co-insurance* - Lenders generally require to be co-insured under the construction all risks insurance, delay in start-up insurance, property all risks insurance, business interruption insurance and third-party and products liability insurance. This means the lenders are directly insured, as well as the project company.
- *Waiver of subrogation* – Lenders generally require insurers to waive any rights of subrogation which they may have or may acquire against any of the lenders.
- *Non-vitiation* – Lenders often wish to protect themselves against the risk that any insurance policy could be avoided by a non-disclosure on the part of the project company. This is typically achieved by way of the inclusion of a "non-vitiation" clause in an insurance policy.
- *Loss Payment clause* – Lenders typically request that insurance proceeds are paid to the borrower unless the security trustee has notified the insurer that an event of default has occurred, in which case the insurer should pay the proceeds as directed by the security trustee.
- *Payment of Premium/Termination* – Lenders do not want the insurances to expire due to non-payment of premium or otherwise and accordingly may require the insurer (or the insurance broker pursuant to the broker's letter) to notify them before the policy is

cancelled. Often, a condition is included in the insurance policy noting that the lenders may (but are not obliged to) pay the premium on behalf of the borrower.

- *Amendments* – Typically lenders will seek to include protections in the facility agreement to restrict amendments to the insurance policy without their consent. The broker may also undertake in the brokers' letter to notify the lenders of any amendments or changes in the scope of the coverage.
- *Compliance with policy terms* – Lenders will likely include provisions in the facility agreement requiring the borrower to comply with the terms of the insurance policy. Again, the broker may also undertake in the brokers' letter to notify the lenders of any breach of the policy by the borrower.
- *Claim management* – The facility agreement will typically include provisions regarding claims management and obligations on the borrower to notify the lenders of any potential claims.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

The UK was one of the pioneers of public–private partnerships ("**PPPs**") in the early 1990s. However, the use of the PPP (or PFI/PF2) has been heavily affected by changing political sentiments over the years. In the 2018 Budget, the then Chancellor of the Exchequer announced that PFI/PF2 would no longer be used to deliver new infrastructure. This remains the government's position, but alternative models continue to be used in certain areas and sectors. One example of this is the Welsh Government's mutual investment model (MIM), which was used to finance the A465 'Heads of the Valleys' Road project that Ashurst advised on.

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

While permitted by law, UK public authorities do not typically enter into direct agreements to support project financings.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

Other than with respect to subsidies and incentives (see further above), the role of the UK Government in most project financings is limited to matters of planning and environmental and regulatory compliance of the project company, since the United Kingdom no longer uses PFI/PPP as a means to procure infrastructure for public services.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Not applicable in light of our answer above regarding the status of the PPP in the UK.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Not applicable in light of our answer above regarding the status of the PPP in the UK.

**23. Is force majeure specifically regulated under the local legislation?**

Force majeure is not a standalone concept in English law. Under English law, contractual performance will be excused due to unexpected circumstances only if they fall within the relatively narrow doctrine of frustration. This doctrine will apply by default unless the parties agree something else in their contract.

Parties who wish to define a wider set of circumstances when failure to perform a contract will be excused and the consequences of failure are generally free to do so. Clauses which deal with these matters are commonly called force majeure clauses and will be negotiated by the parties to the relevant agreement.

**24. What are the general environmental and social requirements in project financings?**

Borrowers and project companies will typically give a number of representations and undertakings in relation to their compliance with environmental law, obtaining required environmental permits and the management of environmental claims. Lenders may appoint a specialist environmental advisor who will provide a report to the lenders on the environmental impact of the project and opine on the environmental permits and authorisations which should be required (which will depend on the type and location of the project).

Environmental law in the UK is comprehensive, however many project finance lenders, in addition to the above, include an obligation for borrowers to comply with requirements known as the Equator Principles in their finance documents to help manage environmental and social risks. Other lenders (particularly development banks or ECAs) have their own environmental policies which they require the borrower to comply with.

Project finance lenders may also wish to incorporate green loan principles or sustainability-linked or social loan principles as published by the Loan Market Association (LMA), into the facility agreement.

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

There is generally no requirement for an English company to only enter into English law contracts. If an English company enters into a contract that is only governed by foreign law and is subject to foreign jurisdiction, the validity or enforceability of that contract will be a matter for the applicable foreign jurisdiction.

EU Regulation 593/2008 ('Rome I') continues to apply following the United Kingdom's departure from the European Union, with amendments, in the United Kingdom as retained EU law. Rome I provides that the applicable law of a contract is without prejudice to the overriding mandatory provisions of the law of the forum (i.e., the place where the dispute is heard). 'Overriding mandatory provisions' are defined as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as political, social and economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable".

Courts in England will give effect to the consensual waiver of immunity by a state. Where a state entity enters into a commercial arrangement, it will not generally be entitled to sovereign immunity. Under the State Immunity Act 1978, there are a number of exceptions

to the general proposition that UK courts have no jurisdiction to adjudicate disputes against sovereign states, as follows:

- the state has submitted to the jurisdiction of the UK courts;
- the proceedings relate to a commercial transaction entered into by the state;
- the proceedings relate to a contractual obligation on the state to be performed in the United Kingdom; and
- the state has agreed to submit the dispute to arbitration.

**26. Can financing documents provide for arbitration clauses?**

Yes, the United Kingdom has been a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, since 1975. The New York Convention provides a regime for the enforcement of arbitral awards in contracting states. Over 157 states are signatories to the New York Convention.

Arbitration is commonly used in cross-border project financings following Brexit as the UK no longer benefits from the streamlined process for enforcing EU judgments in the Recast Brussels Regulation. The UK has acceded to the Hague Convention on Choice of Court Agreements which provides for reciprocal recognition of judgments in certain circumstances, however.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

From mid- 2021 the UK energy market has been dominated by high power prices due to global supply issues. Ofgem (the gas and electricity regulator in Great Britain) announced an increase in the energy price cap of 54% (being the maximum price suppliers can charge their customers) in April 2022, resulting in high energy bills for consumers and a need for Government intervention through the Energy Price Guarantee. Accordingly, there is an increased focus on increasing the UK›s domestic energy supply and storage capabilities. Therefore, we expect most project finance activity in the United Kingdom to be in the energy space, particularly in offshore wind (in light of the separate offshore wind only pot included in the CfD Allocation Round 4), interconnector projects and battery storage financings. Hydrogen and Carbon Capture Utilisation and Storage (CCUS) are also key areas of focus in Great Britain, driven particularly by the Government's «Clean Growth Strategy». Discussions in respect of these assets remain ongoing to ensure that projects will be commercially viable.

In light of high inflation in the UK (being 10.1% as at January 2023), interest rates have risen rapidly. In certain projects, we have seen lenders look to renegotiate and increase their rates if financial close is not achieved by the period set out in their commitment letter. The project finance market is still busy, however, notwithstanding the increased interest rates that UK lenders are looking to charge to borrowers.

**28. Are any significant developments or changes expected in the near future in the project finance market?**

Generators will need to consider the impact of the Electricity Generator Levy on their business models for existing portfolios and also for new projects in planning. The Electrical Generator Levy is a temporary 45% charge on exceptional receipts generated from the production of wholesale electricity. Exceptional receipts are defined as wholesale electricity sold at an average price in excess of £75 per MWh

over an accounting period. The levy will be limited to generators whose in-scope generation output of electricity exceeds 50GWh across a period of a year. The levy will only apply to exceptional receipts exceeding £10 million in an accounting period. This 'temporary' tax will run from 1 January 2023 through to 31 March 2028, so the impact will be long-lasting.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

For GBP transactions, the commercial bank market is typically using Compounded SONIA. Whilst Term SONIA is published, it is less commonly used.

For USD transactions, we are typically seeing Compounded SOFR being preferred by the commercial bank market, however there has been an increase in requests for reference to Term SOFR.

# UKRAINE

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***Disclaimer**: As a result of martial law currently in force in Ukraine (which is likely to be extended if the hostilities from Russia continue) and force majeure events being triggered in the jurisdiction, activity with Ukrainian clients may be subject to restrictions which are not addressed in these guidelines e.g., the National Bank of Ukraine has significantly limited cross-border FX payments (repayment of cross-border loans, performance of guaranty (suretyship) obligations, dividends repatriation and acceleration of loans are not permitted, etc.).*

## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

Ukraine has a complex legal system, which includes an extensive range of laws and regulations governing investment activity. In addition to the general legal framework, the key piece of legislation governing foreign investment is the Law of Ukraine "On the Foreign Investment Regime," which regulates the conditions for investment, the rights and obligations of foreign investors, and the procedure for investing in Ukraine.

It is important to note that there are other laws and regulations that apply to specific investment projects. For example, environmental and construction laws may be relevant to certain projects.

Apart from the domestic legal framework, Ukraine has also signed various international treaties and agreements that play a significant role in project financing in Ukraine. Ukraine has ratified the Convention on the Procedure for the Resolution of Investment Disputes between States and Foreign Persons in 2000, which is commonly known as the ICSID Convention. This Convention provides for the settlement of investment disputes between investors

and states through arbitration. It offers a neutral and transparent mechanism for resolving disputes that arise between foreign investors and the state of Ukraine.

Moreover, Ukraine has concluded over 70 bilateral investment agreements with other countries, which provide favorable conditions for foreign investors and govern the investment process between Ukraine and the signatory state. These agreements typically provide for the protection of investors' rights, including the protection of investments from expropriation, fair and equitable treatment of investors, and the free transfer of funds. The agreements also contain provisions for the resolution of investment disputes through arbitration.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

The project finance market in Ukraine is relatively undeveloped but it has significantly grown and evolved over recent years. Restrictive exchange and capital controls make it challenging for the parties to implement traditional project finance structures. In addition, a high level of corruption adds an uncertainty over judicial independence and protection of creditor's rights. However, the Government is implementing major judicial reforms to tackle the corruption.

Against all the odds, quite a few breakthrough energy and renewables projects were supported by international financial institutions, development banks and private lenders through project finance before the outbreak of the war. The project finance was also driven by infrastructure and transportation projects but to a lesser degree.

The most notable renewables projects include:

- EUR 1,5 billion financing (a mixture of green bond and syndicate financing) for the construction of 800MW Zophia wind farm;
- EUR 372 mln non-recourse financing for the construction of the 250 MW Syvash wind farm near the Azov Sea;
- USD 150 mln limited recourse financing for the constructions of the first 98 MW phase of the 500 MW wind farm in Zaporizhia region;
- Over EUR 135 mln limited recourse financing for the development and construction of solar PV plants in the Central and South parts of Ukraine

In addition, other projects include the construction of a new runway at Boryspil International Airport in Kyiv and the construction of a new terminal at Lviv International Airport.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

In Ukraine, the most commonly used security types in project financings include:

Mortgage: A mortgage is a common type of security interest in Ukraine, whereby a lender takes a security interest over the borrower's existing or future immovable property or assets (including, but not limited to, real estate under construction). Mortgages are typically used to secure loans for the financing of real estate projects. Unlike most of the other types of security interests, mortgages require notarization and state registration.

Pledge: A pledge is another common type of security interest in Ukraine, whereby a pledgor (e.g., borrower or a third party) pledges its movable assets (such as accounts receivables, inventory, or shares) to secure a loan.

Assignment of rights: By this type of security an obligor assigns its rights and interest (often, in project agreements) in favour of the lenders. Assignment of rights in project financing would normally be conditional on occurrence of a default. Assignment is also different from a novation which under Ukrainian laws is a substitution of an existing obligation with a new obligation between the same parties.

Suretyship: This is an agreement by which a surety undertakes to a creditor to perform the obligation of the principal debtor if it fails to perform the obligation. The suretyship is a secondary (ancillary) obligation and does not usually survive termination or cancellation of a principal obligation.

Guarantees: A guarantee, as opposed to a suretyship, is considered a financial service pursuant to the laws of Ukraine and it can be issued by financial institutions such as banks and credit unions. Guarantee is usually independent of the secured obligation and can survive its termination or cancellation.

Liens: Liens are another type of security interest in Ukraine, whereby a creditor has the right to retain possession of a debtor's property until the debt is paid. Liens are commonly used in the context of secured transactions, such as for the purchase of goods or equipment.

It is worth noting that the security types used in project financings in Ukraine may vary depending on the nature and complexity of the project, as well as the preferences of the lenders and borrowers involved.

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, the shares of a company can be pledged as security to the benefit of lenders. The procedure for establishing and perfecting a share pledge is regulated by the Civil Code of Ukraine, the Law of Ukraine "On Pledges", the Law of Ukraine "On capital markets and organized commodity markets" and the Law of Ukraine "On protection of creditors' rights and registration of encumbrances". The most common types of shares are the stock in the joint stock companies and the shares in limited liability companies.

A pledge of shares must be made in writing and signed by the parties. The pledge agreement must include a description of the pledged shares, the main terms of the principal obligation, and usually contains the rights and obligations of the parties.

Notarization and state registration of a share pledge is not mandatory, but in many cases are advisable, particularly, to ensure the first priority of the pledge over security interests or other creditors. Note that if the securities (stock) in a joint stock company are subject to pledge such agreement shall usually involve a depositary institution and perfection (as well as enforcement) would include making respective entries in the depository system.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Under Ukrainian law, private sale is a recognized method for the enforcement of a share pledge. If the borrower defaults on the principal obligation, the lender may enforce the share pledge by selling the pledged shares privately or through a public auction. The specific method for enforcing a share pledge will depend on the terms of the pledge agreement, the type of collateral and the lender's preference.

Note that in Ukraine stock in a joint stock company exists in electronic form only. Share certificates in a paper form are not usually issued and are rarely required in security transactions. Title to stock is evidenced by a statement from the depository system and a depository institution plays an important role in the process of enforcement of such security interests.

It should be noted that in practice, the enforcement of a share pledge can be a complex process, especially if there are disputes or litigation involved. It is recommended that parties seek legal advice and follow the appropriate procedures for the enforcement of a share pledge.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Yes, security interest can be established over future assets, rights, and receivables of the borrower in Ukraine. The Civil Code of Ukraine provides for the possibility of creating security over future assets, including future property rights and claims (receivables).

In order to create a pledge over future assets, it is necessary to specify the subject matter of the pledge in the pledge agreement in sufficient detail to ensure its identification in the future. Note that no full equivalent of an English law 'debenture' is available in Ukraine, meaning that each collateral must be identified in every security instrument quite thoroughly. It is also possible to secure the claims which the lender will hold in the future.

In general, the creation of security over future assets and receivables requires careful drafting of the pledge agreement to ensure that the security interest is enforceable and that the pledged assets or receivables can be identified in the future.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

That would depend on the type of security interest that has been established.

If the security interest is a mortgage or a pledge, the lender can either take possession of the collateral or sell it in accordance with the procedures established by the agreement and the law. The law provides for specific procedures and timelines for taking possession and sale of the pledged assets. Note that during insolvency proceedings the claims of a creditor secured by pledge or mortgage can only be satisfied out of the value of respective collateral. Once the insolvency proceedings commence the collateral can only be sold within the supervision of respective court dealing with the case.

In all other cases, for example when security interest is constituted pursuant to a suretyship or guarantee, respective creditor's claims will be considered together with all other (unsecured) creditors and, in case of their satisfaction, such creditor will receive a payment directly from the debtor.

If the borrower enters into a composition process, the lender may be required to participate in the process and negotiate with other creditors to reach a compromise agreement. If a compromise agreement is reached, the lender will receive a share of the proceeds from the sale of the borrower's assets. If a compromise agreement cannot be reached, the lender may be entitled to file a claim in the bankruptcy proceedings.

In any case, the lender must follow the procedures established by the law to enforce its security interest.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The Civil Code of Ukraine does not provide for a distinct concept of a security trustee, however in the recent years steps have been taken to approximate Ukrainian legislation to the commonly spread legal practices in this regard. The concept of 'trust ownership' has been introduced, however, court precedents enforcing it remains quite scarce.

A parallel debt structure can be used as an alternative mechanism to a security trustee. In this structure, the borrower creates a parallel debt to the lenders that is equal to the amount of the debt owed to them. The parallel debt is secured by the same collateral as the original debt and is treated as a separate debt owed to the lenders. This structure allows the lenders to take enforcement actions on their own behalf without the need for a security trustee.

More often in project financings in Ukraine the lenders act as co-pledgees within the same mortgage or pledge agreement; further relations between them in case of enforcement should then be governed by a separate intercreditor agreement (usually governed by foreign law).

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Ukraine offers various incentives and exemptions to support investment projects with significant investments. Some of these incentives are provided under the Law of Ukraine "On State Support for Investment Projects with Significant Investments in Ukraine" and related regulations. Investment projects that meet the criteria established by the Law can benefit from the following incentives:

- Stable legislation guarantees: Investment projects can receive state guarantees on stable legislation for 15 years and compensation for losses caused by state bodies.
- State support: Investment projects can receive state support of up to 30% of the amount of significant investments in the form of exemptions and other benefits.
- Tax incentives: Investment projects can benefit from a corporate income tax exemption for five years from the moment of filing the application (except for projects in the sphere of extraction for further processing and/or enrichment of minerals). They can also be exempted from land tax and receive reduced rates of rent payments for land of state and communal property.
- Customs and Value Added Tax ("**VAT**") exemptions: Investment projects can benefit from exemptions from customs duties and VAT payments for the import of new equipment and components, subject to certain conditions.
- Infrastructure support: Investment projects can benefit from the construction of related infrastructure (such as highways, communication lines, and utilities) necessary for the realization of the project.
- Land use rights: Investment projects can benefit from a simplified procedure for granting the right to use (lease) of land plots of state or communal property with the pre-emptive right for acquisition of such a land plot to the property after the expiration of a special investment agreement.

Network connection assistance: If an investment project requires connection to the networks of heat, gas, water and electricity supply, utilities, etc., the state

may assist the investor with significant investments in the process of such connection within the framework of a special investment agreement.

It is important to note that the availability and applicability of these incentives and exemptions may vary depending on the specific project and circumstances, and investors should consult with legal and financial advisors to determine the most advantageous financing structure and incentives for their project.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Please refer to the answer to question 9.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

Legal entities that are residents of Ukraine may receive loans from non-residents in foreign currency, including revolving financial assistance, under contracts. The loan agreement should be serviced only through one authorized bank, which is indicated in the extract from the National Bank of Ukraine's automated information system "Loan agreements with non-residents."

Before conducting foreign exchange transactions under the agreement through this bank, the legal entity should contact the bank chosen by them if the National Bank is informed about the agreement for the first time or to change the resident bank in which the account for money settlements (payments) under the agreement is opened, as well as to make changes to the information about the agreement contained in the Information System.

In terms of shareholder loans, Ukrainian law allows for the provision of such loans by foreign shareholders, subject to certain restrictions. For example, the amount of the loan cannot exceed the amount of the shareholder's equity investment in the borrower, and the loan must be provided on an arm's length basis.

Overall, while it is possible to borrow bank loans and shareholder loans from abroad and/or in a foreign currency in Ukraine, there are restrictions and requirements that must be followed in order to do so.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

Foreign investments in Ukraine are generally allowed and welcome. However, there are certain restrictions and limitations that apply to certain types of activities and industries, including strategic industries, such as defense, aerospace, and telecommunications.

On top of that, investments in objects whose creation and use do not meet the requirements of sanitary and hygienic, radiation, environmental, architectural and other standards established by the legislation of Ukraine, as well as violates the rights and interests of citizens, legal entities, and the state that is protected by law, are prohibited

In addition, foreign investors may face certain restrictions related to land ownership, natural resources, and other areas. For example, foreign natural persons are generally not allowed to acquire agricultural land in Ukraine, and foreign legal entities are required to obtain a special permit to acquire ownership or use rights over agricultural land.

Furthermore, foreign investors may face certain restrictions related to the registration and operation of their businesses in Ukraine, including licensing requirements and limitations on foreign

ownership in certain sectors. It is therefore advisable for foreign investors to seek legal advice before investing in Ukraine.

After the full-scale Russian invasion in Ukraine in 2022, investments from Russia and Belarus are no longer tolerated. As a result, any investment proposals from Russian or Belarusian companies are will be rejected by the Ukrainian authorities. This policy reflects the Ukrainian government's commitment to defend its sovereignty and territorial integrity, and to promote economic ties with countries that respect Ukraine's independence and territorial integrity.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

There is no specific minimum equity requirement for project financings in Ukraine under the legislation. However, in practice, lenders may require a certain level of equity contribution from the borrower as a condition for providing financing. This equity contribution can vary depending on the size and risk profile of the project, as well as the overall financial strength of the borrower. The equity contribution is usually determined based on the project's capital expenditure, and may range from 10% to 30% of the total project cost. It is also common for lenders to require that the equity contribution be provided by the sponsor or a group of sponsors, rather than the borrower itself.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

In Ukraine, there are certain registration and filing requirements that must be met in order for project finance documents to be valid and enforceable. These requirements may vary depending on the type of document and the underlying asset or transaction.

For security interests, including pledges and mortgages, the relevant security documents must be registered with the State Register of Encumbrances on Property Rights. Failure to register may result in the invalidity of the security interest.

In addition, the registration of the security interest should be accompanied by payment of a state fee. The amount of the fee depends on the value of the collateral, and the fee must be paid within ten days of registration.

Other project finance documents, such as loan agreements, joint venture agreements or shareholder agreements, do not need to be registered or filed with any government authority. However, parties may choose to have these agreements notarized in order to provide greater certainty and evidentiary weight.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

In general, local insurance policies must comply with the laws and regulations of the jurisdiction where they are issued.

In Ukraine, the statute provides that foreign law may be chosen to govern insurance contracts if the contract has a foreign element, such as the nationality or residence of one of the parties, the location of the subject matter insured, or the place of performance. However, the choice of foreign law cannot conflict with mandatory provisions of Ukrainian law, and local regulatory requirements for insurance policies must still be complied with.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Assuming that the policy is issued by a local insurer (and reinsured by a foreign reinsurance company), there are no restrictions from insurance legislation standpoint for a local insurer to transfer an insurance indemnity in favour of a foreign designated beneficiary, provided that all supporting documents are presented to the insurer and the bank processing the payment. Depending on the type of policy and loss occurred the required documents might consist of: the insurance policy, certificates from state bodies confirming natural hazards, a loss adjuster's report, the insurer's decision to pay under the policy, the relevant lender's bank account details, etc. However, the currency control rules may prevent (currently they do prohibit) an insurer transferring indemnification abroad.

If the policy is not issued by a local insurer and reinsured by a foreign reinsurance company, the payment procedure shall be regulated by the FX rules applicable in the home jurisdiction of the insurer.

Note that, although security assignments are not expressly prohibited, local insurers are usually reluctant to enter into such agreements due to the fact that it is not clear that such security assignments are permitted under Ukrainian law.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

Currency restrictions: following enaction of the martial law in Ukraine, Ukrainian entities and individuals are limited in their ability to purchase foreign currency and make cross-border payments outside of Ukraine. Ukrainian insurers are allowed, subject to applicable terms and limitations, to carry out payment of insurance premium under most reinsurance contracts concluded with non-resident reinsurers. Payment of insurance indemnification abroad may be protracted. Please seek a specific advice.

As a matter of law, foreign licensed insurance companies are not allowed to perform insurance activities in Ukraine, except for (i) insuring and rendering brokerage services with respect to cargo and vessels property, and liability insurance under marine, aviation, and space coverage; (ii) reinsurance, and (iii) ancillary services relating to insurance (e.g., consulting). The following requirements apply to foreign insurers carrying out activities in Ukraine:

- they shall be from a country which is a World Trade Organization (WTO) member, is not Financial Action Task Force (FATF) blacklisted, and is a non-offshore zone;
- the Ukrainian regulator and the insurance regulator of such country where the foreign insurer is based must have entered into a treaty on data exchange and a treaty on preventing tax evasion and avoiding double taxation (a list of relevant agreements is available here); and
- such foreign insurer is under state supervision, has been properly licensed in its country and complies with the financial stability requirements of the Ukrainian regulator.

Foreign licensed insurance companies may operate in Ukraine following the registration of a permanent establishment in Ukraine and obtaining the relevant respective licence.

Insurance payments (payout or premium) originating from Ukraine are considered as Ukraine sourced income for non-residents of Ukraine; and accordingly such payments are subject to withholding tax.

Reinsurance obligations arise out of mandatory criteria and standards of capital

adequacy and the solvency and liquidity of the insurer. If the amount covered under the policy exceeds ten per cent (10%) of the amount of its paid-in authorised capital and reserves, the insurer is obliged to reinsure its liability. The insurer, following entering into a reinsurance agreement, remains fully responsible before a policyholder.

In practice, most of the local insurers reinsure their risks with international reinsurers due to the lack of insurance reserves.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Public-private partnership ("**PPP**") is a long-term cooperation between the state and private companies, with the aim of creating, updating and further effective management of public facilities and socially significant services traditionally provided by the state.

Yes, PPP is a permitted method of developing projects in Ukraine. In fact, the Ukrainian government has been actively promoting PPP projects in various sectors, including transportation, energy, healthcare, and infrastructure.

The Ukraine PPP statutes establish the organizational and legal framework of the interaction of public partners with private partners and the basic principles of the public-private partnership on a contractual basis, while Resolution No. 384 regulates each step of the tender procedure. The Concession law regulates the implementation of concession projects. Furthermore, please note that Article 5 of the PPP Law states that PPPs may be concluded as concession agreements

Procurement procedures provide for three options:

- Competitive tendering;
- Competitive dialogue; or
- Direct negotiations

All three procedures for the selection of a private partner are available only for a concessionary PPP, while for a non-concessionary PPP only one procedure is used - a competitive tendering.

In the event of only one application in the bidding, the PPP contract may be concluded between the state partner with this applicant by agreeing with him on the essential terms of the contract, provided that such applicant meets the main qualification requirements for the participants of the competition, unless otherwise specified laws regulating relations that arise in the process of concluding public-private partnership contracts.

It is common practice when the procuring authority conducts a pre-bid conference where potential bidders can get additional information on PPP project.

The state partner controls the PPP contract implementation but cannot, however, interfere with the economic activities of the private partner or third parties.

Private partners shall provide the public partners with information on the contract performance as specified in the PPP contract, the public partner shall keep this information confidential.

Officers of the public partners monitor the PPP contract performance in accordance with their authority under the law and the PPP contract.

There is no explicit legislative provision stating that PPP implementation must be prioritized against other government investment priorities. At the same time, state targeted programs, the purpose of which is to promote the implementation

of state policy in priority areas of state development, in accordance with the Law of Ukraine "On State Targeted Programs", can be implemented by use of the PPP mechanism.

Several PPP projects have been developed in Ukraine in recent years, including concession of seaports: Chernomorsk, Izmail Sea Port, Reni Port and others, concession of airports, construction of industrial parks, concession of railway stations, construction of highways and bridges, etc. Please review the full list here https://pppagency.me.gov.ua/projects/

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Direct agreements between public authorities and lenders are generally permissible under law of Ukraine.

In Ukraine, direct agreements are commonly seen in project financings, including those involving public-private partnerships (PPPs).

The statute provides grounds for replacement of a private partner in PPP:

- if initiated by the state partner upon material breach of the PPP contract by the private partner;
- if initiated by the creditor (financier) upon foreclosure of security (the property rights of the private partner under the PPP contract); whether after an event of material default or on other grounds in the financing documents.

The replacement shall be made in accordance with the stipulated procedure.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

In Ukraine, there are various types of host government support available for project financing. Some of the commonly used types include:

- Treasury guarantees: The Ukrainian government may provide guarantees for debt raised by project companies, typically covering repayment of principal and interest.
- Fiscal incentives: The Ukrainian government may offer fiscal incentives in the form of tax breaks, exemptions or reductions for qualifying projects.
- Paying to a private partner the payments provided for in the agreement concluded under the public-private partnership, in particular the fee for operational readiness;
- Infrastructure development support: the Ukrainian government may provide infrastructure development support such as land grants, construction subsidies, supplying a private partner with goods (works, services) necessary for the public-private partnership implementation, acquiring by the state partner a certain amount of goods (works, services) produced (performed, provided) by the private partner pursuant to the agreement concluded under the PPP.

The availability of government support for project financing in Ukraine is subject to the relevant laws and regulations, and the terms and conditions of such support are typically negotiated on a case-by-case basis.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

The allocation of political risk events between the public and private parties under PPP agreements in Ukraine may

vary and depend on the terms of each specific contract. In general, political risk events are typically addressed in the PPP agreement, and the allocation of risks may be negotiated and agreed between the parties. The risks may be allocated to the party best able to manage and mitigate the risk, or to the party that is better suited to bear the risk based on its expertise, access to financing, and risk appetite. In some cases, political risk events may be shared between the public and private parties, and in other cases, the risks may be covered by insurance or other risk management mechanisms.

Evidently, it is quite difficult to purchase new policies to cover military risks during active hostilities, even if the region (district of a separate oblast, for example) has not been the object of aggression. If you purchased a policy covering war risks before 22 February 2022, or such coverage is incorporated into existing one, then it is necessary to analyze in detail the relevant provisions. Specialised political/war risk insurance policies in a similar fashion contain a list of insurance events and a number of exclusions. That is, not every loss, even caused by warfare, is guaranteed to be reimbursed. For example, the policy may cover only the direct material damage, and does not cover the seizure of the enterprise, or other deprivation of use of the insured property.

In addition, the Ministry of Economy of Ukraine reports that the Government of Ukraine has agreed with the Multilateral Investment Guarantee Agency ("**MIGA**") to insure investments despite hostilities. MIGA and the Government of Ukraine are ready to implement a pilot project worth USD 30 million.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

In Ukraine, investors and lenders may be protected through a stabilization clause.

The Government guarantees the stability of the conditions for investment activities, observance of the rights and legitimate interests of its entities. Terms of contracts concluded between investment entities remain in force for the entire duration of these contracts, and in cases where after their conclusion by law (except for tax, customs, and currency legislation, as well as legislation on licensing of certain economic activity types) conditions that worsen the position of the entities or limit their rights are set up, if these entities have not agreed to change the contract term. The Government guarantees the protection of investments, as well as foreign investments, regardless of ownership. Investment protection is provided by the legislation of Ukraine, as well as international treaties of Ukraine. Investors, including foreign ones, are provided with equal treatment that excludes the application of discriminatory measures that could hinder the investment management, use, and liquidation, as well as the conditions and procedure for the export of invested valuables and investment results.

However, the availability of protection depends on industry of the investment. For example, the Government of Ukraine has taken various steps to ensure that the Ukrainian electricity market is attractive to foreign investors. The most important step is the stabilisation clause, which is an undertaking by the state to preserve the favourable legal framework for renewable energy and to refrain from introducing changes that would be disadvantageous to renewable energy producers, except where changes are required in the interests of defence, national security, tax regime, public order and environment protection.

However, the effectiveness of stabilization clauses in Ukraine has been the subject of

some debate, as the Ukrainian government has been known to challenge such clauses in the past. As such, investors and lenders need to carefully negotiate and draft stabilization clauses to ensure that they are enforceable and provide the desired level of protection.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, force majeure is specifically regulated under Ukrainian legislation. The Civil Code of Ukraine defines force majeure as extraordinary and unavoidable circumstances that cannot be foreseen or prevented by reasonable measures. Examples of force majeure events are natural disasters, military actions, strikes, epidemics, and other events beyond the control of the parties.

Under Ukrainian law, force majeure events may excuse a party's non-performance of its contractual obligations, provided that such events render performance impossible. The affected party must notify the other party of the force majeure event as soon as possible, and must take reasonable steps to mitigate the impact of the event on its performance.

It should be noted that the occurrence of a force majeure event does not automatically terminate the contract, but may suspend its performance for the duration of the force majeure event. If the force majeure event continues for a prolonged period of time, the parties may be entitled to terminate the contract based on the provisions of the contract or on the grounds of material breach of contract.

It is an established rule of business customs and statutory law that a person is released from liability for breach of contract if he/she proves that a breach was caused due to accident or force majeure. Article 14-1 of Law of Ukraine 'On Chambers of Commerce and Industry of Ukraine' (dubbed by Regulation on certification of force majeure by the Chambers of Commerce and Industry of Ukraine) provides for the list of such circumstances: war or threat of war, armed conflict or serious threat of such conflict, hostile attacks, blockades (including the closure of ducts), a ban on exports or imports, military embargoes, mobilization, armed forces actions, riots (including elements of hybrid aggression), acts of terrorism, sabotage, piracy, invasion, curfew, requisition (seizure), fire, explosion, flood, illegal actions of third parties (illegal seizure of an enterprise), quarantine, etc.

The list of statutory force majeure grounds coincides in many respects with the situations invoked by martial law or during other special periods (see the table).

Lack of funds, short supply of services or commodities, exchange rate volatility is generally not considered force majeure. Therefore, the behavior of the markets should greatly impress the judges before they allow any exception to this rule. In our opinion, theoretically, this may be an objective impossibility to make a payment as a result, if the bank does not work, in particular, due to the lack of electricity supply in the region, destruction of equipment, unauthorized interference with the operation of the bank's computer networks or the bank is closed in connection with the risk of physical seizure or destruction of branches - in case of blocking the relevant settlement by the enemy; legislative restriction of payments, in particular cross-border currency transfers - as currently introduced by the National Bank; bankruptcy of a systemically important bank or large clearing house member of an organized commodity market, such as electricity, fuel; The physical inability of a director or accountant to make a payment if they are under occupation or shelling without access to a client-bank system and unable to move to a safe place where there is an operating bank.

*Certification of force majeure*

The Chambers of Commerce and Industry of Ukraine ("**CCI**") and its regional divisions are authorized to issue a certificate of force majeure, which is sufficient evidence under the Ukrainian law. A breaching party must apply to the CCI for a certificate and, establish, to the contemplation of the CCI expert, the causal link between the force majeure and non-performance of the contract.

With the extreme situation caused by the initiation of the war, the CCI has published on its website a general official letter certifying force majeure of Russia's aggression against Ukraine – from 24 February 2022 until the end. Thus, the procedure for the martial law period had been simplified: a business no longer needs to apply to the CCI with a bundle of documents to certify force majeure on each contract. The only thing you must do is to establish the respective causal link with the non-performance of the agreement.

Moreover, the contract may contain a provision, if force majeure lasts more than a certain period (for example, 90, or 180 days), the contract may be terminated at the initiative of one of the parties.

**24. What are the general environmental and social requirements in project financings?**

In project financings, environmental and social requirements are often included in project financing agreements, and they aim to ensure that the project is developed and operated in a manner that is consistent with sustainable development principles.

There are no environmental requirements in private project financings as such, however the restrictions or obligations might be applicable to the operating project (e.g., plant or factory) itself.

The environmental and social requirements are those mostly dictated by lenders.

However, for PPP obligatory projects assessments conducted when identifying and preparing a PPP:

- Socio-economic analysis
- Fiscal affordability assessment
- Risks assessment
- Comparative assessment of PPP v. non-PPP procurement
- Financial viability assessment
- Environmental impact assessment
- Social impact assessment
- Market sounding for private sector interest
- Market sounding for technological solutions

The procuring authority entity does not provide or facilitate obtaining of the environmental permits, such as emission permit, permit for felling green areas etc.

Instead, the procuring authority, as the investor in the construction (site owner), must procure an environmental impact assessment as a prerequisite to commence the construction works.

Article 4 (2) of the Law on Concession puts a burden of the environmental impact assessment (EIA) on a concessionaire (private partner) after the concession contract has been signed.

This norm conflicts with Article 2 (3) of the Law of Ukraine on Environmental Impact Assessment, which stipulates that state authorities, local self-government bodies (i.e., public partner) are the subjects of the EIA whenever such public partner is a customer of the planned activity. Their role under the concession contract can be designated as a customer (procuress' of the public service).

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

As a matter of principle, Ukrainian law permits the parties to a contract to freely elect the law which shall govern their agreement, provided that (i) such agreement is an "international contract", and (ii) such election is made in good faith, i.e., without the intention of avoiding application of any mandatory provisions of Ukrainian law which would have otherwise applied to such agreement.

The Ukrainian State and State entities generally do not enjoy sovereign immunity in Ukraine with respect to applications to have an arbitral award or foreign court judgment against them recognised in Ukraine. However, there are certain assets of the State which are unable to be enforced against, e.g., fixed assets of enterprises in which the Ukrainian State holds 25% stake or more and such immunity cannot be waived.

Under Ukrainian legislation, foreign States enjoy absolute jurisdictional immunity under Article 79 of the Law of Ukraine "On international private law". Such immunity can be waived by the competent organs of the respective State.

Recent court practice has shown the willingness of the Ukrainian courts to change that approach in favour of functional immunity. In particular, the courts have applied the United Nations Convention on Jurisdictional Immunities as a rule of customary international law as in Everest et al vs Russia (Case No. 796/165/2018). The courts have also suggested that an agreement to arbitrate in a bilateral investment treaty can constitute a sufficient waiver of State immunity.

It is worth noting that the enforcement of submission to a foreign law and waiver of immunity provisions may be subject to the terms of any relevant bilateral or multilateral treaties to which Ukraine is a party.

**26. Can financing documents provide for arbitration clauses?**

Financing agreements in Ukraine are typically governed by Ukrainian law where the parties are Ukrainian. If the financing agreement involves a foreign party, it can be governed by the law chosen by the parties. In practice, English law will typically be chosen by the parties.

Ukrainian law will apply if it is chosen by the parties and where the rules of the Ukrainian private international law is so direct (in the absence of the parties' choice). In that case, the parties' agreement to refer their disputes to arbitration is effective and enforceable in accordance with Article II of the New York Convention.

Where there is no foreign element present in a relationship, including where all of the parties are Ukrainian, the parties are not free to choose a foreign law. Mandatory rules of Ukrainian law will apply irrespective of the parties' choice of law.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

A full-scale Russia's invasion of Ukraine has badly impacted the economy and led to suspension of infrastructure and energy projects, not to mention that a severe damage has been caused to social, energy and transportation infrastructure of Ukraine.

However, even during the wartime, we see that a number of social projects such as the construction of child hospitals or residential

properties for displaced are being financed by international financial institutions.

The war and high political violence risk remain to be the biggest obstacle for the international investors and financial institutions to finance the projects in Ukraine, even if the projects are located in the Western part of Ukraine and remain untouched by the war. Therefore, most of the construction or renovation projects are structured through the participation of sovereign which either acts as direct borrower or issues the sovereign guarantee in order to cover the political violence risk for the financiers and investors. We therefore anticipate that all projects during the war time will be driven or supported by the state until the war ends.

**28. Are any significant development or change expected in the near future in the project finance market?**

Thanks to Ukraine's success on the battlefield, we can observe a growing interest of international donors, international financial institutions, development banks and equity funds in the future recovery and reconstruction in Ukraine after the war is over.

For instance, BlackRock FMA will provide advisory support for the Ministry of Economy to design an investment framework with a goal of creating opportunities for both public and private investors to participate in the future reconstruction and recovery of the Ukrainian economy. It is expected that Black Rock will manage an up to US$ 25 bln investment fund for reconstructing the Ukrainian infrastructure destroyed or damaged during the war.

On the other side, IFC has launched $2 bln response package in financing and guarantees to support Ukrainian private sector. DFC, the U.S. development finance institution, has committed to provide debt financing and credit risk coverage for Ukrainian private projects. It is also expected that the MIGA will allocate funding for political risk insurance for Ukraine-related projects in a broad range of sectors. In addition, the EBRD, the EIB and other development banks have committed to provide financing and support for Ukraine.

Given the foregoing, we trust that a massive financing for the Ukrainian energy, housing, healthcare and infrastructure projects will be unleashed by international financial institutions and donors once the war is over.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

In order to depart from LIBOR and apply new benchmarks, the National Bank of Ukraine has advised that Ukrainian banks and non-banking d\financial institutions to refrain from concluding agreements and using financial instruments that reference LIBOR and switch instead to benchmarks that has been published on the official websites of central banks, including the Federal Reserve System, the European Central Bank, and international institutions.

# UZBEKISTAN

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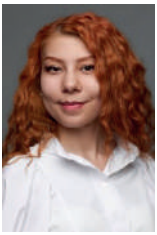

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## A. Overview

**1. What is the main legislation and international treaties governing the project financing in your jurisdiction?**

The central piece of legislation in the area of project financing in Uzbekistan is the Civil Code effective from 1 March 1997 as amended ("**Civil Code**"). A few other normative legal acts that are applied in the project financing transactions are as follows:

- Law on Public – Private Partnership dated 12 June 2019 ("**PPP Law**");
- Law on Foreign Investments and Investment Activity dated 25 December 2019;
- Law on Foreign Currency Exchange (as amended) dated 22 October 2019;
- Law on Foreign Borrowings dated 29 August 1996;
- Law on Pledge (as amended) dated 1 May 1998;
- Law on Mortgage dated 4 October 2006;
- Law on Foreign Economic activity (as amended) No. 77-II dated 26 May 2000;
- Law on Nature Protection No. 754-XII dated 9 December 1992 ("**Law on Nature Protection**");
- Law on Environmental Examination No. 73-II dated 25 May 2000 ("**Law on Environmental Examination**"), etc.

**2. How mature is the project finance market in your jurisdiction, and what are the most significant project financings closed during the last 12 months?**

Uzbek market as well as its legislative framework are still undergoing structural developments and constant changes where Uzbek Government is an important actor in defining the market development.

Uzbekistan has been consistently commended by the IMF, ADB and World Bank for its tight monetary policy and resilience to the global economic downturn. This is largely attributed to the country's selective approach to foreign borrowings and the conservative level of reliance on world capital markets for generating domestic growth.

The government of Uzbekistan is keen to see domestic banks and financial institutions play a more prominent role in propelling the economy towards the targeted objectives. Project finance is increasingly becoming a popular instrument of implementing large strategic investment projects across different government priorities.

The most significant project of the year is a project financing for a wind power plant with a capacity of 500 MW in the Uzbek city of Zarafshan of Masdar Company. The project received the PFI Awards as the Deal of the Year in Central Asia.

## B. Security Interest

**3. What are the most commonly used security types in project financings in your jurisdiction?**

Among the most commonly used security types in project financing in Uzbekistan are pledges over movable and immovable property as well as property rights (e.g., contractual rights, receivables and bank accounts).

**4. Can the shares of a company be pledged as a security to the benefit of lenders? If so, is there a specific requirement in terms of formalities or procedure to be followed for establishing or perfecting a share pledge?**

Yes, shares in both limited liability company ("**LLC**") and joint stock company ("**JSC**") can be pledged to lenders. We note that in LLC, its owners as such do not own "shares" but rather they own "participating interests" in the LLC.

A shareholder in both LLC and JSC is entitled to pledge its participating interest/ shares provided that:

(a) the charter of the company does not prohibit the pledge of participating interests in favour of a third party; and

(b) a resolution approving this pledge is adopted by a general meeting of participants of the LLC / of shareholders of the JSC.

A pledge of participating interest shall be made in a simple written form, no registration is required for its validity and effectiveness. The pledge of shares shall be signed in front of an officer from the depository office and is subject to registration with the relevant shares depository's office.

**5. Is private sale a recognized method for the enforcement share pledge? What are the endorsement types typically used for the share certificates?**

Private sale is not recognised as a method for the enforcement of share pledge under Uzbek law. Enforcement of the share pledge is executed only through the public online-auction, via stock exchange.

**6. Can security interest be established over future assets, rights and receivables of the borrower?**

Uzbek law does not allow to establish the security interest over the future assets (other than future receivables as explained below). Pledge can be created only over the assets already purchased by the pledgor and reflected in its accounting books.

Future receivables of the pledgor can be pledged in favor of the pledgee provided that the parties can define the future

receivables substantially enough so it allows to distinguish it in the future, e.g., Uzbek law allows creation over future receivables from the contract which already exist at the moment of pledge execution.

**7. What are the steps to be taken by the lenders to enforce their security interest, in case the borrower becomes insolvent, is technically insolvent and/or commences composition process?**

The concept of technical insolvency is not defined and recognized under Uzbek laws. Thereby, enforcement of security in such cases should be agreed by the parties under the security documents.

Enforcement of security interest in case of insolvency of the borrower.

In accordance with local legislation, the legal entity can be declared as a bankrupt (insolvent) only upon the decision of a court. After the bankruptcy procedures have been commenced by the court, the interests of the creditors are represented by the committee of creditors or creditors meeting and all further actions on behalf of the creditors are carried out only by the committee/meeting of creditors. The creditors shall register with the registry of creditors, where all claims of the creditors are reflected.

The process of enforcement of the security interest shall begin upon the relevant decision of the court have been issued.

Settlements with the creditors are conducted in accordance with the register of creditors in the order, established under the law on Insolvency.

Claims of secured creditors are satisfied from the funds received after the sale of the secured property in a public online-auction.

**8. Is security trustee concept enforceable in your jurisdiction? If not, is an alternative mechanism, such as a parallel debt, available?**

The concept of security trustee is not recognised under Uzbek legislation. Uzbek law requires that only the lender (the creditor) can act as a pledgee. In case there are several creditors under the same facility agreement, one of the creditors (agent) can act as a security agent (pledgee) on behalf of other secured creditors.

## C. Incentives and Restrictions

**9. What are the main incentives and exemptions for project financing in your jurisdiction?**

Incentives and exemptions depend on the types of the projects which are being financed. There are several government support programs which provide for incentives in different areas, such as agriculture, textile, etc. There are also Free Economic Zones in certain regions of Uzbekistan, the residents of which are entitled to tax and customs exceptions, subsidies.

**10. Are there any incentives or exemptions specifically applicable to foreign investors?**

Yes, only foreign investors under PPP projects have a right to link the prices for the sale of the goods/products/services under PPP to foreign currency.

Foreign investors also enjoy certain privileges in obtaining work permits and entry visas for foreign employees.

**11. Are there any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency?**

There are no any restrictions for borrowing bank loans and shareholder loans from abroad and/or in a foreign currency.

**12. Are there any restrictions for foreign investments in your jurisdiction?**

The foreign entities and citizens are not entitled to privatize land, i.e., cannot have ownership rights over the land and there are also limits on the share ownership in certain sectors (mass media, national security etc.).

Otherwise, foreign investments are not subject to any specific restrictions in Uzbekistan.

**13. Is there any minimum equity requirement, under the legislation or in practice, for project financings in your jurisdiction?**

No, there is no minimum equity requirement under the legislation for project financing.

**14. Please explain the registration and filing requirements which are applicable for project finance documents to be valid and enforceable in your jurisdiction.**

The transaction documents in project financing are subject to the following registration procedures:

- Registration of a loan agreement with the Central Bank of the Republic of Uzbekistan;
- Registration with cadaster authority for land lease rights pledge and mortgage;
- Registration with the State Register of Pledges for any pledge agreement;
- Registration of onshore export and import contracts with the Unified Electronic Information System of Foreign Trade Operations.

Special regulatory approvals are required for any state-owned company acting as a borrower.

## D. Insurance

**15. Can local insurance policies be governed by a foreign law?**

No, local insurance policies may not be governed by foreign laws.

**16. Can insurance proceeds under the insurance and reinsurance policies be assigned to the benefit of the lenders?**

Yes, insurance proceeds under the insurance and reinsurance policies can be assigned to the benefit of the lenders. This can be achieved via pledge of rights under insurance agreements.

**17. What are the other complications, concerns or other issues in relation to the insurance provisions under the project financing documentation, if any?**

The following requirements of local legislation should be considered:

- Insurance of the property interests of a legal entity - resident of the Republic of Uzbekistan located on the territory of the Republic of Uzbekistan can be insured only by an insurance company - resident of the Republic of Uzbekistan, except otherwise explicitly provided under the law;
- Authorized state authority has a right to provide for minimum requirements and conditions to insurance contracts;
- Prior to the assignment of insurance obligations for reinsurance to foreign insurance companies, the reinsurer (reinsurance broker) is obliged to offer proposals to conclude reinsurance contracts in the amount of at least 50 percent of the obligations to local insurance companies.

## E. Financing of Public-Private Partnership (PPP) Projects

**18. Is PPP a permitted method of developing projects, and if so, have any PPP projects been developed to date in your jurisdiction?**

Yes, PPP is a permitted method for the project development in Uzbekistan. In accordance with the report published by the PPP Development Agency of Uzbekistan (former authorized body in the PPP sector of Uzbekistan) in January 2023, about 200 PPP projects have been developed in Uzbekistan including 8 projects in the energy sector and 20 projects in the healthcare sector of the country[58].

**19. Are direct agreements between the public authorities and the Lenders permissible under the local law, and if so, commonly seen in the Project Finance market in your jurisdiction?**

Yes, direct agreements are allowed under Uzbek law and are commonly seen in the Project Finance Market of Uzbekistan.

In particular, Article 35 of the PPP Law states that lenders may enter into direct agreements with the public partner or private partner and requires such direct agreements to contain the following:

- lenders' rights and obligations in connection with the replacement or removal of the private partner (or the private partner management);
- obligation to pay the lenders the fees payable by the public partner to the private partner in accordance with the PPP agreement in the event of replacement or removal of the private partner;
- conditions to mitigate the risk of termination of the PPP agreement;
- payments for the early termination of the PPP agreement;
- procedure for exchanging information on the implementation of the PPP project, on the security of rights and obligations of the parties.

The PPP Law also provides for the lenders' step-in rights and allows the private partner to grant its lenders any form of security, including its rights under the PPP agreement, assets, share pledge, assignment and transfer of rights under other PPP project agreements forming part of the PPP project.

In practice, in PPP projects, the direct agreements are signed in relation to the PPP agreement, the government support agreement and the land lease agreement.

**20. Please indicate the types of host government supports (including treasury guarantee, debt assumption etc.) available in your jurisdiction.**

The PPP Law allows provision of additional guarantees and state support to a private partner and lenders under the PPP projects.

Particularly, PPP Law sets out a non-exhaustive list of government support measures that can be provided to a private partner and/or lenders under a PPP project as follows:

(a) subsidies, including those allocated to ensure a guaranteed minimum income for the private partner from the implementation of the PPP project;

(b) contributions in the form of assets and property necessary for the implementation of the PPP project;

(c) funds from the state budget of Uzbekistan covering a certain amount or part of goods, works, services that

58 https://www.pppda.uz/en/10897

are produced or supplied under the PPP project;

(d) provision of loans, grants, credit facilities and other types of financing;

(e) additional guarantees aimed at ensuring that the sponsors are able to fulfill their obligations under the PPP project;

(f) tax incentives and preferences, as well as other benefits;

(g) other guarantees and/or types of compensation.

Any additional guarantees and state support shall be provided by execution of a government support agreement between a private partner and the Republic of Uzbekistan represented by the Ministry of Economy and Finance or otherwise as provided under a PPP agreement.

**21. Are political risk events usually under the responsibility of the public party or the private party under the PPP agreements?**

Under the PPP agreements in Uzbekistan, political risk events are usually under the responsibility of the public party.

In particular, PPP agreements in Uzbekistan usually contain a political risk event concept which includes political force majeure events (wars, revolutions, strikes of a political nature, embargo etc. in Uzbekistan or directly involving Uzbekistan), change-in-law and other political events affecting the private partner and the project.

In case the political risk events occurred and continuing, the private partner is usually entitled to claim increased costs and / or terminate the PPP agreement.

**22. Are investors and lenders usually protected against a change in law passing subsequent to the signing of the relevant concession agreement?**

Yes, the PPP Law expressly recognizes that a PPP agreement can envisage change in law protection mechanisms entitling the private partner to request compensation in the form of lump-sum payment, tariff adjustment or amendment of the PPP agreement in the event the change in law occurring after the execution of the PPP agreement directly increases the private partner's costs or decreases its revenue from the PPP project.

At the same time, the PPP Law provides that such change in law protection shall not apply to the change of law resulting in the change of taxes following execution date of the PPP agreement unless such changes are discriminatory in respect of a certain PPP project.

In practice, change in law provisions under a PPP agreement usually apply from a bid date (in case of tendered projects only) and cover the general changes in taxes as well. In order to rectify such deviations from the PPP Law, such extension of a change in law protection is provided as an additional guarantee under a government support agreement.

**23. Is force majeure specifically regulated under the local legislation?**

Yes, under Article 333 of the Civil Code, a party can be relieved from liability if such party proves that it could not perform its obligation due to force majeure circumstances unless otherwise provided for by law or the underlying contract.

The Regulation on Administrative Regulation for Delivery of Public Services

Confirming Force Majeure Events[59] defines the term "force majeure" as emergency, unavoidable and unforeseen circumstances under given conditions caused by natural phenomena (earthquakes, landslides, hurricanes, droughts, etc.) or socio-economic circumstances (state of war, blockades, bans on import and export, etc.), which are not dependent on the will and actions of the parties in connection with which they are unable to fulfill their obligations.

**24. What are the general environmental and social requirements in project financings?**

The project financings are subject to requirements of imperative local laws, regulations and norms. The key law governing the environmental regime in Uzbekistan is the Law on Nature Protection and Law on Environmental Examination.

The Law on Nature Protection specifically provides for environmental management, prevention and control of pollution as well as sustainable management and use of natural resources.

The Law on Environmental Examination sets out the criteria for environmental experts, the procedures conducted in the course of expertise, the duration of expertise and the financial obligations of applicants. State environmental examination is the key instrument for ensuring compliance of the contemplated project with the environmental legislation.

The Equator Principles are not part of the legislation of Uzbekistan; however, the Equator Principles are used in several large infrastructure projects in Uzbekistan financed by DFIs and foreign banks.

Uzbekistan has no specific legislation governing social matters, but certain aspects are contained in various laws (for example, the Law on Nature Protection, which provides that every citizen has the right to a clean, safe and healthy environment).

## F. Jurisdiction, Waiver of Immunity

**25. Are submission to a foreign law and the waiver of immunity provisions enforceable?**

Under general provisions of Uzbek laws, parties to an agreement can agree on a foreign law to govern the agreement provided that there is a "foreign element" in the transaction (e.g., one party is a foreign company). That said, a choice of a governing law does not affect the applicability of mandatory rules of Uzbek laws regulating corresponding relations.

In accordance with article 79 of the Uzbek Civil Code, the state (represented by the government) takes part in relationships regulated by civil legislation on an equal basis with other participants and is liable for its undertakings with its own property.

The Uzbek Civil Code is therefore clear that if the government enters into a commercial activity, it loses special treatment or sovereign immunity. When dealing with the government directly in Uzbekistan it is widespread practice for the government, as a public entity, to waive its sovereign immunity. From our experience of direct contracts with the government, whether investment agreements or PSAs, the waiver of sovereign immunity was not an issue. It is quite natural for a foreign investor to request the government of a host country to waive immunity.

Meanwhile, the Republic of Uzbekistan is not a party to any multilateral or bilateral treaties with any Western jurisdiction or the

59 Resolution of the Cabinet of Ministers of the Republic of Uzbekistan No. 625 dated 28 2022.

United States for the mutual enforcement of court judgments. Consequently, should a judgment be obtained from a national court in any Western jurisdiction or the United States, it is highly unlikely to be given direct effect in Uzbek courts.

**26. Can financing documents provide for arbitration clauses?**

A party's submission to a foreign jurisdiction is legally binding and enforceable if a dispute is subject to international commercial arbitration. Uzbekistan is a party to the 1958 New York Convention and, thus, arbitral awards made in foreign jurisdictions are recognized and enforced in Uzbekistan unless there are grounds for the refused pursuant to Article 5 of the New York Convention.

Investor-state disputes submitted to ICSID and other institutional or ad hoc arbitration tribunals abroad in accordance with valid arbitration clauses are also subject to recognition and enforcement in Uzbekistan pursuant to the New York Convention. Apart from the arbitration clause, there shall be a due sovereign immunity waiver from the state or its governmental organization in an investor-state dispute.

Disputes relating to administrative, corporate, family, inheritance and employment relations are not arbitrable under Uzbek law.

Also, Uzbek courts have exclusive jurisdiction over the cases related to immovable property (buildings and land) when such immovable property is located in Uzbekistan and transportation of passengers, baggage and goods when the transport organization is incorporated in Uzbekistan.

## G. Trends and Projections

**27. What are the main current trends in project financings in your jurisdiction?**

Investment in key energy and manufacturing sectors, coupled with priority infrastructure development, remain dominant areas of the project finance sector in Uzbekistan with increasing activity in the energy sector.

Infrastructure development is, by and large, funded by the state, occasionally raising much needed financial resources from IFIs or financial institutions and state development funds in Asia or the Middle East, predominantly China, South Korea and oil rich Arab countries.

**28. Are any significant development or change expected in the near future in the project finance market?**

As mentioned above, the main focus in the coming years will remain with the energy industry. The government of Uzbekistan is aiming to generate approximately 25% of all its energy needs from renewable sources, including solar, by 2026. It is therefore contemplating developing a strategy for the use of alternative sources of energy, along with the very intensive construction of small HPPs in the near future. The government plans to spend 314.1 billion UZS ($81 million) of its own money and raise 20.5 trillion UZS ($5.3 billion) from foreign sources to develop hydro, solar and wind power through 2025.

**29. What are the alternative reference interest rates which are being commonly used in your jurisdiction during the LIBOR transition period?**

SOFR is being commonly used in Uzbekistan as an alternative reference interest rates during the LIBOR transition period.