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Eleventh Edition

Editor
Júlio César Bueno

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THE

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Appendix 1

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Júlio César Bueno has been a partner at Pinheiro Neto Advogados since 2001. He is based in São Paulo and has considerable national and international experience in focusing on the practice of construction law and engineering contracts (including the use of FIDIC standard forms), project finance, public procurement, as well as in arbitration and mediation proceedings, and dispute boards. He represents some of the world's largest organisations (owners, multilateral agencies, financial institutions, contractors and developers) in global infrastructure and construction projects in Brazil, the rest of Latin America and Africa.

He assists clients across the entire project spectrum, including gas facilities, power plants (nuclear, coal-fired, gas-fired, combined cycle and hydro), wind farms, steel manufacturing facilities, copper mining facilities, coal mining facilities and ports.

He is chair of the Brazilian Society of Construction Law, the immediate past president of the Dispute Resolution Board Foundation Region 2, an officer of the London Court of International Arbitration User's Council and an officer of the International Bar Association's International Construction Projects Committee. He is also a fellow of the Chartered Institute of Arbitrators, the International Academy of Construction Lawyers and the International Association of Construction Law, a co-coordinator of the Brazilian Arbitration Committee's working group dealing with arbitration in infrastructure contracts, a board member of the International Construction Law Association, and a member of the Mediation and Arbitration Chamber of the Institute of Engineering of São Paulo and the Brazilian Institute of Civil Procedure Law.

He holds a law degree and a doctorate from the Faculty of Law of the University of São Paulo law school (LLB, 1991; PhD, 2001) and a master's degree from the University of Cambridge (LLM, 1995). He has published several articles on matters relating to civil procedure law, civil law, engineering contracts, infrastructure and construction law.

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Chapter 15

UNITED KINGDOM

Munib Hussain and Yi Ming Chan[1]

I INTRODUCTION

The United Kingdom has an established history of using project finance to fund infrastructure projects nationally in most sectors, including transport, telecommunications, schools, hospitals, power and water. A number of different project finance structures have been developed and adopted for this purpose, including the private finance initiative (PFI) (which has since been discontinued) and other variants of the public-private partnership (PPP) model, which have been used extensively to fund key infrastructure projects. The PFI and PPP models are discussed further later in this chapter.

The UK is also a key hub from where international project financings are structured, negotiated and documented, despite the underlying project being located elsewhere. The international English law finance market far outstrips the domestic UK project finance market in both volume and size of deals.

Notwithstanding the recent economic standstill brought about by the covid-19 pandemic, in the recent past, there has been substantial demand in the UK for upgrading existing infrastructure or investing in new, greenfield projects. Each year, the government publishes a national infrastructure and construction pipeline (NIP). In June 2020, the NIP's analysis confirmed that between £29 billion and £37 billion of contracts across economic and social infrastructure will be brought to market in 2020 and 2021. The transport sector accounted for a significant proportion of the 2020/2021 procurement pipeline (with a minimum of £12.7 billion and a maximum of £20.7 billion in contract value) and approximately half of the value of procurement contracts for the total 2020/2021 procurement pipeline was for construction work (a maximum of £19.3 billion).[2] Through these investments and projects, the government aims to improve living standards, drive economic growth and boost productivity. The UK has also become one of the world's top destination for foreign investment in renewable energy projects and, in particular, offshore wind projects; in the period between 2016 and 2019, the country attracted more foreign investment in greenfield renewable energy projects than any other country in Europe. According to EY's Renewable Energy Country Attractiveness Index for 2020, the UK is ranked as the fifth-most attractive country in terms of renewable energy investment and deployment opportunities, just below the US, China, Australia and India.

Multilaterals and export credit agencies have continued to participate in the market, and existing institutions (rebranded with additional products to help fill debt financing gaps)

1 Munib Hussain is a special counsel and Yi Ming Chan is an associate at Milbank LLP.

2 See 'Analysis of the National Infrastructure and Construction Pipeline', June 2020.

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have continued to invest in the UK's energy and infrastructure sectors. However, the UK's access to European Investment Bank (EIB) funding, which has been an important source of funding for smaller-scale UK projects and, more recently, the UK renewable energy sector, has been significantly curtailed since the 2016 Brexit referendum. In 2015, the EIB lent €7.8 billion to 47 projects in the UK; in 2016, it lent €7 billion to 54 projects. However, in 2017, this dropped to €1.8 billion for 12 projects, and in 2018, this was halved again to €0.9 billion for 10 projects – a nearly 90 per cent fall in four years. The EIB has made several warnings that funding for the UK renewable energy sector could be impacted as a result of Brexit; to qualify for funding, new projects in the UK will need to demonstrate that they will further the EU's policies. To meet this gap in funding, the UK Treasury has committed to underwriting funding that would have otherwise come from the EU. In addition, the government has announced that it would establish the National Infrastructure Bank by spring 2021 as a domestic replacement for the EIB.

II THE YEAR IN REVIEW

In March 2020, the World Health Organization declared covid-19 to be a pandemic. In an effort to reduce the spread of the virus, countries around the world implemented varying protective measures, ranging from lockdown restrictions to imposing embargoes or limits on the international trade of goods and the movement of people. The impact of the pandemic on both the international financial market and markets *in situ* in the United Kingdom has been severe and continues to be tempestuous. The UK's gross domestic product experienced an unprecedented annual decline of 9.9 per cent in 2020 since the onset of covid-19, and similar tremors have been felt by countries around the world. In January 2021, England entered a third national lockdown; with the UK government announcing a gradual plan for easing restrictions in England, the UK economy is not due to reopen until late spring, extenuating economic uncertainty in the near term.

In the project finance market, the restrictions arising out of covid-19 have resulted in the disruption of operational projects and the construction of pre-operational projects for a myriad of reasons, ranging from outbreaks of the virus on-site, to the unavailability of formative or spare parts due to a slowdown in production or shutdown of manufacturing plants as a result of lockdown restrictions in other countries, to the inability to charter international flights for specialist engineers. These disruptions could have a severe impact on projects as they could result in completion delay, reduced operations or outages, among other consequences. Government authorities, sponsors, lenders and contractors to projects have therefore been keen on enforcing their force majeure rights under the relevant agreements while ensuring that their rights are preserved and denying other parties' claims of force majeure. Parties involved in negotiations for pre-construction projects have also been focused on ensuring that their rights across the chain of construction, finance and concession agreements remain watertight when it comes to potential force majeure claims.

As a result of government spending to combat the pandemic (the Office for National Statistics has estimated that borrowing could reach £393.5 billion by the end of the financial year), the UK has incurred severe budget deficits. This has led to doubts as to whether government funding would be available to support planned or ongoing public infrastructure projects and whether such projects were going to be delayed or scrapped altogether. However, towards the latter part of the year, the UK decided to continue with some of these expensive projects, as doing otherwise would, in the words of the Minister for the HS2 project

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Andrew Stephenson MP, have a 'chilling impact' on the UK construction sector and inward investment and send a 'terrible message' in response to the pandemic. Notably, construction work on the HS2 high-speed railway project connecting London to northern UK cities, estimated to cost up to £106 billion, finally began in September 2020; in December 2020, the government provided a last-minute £825 million loan to London's transportation authority to enable it to continue construction on the Crossrail project in London, which had been experiencing construction delays due to covid-19. However, some projects that were still in the consultation/planning stages, such as the Crossrail 2 project, were not spared, and work on such projects has been stalled for the foreseeable future.

The construction of pre-operational projects was severely delayed by the UK's first government-imposed lockdown, which began on 23 March 2020 and continued through to July of that year. During that period, construction across the UK largely came to a standstill, as such work did not qualify as essential services that were allowed to continue during the lockdown (construction work was, however, permitted to continue during subsequent lockdowns, provided that certain health and safety guidelines were met). Construction work was then later impacted by restrictions on cross-border trade and disruptions to supply chains that were a result of lockdowns practised in other countries. To illustrate the severity of covid-19's impact on projects in the UK, the completion of the 3.2GW Hinkley Point C nuclear power station in southwest England, which is being developed by EDF, is likely to be delayed by six months to June 2026 due to covid-19 restrictions, and EDF has estimated that such a delay will result in an increase in overall project costs by about £1 billion to a range of £22 billion to £23 billion.

On 31 December 2020, the transition period in which the UK and European Union could negotiate a deal to define their future relationship ended as governed by the EU-UK Withdrawal Agreement. The close of the transition period marked the start of a new chapter for the UK outside of the European Union. The period of uncertainty that characterised Brexit, however, has not ended. This uncertainty has affected the amount of activity in the country's project finance market. The upcoming transition from LIBOR is also worth noting for the issues it raises for the project finance market in the UK more generally.

The twin headwinds of covid-19 and the impact of Brexit in 2020 have been an impetus for the government's ambitious green industrial revolution policy to 'build back better'. In its November 2020 white paper The Ten Point Plan for a Green Industrial Revolution, the government signalled its commitment to, among other things:

a quadruple the UK's offshore wind energy capacity and supporting supply chain to turn the UK into the 'Saudi Arabia of Wind': this endeavour will require a major overhaul of the UK's wind infrastructure, supply chain and jobs, and estimates have placed the potential cost of this to be approximately £50 billion, of which £30 billion could potentially come from the private sector;

b develop 5GW of low carbon hydrogen production capacity in the UK by 2030 and establish a £240 million net zero hydrogen fund;

c invest up to £215 million (which could potentially be matched by £300 million of private sector matched-funding) into small modular nuclear reactors to develop a domestic smaller-scale power plant technology design that could potentially be built in factories and then assembled on site;

d commit up to £170 million for a research and development programme on advanced modular nuclear reactors;

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e invest £1 billion to support the electrification of vehicles in the UK, including the development of electric vehicle battery gigafactories in the UK;
f invest £1.3 billion to accelerate the rollout of charging infrastructure in the UK that will be required to support the nation's electric vehicular fleet;
g spend tens of billions of pounds in upgrading the UK's rail network and city public transport;
h extend various schemes and grants that encourage the improvement of the energy efficiency of homes and buildings;
i establish four industrial carbon capture, usage and storage (CCUS) clusters in the UK, which could potentially include the development of a project to store captured carbon underneath the seabed of the North Sea; and
j raise the UK's expenditure on research and development into new green energy and CCUS technology to 2.4 per cent of GDP by 2027.

It remains to be seen how many of these commitments will be realised in the near future, but these goals will no doubt have a significant near-future impact on the UK's project finance and construction sector.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

The contractual framework for project financings in the United Kingdom varies depending on the size, nature and revenue generation model of the project. Since 1992, the government has primarily used the PFI model for public infrastructure projects that are of a smaller scale and capital value, most notably in the health, roads, prisons and education sectors, while larger projects use other variants of the PPP model, such as the concession or joint venture model. What separates the PFI model from other PPP models is that the public sector enters into a contract with the private sector to purchase services in relation to an infrastructure project, rather than, for example, the public sector entering into a contract with the private sector to construct an infrastructure project and then granting the latter a concession to operate the infrastructure project. On the other hand, project financing for private infrastructure projects follows more generic models, such as build-operate-transfer or build-own-operate-transfer.

In most cases, a project financing will include the sponsors of a project and a project company, a government entity, lenders, a special purpose vehicle (SPV) of the project company to facilitate financing, contractors and subcontractors, an operator for the project, insurers and offtakers.

ii Documentation

The types and quantity of documents involved in a project finance transaction will depend on various aspects of the project, such as the sector and use of the project, the ownership structure, regulatory involvement and the nature (public or private) of the project.

The sponsors of a project will typically incorporate a limited liability company to be the project company. The articles of association of the project company will govern the relationship between the sponsors as shareholders of the project company and the project company itself, as well as dictate the project company's internal rules and decision-making

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process. In addition, if there is more than one sponsor of a project, the sponsors will usually enter into a shareholders' agreement that governs their relationships with each other and how the project company should be operated.

The project company would typically enter into a concession agreement with a government entity, under which the project company is required to, for example, construct, operate and maintain a facility during the concession period. The concession agreement is usually a lengthy document that contains, among other things, the parameters of the project, details and specifications of what the project company must achieve and the allocation of risks between parties.

As it is an SPV with few resources, the project company will seek to subcontract its construction obligations under the concession agreement to a single contractor or several contractors through a single engineering, procurement and construction (EPC) contract or several construction contracts. The project company will also enter into a separate operation and maintenance (O&M) contract for the operation of the infrastructure facility, for when the construction work has been completed.

The project company will need to acquire debt to fund the aforementioned activities and will therefore require project financing. This kind of financing is provided through non-recourse financing that is secured against income streams of the project company, typically at high debt-to-equity ratios. As such financing is typically risky for lenders, various security agreements will be required, such as debentures, direct agreements and account bank agreements. It is also typical for parties to enter into a common terms agreement if there are multiple lenders to separate loan facilities for the project.

Depending on the kind of project, the project company may be required by the lenders to enter into offtake agreements to mitigate risks by ensuring a stable revenue stream once the project has been completed. The project company may also be required to agree to fuel and other supply agreements, especially if the project involves the project company processing raw materials.

iii Delivery methods and standard forms

As has been explained, a project company will enter into construction contracts so as to pass down its construction obligations under the concession agreement to a more competent party. Under such a contract, a contractor will undertake to complete the whole or part of the construction of the project and will assume liability for performance defects, cost overruns and construction delays in relation to the project.

In contrast, under an EPC contract, a single contractor is engaged by a project company to deliver a completed project on a turnkey basis. This will require the contractor to manage all aspects of the design, procurement and construction of the project, including the procurement and management of multiple subcontractors. EPC contracts are typically used for complex building projects, especially in the petrochemical, mining and power industries.

Depending on the nature and location of the project, construction contracts may be bespoke or follow standard forms used in the construction industry (such as those from the International Federation of Consulting Engineers), although these standard forms are often significantly amended to reflect the realities and risks associated with the project.

Project documents for PFI projects were not standardised until 2012 when the government introduced a new set of standard documents to be used in PFI projects.

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IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The United Kingdom is generally a safe and stable country and the risk of non-economic-related adverse events occurring (such as natural disasters and wars) is low. Risks associated with project financing transactions are therefore usually confined to:

a construction risk: for example, the risk of there being design or construction issues, unforeseen problems and construction delays;

b operational risk: for example, the risk of failure to complete a project to the standards required under the concession agreement and ongoing O&M issues;

c revenue risk: namely the risk of a project not being able to repay its debt under the project financing because, for example, the project does not produce sufficient output or the anticipated market for the project fails to materialise;

d insolvency risk: namely the risk of an important party to the project, such as a contractor or the operator, becoming insolvent;

e environmental risk: namely the risk relating to any environmental liabilities that may arise out of the construction or operation of the project; and

f political risk: for example, the risks associated with political instability or policy changes brought about as a result of change in government that could affect the construction or operation of the project or the production of the project.

Insofar as is possible, the lenders and the project company will seek to transfer as many risks relating to the construction, completion and operation of the project to the contractors, subcontractors and operators through the various project documents. Insurance may be obtained to mitigate risks that are not successfully transferred under the project documents, and the project company may enter into offtake agreements to reduce revenue risks and hedging agreements to reduce currency risks.

The government may also help to reduce project risks, for example, by providing contracts for difference for the purchase of electricity or using the regulated asset base model for public infrastructure projects.

ii Limitation of liability

Project companies and their contractors and subcontractors will typically seek to limit their liabilities for any loss or damage caused by their actions, unless their actions resulted in any death or personal injury or such loss or damage was caused by that party's fraud, gross negligence or wilful default. The cap on liabilities under construction contracts will usually be based on a percentage multiple on the construction contract itself, and there may also be a separate cap for damages as a result of delays in the construction. Liability for consequential losses will generally be limited or excluded by the parties.

Project agreements will typically include relief from liability in respect of force majeure. Under such provisions, parties may be required to mitigate losses and seek alternative means of delivering the project, and terminate the agreement if a force majeure event continues for a specific period. Provided that they are properly defined in the agreement, force majeure provisions and exclusions will be enforceable under English law. It must be noted that force majeure events are distinguishable from relief events, in that the latter entitle parties only to an extension of time to perform an obligation but not the right to terminate the agreement.

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iii Political risks

Being a free market economy with few barriers for foreign investment in infrastructure projects, project finance transactions in the United Kingdom have not historically been exposed to significant political risks. However, there is still some uncertainty surrounding Brexit's effect on existing and future construction projects – although many of the existing EU laws have been incorporated into UK legislation and the UK and EU have agreed to a trade deal in the form of the EU–UK Trade and Cooperation Agreement (TCA), such legal and economic frameworks have yet to be tested in the national courts.

V SECURITY AND COLLATERAL

The main types of securities under English law are mortgages (equitable and legal), charges (fixed and floating), assignments (equitable and legal), pledges and liens. Under English law, security interests over land and floating charges over a company's property or undertaking need to be registered at HM Land Registry and Companies House, respectively. Failure to register a security interest over land will prejudice the priority of the security (but not render the security void), while failure to register a floating charge over a company's property or undertaking within 21 days of the creation of the security will result in the charge being void against an insolvency officer or any creditor of the project company (this time frame was temporarily extended to 31 days due to covid-19 disruptions and the extension has since lapsed on 5 April 2021).

In domestic UK project financings, lenders will typically seek to obtain security over all, or substantially all, a project company's assets. This is achieved through multiple agreements with various entities related to the project company.

The lenders will usually enter into a general security agreement, such as a debenture, with the SPV that is used for the project financing. This debenture will include a range of mortgages, charges and assignments depending on the nature of the security assets, and cover all the SPV's rights and assets. The lenders will also seek to further obtain cure and step-in rights to supplement the security, which will allow the lenders to step into the project (or appoint a representative) to complete or operate the project in the event of a project company's default under any of the project documents. This is based on the rationale that the lenders would not be able to recoup their loans even if they were successfully to realise their security over the project, if the project was half-completed.

Lenders may also seek to obtain parent company guarantees from the project company, a charge over the shares of the project company, equity support from the sponsors of the project, and assignments over important EPC contracts and subcontracts.

Finally, the lenders will also seek to restrict the distributions made by the SPV to ensure that the lenders are paid first from any revenue generated by the project. This is typically done by requiring income streams from the project to be paid into multiple bank accounts with funding institutions and restricting how that money can be withdrawn from those accounts, for example by requiring the project company to hold enough funds in one or more accounts to maintain a specific ratio to the outstanding amount under the project financing. A payment waterfall mechanism is also typically used to direct to whom the income streams of the project should be applied.

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VI BONDS AND INSURANCE

It is common for contractors and subcontractors to provide bonds to employers in project finance transactions in the United Kingdom, so as to secure payments made by the employer against the release of retained monies. These types of bonds are payable on demand (i.e., upon the presentation of the stipulated documentation to an issuing bank).

Performance bonds may also be used in project finance transactions. In contrast to the aforementioned bonds, a beneficiary to a performance bond will only be entitled to the monies promised under a bond if a stipulated default occurs and the beneficiary has evidence of that default.

As mentioned in Section V, the lenders to a project financing may also take parent company guarantees from the sponsors of a project.

Projects may be funded by project bonds issued in the London market and there are no legal requirements that apply exclusively to project companies seeking to issue project bonds. Project companies seeking to issue and list securities on the London Stock Exchange will need to comply with, among other things, the UK Listing Authority's Listing Rules, the London Stock Exchange's Admission and Disclosure Standards, and the relevant Disclosure and Transparency Rules. The applicable rules may also differ according to the project company's market sector and investor base. For example, mineral, oil and natural gas companies are subject to the additional disclosure requirements set out in Chapter 6 of the Listing Rules, whereas there will be less stringent disclosure obligations if the project company is issuing securities to solely professional investors.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

There are different types of insolvency proceedings under English law: administration, receivership or administrative receivership, compulsory liquidation, company voluntary arrangements and schemes of arrangement. In the event of insolvency, existing security will crystallise in relation to the relevant asset, and secured creditors will, in terms of priority in relation to being entitled to the relevant asset, rank ahead of all other parties. In contrast, unsecured creditors will rank behind various preferred creditors, including tax authorities and, to an extent, employees and pension interests.

Many security interests, such as step-in rights and charges of receivables, may be enforced outside insolvency proceedings.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Projects in the United Kingdom are subject to onerous UK and EU environmental regulations (at the time of writing). Environmental considerations are generally dealt with through the planning permission procedure regime in the UK, and specific licences may be required in relation to the construction and operation of projects. Carbon-reduction legislation and emissions trading schemes may also apply.

Note that environmental liability attaches to the polluter, which, in most cases, is the owner of the land on which the project is situated. Hence, lenders must be wary of any potential environmental liability relating to the project when exercising their security rights.

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ii Equator Principles

The Equator Principles form an internationally recognised risk management framework adopted by financial institutions to determine, assess and manage environmental and social risk in project finance transactions and project-related corporate loans and bridge loans. Financial institutions that adopt the Equator Principles commit to not providing project finance or project-related corporate loans to projects if the borrower will not, or is unable to, comply with the Equator Principles. As at May 2021, 118 financial institutions in 37 countries have adopted the Equator Principles. EP IV is the current form of the Equator Principles and financial institutions that have adopted the Equator Principles were required to implement EP IV by 1 October 2020.The Equator Principles do not have legal status in the United Kingdom and it is not mandatory for lenders to project finance transactions in the UK to adopt them. However, most financial institutions that are active in project financing in the UK have adopted the Equator Principles and are members of the Equator Principles Association.

iii Responsibility of financial institutions

As discussed above, financial institutions are not required to adopt the Equator Principles, but most have done so anyway. Financial institutions have in recent times also placed greater emphasis on their environmental, social and governance policies in their lending policies.

Financial institutions are typically liable for any money laundering and sanctions issues that may appear in a project financing.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

The government has used various PPP models for public infrastructure projects, ranging from projects in the health and education sectors to prison infrastructure and defence projects. Since it was implemented in 1992, PFI has been the most commonly used PPP model in the United Kingdom.

There is no formal statutory and legal framework for the PFI model and there is some standardised documentation under the PF2 model. Under the PFI model, the government typically contracts a project company for the provision of services in relation to a public infrastructure facility – the government does not pay fees in relation to the construction of the project, but rather the operation of the project to the standards as specified in the project documents. There are often financial (and even termination) penalties for failure to meet these standards.

While the government announced as part of its 2018 Budget that it would no longer use the PFI model to commission the construction and operation of new public projects, PFI will still be a feature in the UK projects and construction sector. The government has promised to continue to honour its commitments for existing PFI projects,[3] partly because

3 See House of Commons Library Podcast, 'Goodbye PFI', https://commonslibrary.parliament.uk/parliament-and-elections/government/goodbye-pfi/; and HM Treasury, Budget 2018 – Private Finance Initiative (PFI) and Private Finance 2 (PF2), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752173/PF2_web_.pdf.

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of the high cost of compensation required to voluntarily terminate PFI contracts.[4] PFI contracts also typically run for between 25 and 30 years[5] – there is even one contract with a term of 52 years that concludes in 2049–2050.[6] Furthermore, capital spending on public infrastructure is a devolved policy area, and thus the devolved administrations of Northern Ireland, Scotland and Wales are still free to commission new PFI projects.[7]

ii Public procurement

Starting from 1 January 2021, procurement contracts for public infrastructure projects in the UK that are up for tender are no longer subject to the EU public procurement legislation. However, given that most of the EU public procurement legislation was incorporated into UK law through UK regulations, such as the Public Contracts Regulations 2015, Concession Contracts Regulations 2016 and Utilities Contracts Regulations 2016, these UK regulations will continue to apply and the post-Brexit UK public procurement regime will still retain many features of the prior EU public procurement regime. It must be noted that the EU public procurement regime will continue to apply to any UK public procurement that commenced before 1 January 2021.

The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (PPR 2020) came into effect after the UK left the EU and primarily amends the Public Contracts Regulations 2015, Concession Contracts Regulation 2016 and Utilities Contracts Regulations 2016 by removing EU-specific references (e.g., references to 'the Commission' and 'treaties'), changing the financial thresholds for contracts to be denominated in pound sterling and empowering the UK government to amend and review the financial thresholds for contracts and certain regulations to take into account any technological advances. The PPR 2020 also created an obligation for contracting authorities to list public sector notices on a new 'find a tender' e-service that the UK government created; previously, contracting authorities would list such notices on the Official Journal of the European Union. The PPR 2020 does not change any prior EU jurisprudence on public procurement.

The World Trade Organization's government procurement agreement (GPA) will also continue to apply to the UK public procurement regime, and along with the TCA will govern the public procurement framework between the UK and EU Member States. Among other things, the TCA has the effect of providing mutual 'market access that go beyond the level set in the GPA based on clear and enforceable rules and standards [and will also provide] market access for an additional set of services, including a range of hospitality services, telecommunications, real estate, and education services'.[8] Contracting authorities will benefit as increased competition for public contracts provides value for money for taxpayers and improves the quality of public services.

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4 See House of Commons Library Podcast, 'Goodbye PFI', https://commonslibrary.parliament.uk/parliament-and-elections/government/goodbye-pfi/.

5 See House of Commons Library, Briefing Paper Number 6007, 13 May 2005, page 2, https://researchbriefings.files.parliament.uk/documents/SN06007/SN06007.pdf.

6 See footnote 4.

7 See HM Treasury, Budget 2018 – Private Finance Initiative (PFI) and Private Finance 2 (PF2), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752173/PF2_web_.pdf.

8 See Cabinet Office, 'Procurement Policy Note – Requirements for contracts covered by the WTO Government Procurement Agreement and the UK-EU Trade and Co-operation Agreement', 19 February 2021.

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X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There are no specific restrictions or special licensing requirements for foreign investors and contractors, but there are specific statutory regimes in place for certain industries. Authorisation is required for investment in specific regulated areas, including the nuclear industry, banking, media, financial services and defence.

UK and EU competition rules may affect ownership by companies that have UK, EU or global business turnovers exceeding specific thresholds. Compliance with EU directives may affect an entity's ability to invest in or own certain assets.

The United Kingdom does not offer specific incentives to encourage foreign investments. For as long as the UK remains a member of the European Union, all UK investment must be satisfactory from the perspective of EU procurement regulations and wider EU law, including in relation to the restrictions on state aid. In terms of investor protection, the United Kingdom is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The UK is also a party to a large number of bilateral investment treaties (BITs) with a range of other states. UK BITs afford protection to investors that include protection against expropriation without compensation, the right to fair and equitable treatment and the right to repatriate profits.

The United Kingdom does not generally impose restrictions on foreign investments in particular industries, although this is a changing landscape in Europe. The European Parliament, Council and Commission reached an agreement in November 2018 on an EU legal framework for screening foreign direct investments into the European Union, which will apply to investments by non-EU investors. This framework placed particular emphasis on foreign state-backed acquisitions of European infrastructure and technology. Key sectors that will be subject to the framework include critical infrastructure, critical technologies, sensitive information, media, land and water supply infrastructure. The EU proposal also identifies control of a foreign investor by the government of a country outside the European Union, including through significant funding, as a potentially sensitive factor. Given the current uncertainty relating to Brexit, it is not clear how the proposed EU legal framework will apply to the UK.

In the event of foreclosure on a project or related companies in the context of security over an asset, the mortgagee could obtain a court order under which it becomes the owner of the property. A mortgagee's right to foreclose arises once the liabilities secured by the mortgage have become repayable. Even in these circumstances, a mortgagee normally has certain obligations to the mortgagor, including an obligation to obtain a reasonable price for the sale of a mortgaged asset, and (pursuant to the equity of redemption) to return any excess proceeds over the secured debt finalised by it to the mortgagor. In general, under English law, foreign investors are not treated differently from businesses established in England and Wales in relation to the enforcement of security.

Removal of profits and investment

The United Kingdom does not impose currency exchange controls; nor are there any laws that preclude the removal of profits or investments from the UK. There is an unrestricted regime in relation to the repatriation of profits. Other than the normal incidents of taxation, there are no particular restrictions on remittances of investment returns. The UK imposes a withholding tax at the basic rate of income tax (currently 20 per cent) on any payment of

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yearly interest arising in the United Kingdom. Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20 per cent of that interest payment and account for this withheld amount to the UK tax authorities.

The UK may impose withholding tax on repatriated profits. There is also a comprehensive regime of double taxation treaties.

XI DISPUTE RESOLUTION

Disputes arising from construction and engineering work in projects are commonly dealt with by three separate regimes: adjudication, arbitration and high court litigation.

i Special jurisdiction

Under the Housing, Grants, Construction and Regeneration Act 1996, all construction contracts in the United Kingdom must include provisions for the adjudication of disputes. If a construction contract does not include a provision for adjudication, then the statute will imply an adjudication regime into it. Statute will also imply an adjudication scheme if the adjudication provisions of a construction contract do not comply with the requirements of the Local Democracy, Economic Development and Construction Act 2009.[9]

However, there are several exceptions to these rules. Parties may avoid the statutory adjudication regimes if the construction contracts relate to energy and process plants or offshore construction works. Project companies and government authorities who are party to a concession agreement in relation to a PPP project are also exempt from the adjudication regime; however, note that the other project contracts will not be able to rely on such an exemption.

The statutory adjudication regime requires construction contracts to include provisions that allow disputes to be referred to adjudication at any time. Upon making a referral, parties must appoint an adjudicator within seven days, following which the adjudicator must make a decision on the dispute within 28 days of their appointment. Such period may also be extended by the parties.

Any kind of dispute may be referred to adjudication, and the adjudicator's decision is binding and enforceable through the English courts. However, either party may subsequently litigate or arbitrate the same dispute without restriction. The English courts are generally reluctant to refuse to enforce adjudicators' decisions, unless the adjudicator clearly lacked jurisdiction or there had been a breach of natural justice in the adjudicative process.

ii Arbitration and ADR

Contractual provisions in project documents governed by the laws of England and Wales requiring submission of disputes to international arbitration are generally recognised and supported by the English courts. Under the Arbitration Act 1996, and provided that the arbitration agreement is in writing, the English courts will stay any proceedings brought in

9 This scheme is contained in a statutory instrument and sets out default terms for adjudication: The Scheme for Construction Contracts (England and Wales) Regulations 1998 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. The latter applies to construction contracts covered by the Local Democracy, Economic Development and Construction Act 2009. Similar schemes apply in Scotland and Northern Ireland.

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breach of that agreement, unless the court is satisfied that the arbitration agreement itself is null and void (Arbitration Act 1996). The UK is a signatory to the New York Convention, under which arbitral awards may be recognised and enforced.

Arbitration has historically been used by the construction sector and most arbitral proceedings are conducted by industry specialist arbitrators, including former engineers, architects or chartered surveyors who have subsequently trained and qualified as arbitrators. The Royal Institution of Chartered Surveyors is one of the largest nominating bodies for arbitrators and adjudicators in the United Kingdom. However, since the implementation of the statutory adjudication regime, construction arbitration has diminished significantly.

Matters that are arbitrable under English law are generally limited to civil proceedings; that is to say, criminal and family law matters, or matters relating to status, may not be submitted to arbitration. However, a claim for compensation arising out of a criminal act or property relating to a divorce may well be arbitrated. Note, however, that, although the English courts at one point suggested that an arbitration agreement would be considered null, void and inoperative insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law,[10] this approach has not been followed in subsequent cases.[11] The *Fern Computer Consultancy Ltd v. Intergraph Cadworx & Analysis Solutions Inc* case has subsequently received positive judicial treatment. However, there has not yet been any ruling by an appellate court in relation to this issue and, therefore, some ambiguity remains.

XII OUTLOOK AND CONCLUSIONS

The United Kingdom continues to be committed to using project finance to finance domestic infrastructure projects and this will be a key source of funding for the significant infrastructure projects for which there is a commitment that they be completed during the course of the next decade. Furthermore, given the preference of project finance lenders and investors to use English law as one of the preferred laws to govern project and project finance documentation, the UK is well positioned to remain a key hub for international project financings.

At present, it is difficult to predict the full extent of the covid-19 pandemic's impact on the UK projects and construction sector, although it is widely acknowledged that things will not return to normal for the foreseeable future and that firms can expect severe disruptions to construction work and supply chains and delays to investment decisions.

Brexit will continue to affect project finance, not least the English legal framework relevant to project finance, since much of it draws from EU law. The UK's post-Brexit public procurement is largely similar to the EU regime that was previously applicable. The UK's departure from the EU has also led to some important legal uncertainties that could affect projects in the UK. Despite the UK and the EU agreeing to the TCA on 30 December 2020 to govern post-Brexit trade relations, it is unclear how the UK will introduce its own domestic subsidy control regime, and how closely the new UK state aid authority and the courts will follow the EU jurisprudence in relation to EU state aid rules. In addition, it is unclear as to

10 *See Accentuate Ltd v. ASIGRA Inc* [2009] EWHC 2655.

11 See, e.g., *Fern Computer Consultancy Ltd v. Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch).

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whether the commercial viability of projects in the UK would be materially impacted as a result of tariffs for services and construction materials and parts that originate from the EU. Finally, there has also been a concern that English law-governed contracts and English law judgments may not be effectively enforced in EU Member States as they were prior to the UK leaving the EU.

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Appendix 1

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Munib Hussain is a special counsel in the London office of Milbank LLP and a member of the firm's global project, energy and infrastructure finance group. Munib has significant expertise in advising lenders, sponsors and sovereigns on first-of-a-kind international projects, energy and infrastructure financings in the oil and gas, power and mining sectors, and in particular specialises in multi-sourced financings involving ECAs, multilaterals and commercial and Islamic banks.

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