ICLG

The International Comparative Legal Guide to:

# Project Finance 2014

**3rd Edition**

A practical cross-border insight into project finance


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# The International Comparative Legal Guide to: Project Finance 2014

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# USA

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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in the USA?

From our perspective, a number of exciting trends and significant developments have recently emerged in the U.S. project finance market.

First, the U.S. shale revolution is causing a dramatic shift in the global energy landscape and providing a number of investment opportunities in the U.S. – including in (i) midstream infrastructure, (ii) LNG liquefaction, (iii) petrochemicals, and (iv) gas-fired power projects.

With the U.S. poised to become a net exporter of oil/gas/Natural Gas Liquids (NGLs) within 10 years, massive investments will be required in midstream infrastructure to gather, process and transport oil/gas being produced in the Eagle Ford, Bakken and Marcellus shale regions. An estimated US$10-15 billion per year is expected to be invested in future pipelines, rail terminals, export facilities, processing and fractionation developments. A reflection of this trend is the recent US$665 million financing of Phase I of the Los Ramones natural gas pipeline system from Texas to Mexico. The pipeline will be a key source of expanding delivery of U.S. natural gas into Mexico and a facilitator of the development of the U.S. shale gas market.

It is predicted that by 2016 the U.S. will become a major LNG supplier to energy-hungry Asian customers. Increased demand for LNG has led to a number of new LNG export projects in recent years, such as the Cheniere, Freeport, Cove Point, Cameron LNG and Lake Charles projects. These new projects will require massive capital investments (in the range of US$10 billion per project). In addition, expanded global LNG trading will require significant investment in new LNG shipping capacity such as the recent US$195 million refinancing for the Meridian Spirit ApS LNG tanker vessel.

Some experts believe shale gas has the potential to spur "an industrial renaissance" in U.S. petrochemicals production due, in part, to massive increased volumes of NGLs being produced as shale gas and oil production continues to expand. In order to transport natural gas efficiently and sell it commercially, its impurities must first be extracted. The by-products of the extraction process, such as ethane, butane and propane, are valuable raw materials for manufacturing petrochemicals, providing the U.S. with a global competitive advantage based on cheap petrochemical feedstock.

M&A activity around existing gas-fired plants continues to be strong, with Tyr Energy's US$73.3 million acquisition of Polaris, a portfolio of four natural gas-fired power projects located throughout the Midwest, Mitsui's acquisition of a 20.6% stake in the US$1 billion Astoria I gas-fired power station, EIF's acquisition of the 865 MW Channelview cogeneration plant in Texas, the aggregate US$831 million EquiPower refinancings for the acquisitions of two 1,138 MW and 1,406 MW generating facilities in Illinois, a 1,528 MW generating facility in Massachusetts and two nameplate electric power generating stations in Ohio.

The financing and development of gas-fired power plants in 2014 may be further impacted by recently proposed carbon emission standards for new power plants that could become final in 2014. In addition, the U.S. Environmental Protection Agency faces a June 2014 deadline to propose carbon emission standards for existing power plants. Although both sets of proposed rules will likely be subject to litigation and administrative challenges, a strict regulatory burden is expected for coal-fired power plants, which could increase demand for gas-fired power plants. Major U.S. natural gas deals in 2013 included the US$850 million Highstar West Power Portfolio refinancing and the US$69.5 million Cherokee County Cogeneration Plant refinancing.

Second, regulatory policy continues to be a driving force in the renewable energy sector. The extension of the production and investment tax credits through "The American Taxpayer Relief Act of 2012", signed into law by President Obama on January 3, 2013, led to a flurry of wind projects. Under that legislation the PTC and 30% ITC remains available for wind projects whose construction began before December 31, 2013. Legislation has been proposed that would further extend those credits to projects placed in service through calendar year 2016 and that would allow renewable energy projects, including wind operations, to be structured as master limited partnerships. As a master limited partnership, the entity would be taxed as a partnership rather than a corporation but still have publicly-traded ownership interests. While it is still too early to predict whether either of these legislative proposals will be enacted, both have begun to gain traction. In addition, last year was a big year for solar energy. According to the Solar Energy Industry Association's "U.S. Solar Market Insight Report", the third quarter of 2013 was the second largest quarter in the history of the U.S. solar market and the largest quarter ever for residential PV installations.

2013 also ushered in the increased involvement of a number of technology companies, such as Google, Facebook, Microsoft and Apple, in the renewable sector through investment in renewable energy projects and acquisitions of "green" power, partially as a way to reduce their carbon footprint. Google, for example, has made more than a dozen investments in the renewable energy sector – including acting as a tax-equity investor in connection with the

financing of a 161 MW nameplate wind energy project in Western Texas. It is anticipated that technology companies will continue to play an important role in the increased development of the renewable energy sector.

Third, we have continued to see an increase in the type of financiers willing to invest in project finance transactions and, as a result, the creative cohesion of multiple-financing techniques into a single package – such as Pattern Energy's "Panhandle 2" wind project in Texas. Panhandle 2 seamlessly brought together construction loans, equity bridge loans, an energy hedge, tax equity and strategic equity. Further, changes adopted by the Organization for Economic Co-operation and Development have allowed export credit agencies to participate in financing projects in major LNG, mining, renewables and transportation projects in developed economies, including the U.S.

2013 also witnessed the increased prominence of term loan B financing – known for its high-yield, longer maturity loans typically offered by institutional investors rather than commercial banks – particularly in the area of refinancings of existing power projects. The US$640 million refinancing of the Topaz Power Holdings LLC natural gas power portfolio, the US$420 million Channelview Cogeneration Plant refinancing and the US$400 million First Wind recapitalisation were oversubscribed due to overwhelming institutional investor appetite for Term B loans in a merchant portfolio.

Fourth, New York still remains an important jurisdiction for project finance, particularly with respect to projects in Latin America. Project finance growth in Latin America is expected to remain strong with continued appetite for providing debt to the Latin American energy and infrastructure sector. Most notably, the US$174 million Teekay Shuttle Tanker Project, the Sete Brasil Bridge Facility for 15 drillships, the US$370 million Puerto Bahia Port Terminal, the US$650 million Antucoya Copper Project, the US$603 Carreteras de Occidente Offering, US$350 million Cementos Progreso Project and the US$75 million Quadro I and Quadro II Transmission Line Project all reached financial close in 2013.

### 1.2 What are the most significant project financings that have taken place in the USA in recent years?

See question 1.1.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Several different tools are typically used to provide lenders security in the project assets, including a security agreement covering personal property of the project company.

The Uniform Commercial Code (the "UCC") provides a well-developed and predictable framework for lenders to take a security interest in the borrower's personal property assets. Each U.S. state has adopted article 9 of the UCC, which governs secured transactions, with some non-uniform amendments. Under the UCC, a security agreement must, among other elements, describe the collateral and the obligations being secured in order for the lender's security interest in the collateral to attach to a borrower's personal property assets. Filing a UCC-1 describing the collateral in the appropriate filing office perfects the lenders' security interest.

Perfection of rights in deposit accounts, money and letters of credit is achieved by control rather than by the filing of a UCC-1. Control in accounts is achieved by the lender (or its collateral agent) taking control of the deposit account under control and funding provisions in the security agreement or entering into an account control agreement.

Lenders usually also require a pledge of the ownership interests in the project company to give them the ability to own the project company (and all of its assets) in the event that they choose to foreclose.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security may be taken over real property, subject to the real property laws of the state in which the real property is located, through a mortgage, deed of trust, leasehold mortgage or leasehold deed of trust. If under a certain state's law these instruments do not cover fixtures, a UCC-1 fixture filing may also be required.

To create a security interest in real property by mortgage or deed of trust, such instrument will: (i) identify the legal names of the lender and the borrower; (ii) state the amount of the debt owed by the borrower to the lender and identify the promissory note evidencing the indebtedness; (iii) contain a granting clause conveying the mortgage to the lender; (iv) describe the secured property; and (v) be signed and notarised. In most states, a security interest is perfected when the instrument is recorded in the recorder's office of the county where the real property is located.

### 2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Yes, a consent to collateral assignment by the project company to the lenders provides the lenders the right to collect receivables under an underlying assigned agreement.

### 2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Please see question 2.1 above.

### 2.5 Can security be taken over shares in companies incorporated in the USA? Are the shares in certificated form? Briefly, what is the procedure?

Please see question 2.1 above.

### 2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Depending on the relevant state, city and county laws, recording fees and taxes for perfecting a security interest in real property will typically comprise a significant percentage of the debt obligations secured.

### 2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Please see question 2.6 above.

### 2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Requirements for regulatory consents are specific to the location and nature of the project and the identity of the project parties.

## 3 Security Trustee

### 3.1 Regardless of whether the USA recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

In New York law-governed security documents where there are at least two lenders, a collateral agent is nearly always appointed to act on behalf of the lenders with respect to the collateral.

### 3.2 If a security trust is not recognised in the USA, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

New York law recognises the concept of a security trust, although it is not typically used.

## 4 Enforcement of Security

### 4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Regulatory approval varies greatly as such elements are dependent on the type of collateral involved. For example, a direct or indirect change in control over electric power assets subject to the jurisdiction of the Federal Energy Regulatory Commission-jurisdictional ("FERC") must be approved by FERC. FERC has jurisdiction over most sellers into wholesale electric markets and electric power transmission facilities in the contiguous U.S. states other than in the Electric Reliability Council of Texas ("ERCOT") region, which is subject to state jurisdiction. Certain small power generators known as "qualifying facilities" may qualify for exemption from FERC approval of changes in control. Moreover, if the remedies to be exercised involve direct taking of assets subject to FERC hydro-electric licensing rules, or an interstate natural gas pipeline or underground gas storage facility that holds a FERC certificate of public convenience and necessity, transfer of the licence or certificate may be required. Certain state laws and regulations may also require approvals, such as New York State, which generally parallels FERC regulations. Most states, however, require approval only if the assets are in the nature of a "traditional" public utility serving captive customers under cost-based rates or are subject to a certificate of public convenience and necessity issued under state law.

Similar considerations arise with nuclear facilities, for which the operator will hold a licence from the Nuclear Regulatory Commission ("NRC"), and any transfer of such licence that might need to accompany an enforcement action would require separate NRC approval, recognising that only the licensed operator may operate a nuclear power plant. It should be noted that foreign entities are not allowed to hold an NRC nuclear power plant operating licence or to exercise control over the licensee.

Many energy facilities include a radio communication system licensed by the Federal Communications Commission ("FCC"), and a transfer of ownership of the FCC licence related thereto will require prior approval from the FCC. In addition, there are restrictions on the grant of a security interest in an FCC licence; generally, such security interests are limited to an interest in the proceeds thereof rather than the licence itself.

Any foreclosure or enforcement action is also subject to the possible imposition of (i) the automatic stay under the Federal bankruptcy code, title 11 of the United States Code (the "Bankruptcy Code"), if the title-holder commences a case under the Bankruptcy Code, and (ii) more generally, for any non-judicial foreclosure, the obtaining of a specified injunction halting the auction or other proceeding.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

See section 6 below.

## 5 Bankruptcy and Restructuring Proceedings

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

Once a bankruptcy case is commenced under the Bankruptcy Code in respect of a project company, the Bankruptcy Code imposes an "automatic stay", or statutory injunction, which immediately stops all enforcement actions outside of the bankruptcy court against the debtor project company or its property. The automatic stay applies to secured creditors, although it is possible for a secured creditor to obtain relief from the automatic stay in certain circumstances, but such relief is only available through a court order. In addition, in certain limited circumstances, the Bankruptcy Code allows the court to extend the automatic stay to protect parties which are not debtors in a bankruptcy case or assets of such non-debtor entities.

A secured creditor is not, however, without protection in a case under the Bankruptcy Code. For instance, there are limits on the ability of the project company to use certain types of collateral or to dispose of collateral without the consent of the secured creditor. In particular, the project company will not be permitted to use cash collateral without the agreement of the secured party or an order of the bankruptcy court. In any sale of collateral (other than in the ordinary course of business sales, such as sales of inventory during normal business operations), during a bankruptcy case, the secured creditor generally has the right to credit bid its debt, although that right can be limited by the bankruptcy court for cause. The determination of cause is fact-intensive. A recent case, *In re Fisker*

*Automotive, Holdings, Inc.* 2014 WL 210593 (Bkrtcy.D.Del. Jan. 17, 2014), which is the subject of a pending appeal, found cause to exist in order to enable an auction to occur. It should also be noted that in the context of a plan of reorganisation, a secured creditor cannot be compelled to accept a plan through a "cramdown" when such plan provides for the auction of the secured creditor's collateral without giving the secured creditor the right to credit bid. However, it is still possible to cram down a secured creditor by providing it with the indubitable equivalent of its secured claim, which can include substitution of collateral.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

Generally speaking, the holder of a perfected security interest is entitled to payment from its collateral ahead of all other creditors (other than the holder of a security interest that is prior in right to it). While certain creditors such as taxing authorities or employees may be entitled to priority claims under the Bankruptcy Code, such claims do not come ahead of a secured claim with regard to the collateral. Under very limited circumstances, a debtor may surcharge collateral for the costs of preserving that collateral.

Under the Bankruptcy Code, a transfer includes the incurrence of debt or the grant of a security interest. Therefore, a lender's security interest may be at risk of being "avoided" or set aside in a case under the Bankruptcy Code. The two primary mechanisms for such avoidance are referred to as a "preference" or a "fraudulent transfer". It is important to note that there is no requirement for there to be actual fraud or wrong-doing for a transfer to be avoided. A transfer may be deemed a "preferential transfer" by a bankruptcy court if the project company grants or perfects the lender's security interest within 90 days of bankruptcy and on account of existing "antecedent" debt, and if the transfer enables the creditor to receive more than it would in a liquidation of the project company. However, if the lender is an "insider" of the debtor, the preference look-back period is one year. Under the Bankruptcy Code and applicable state laws, a constructive fraudulent transfer claim can be asserted to recover transfers not made in exchange for reasonably equivalent value if (i) the transfers were made during an applicable look-back period while the subject company was insolvent or unable to pay its debts, or (ii) such transfer rendered the subject company insolvent or with unreasonably small capital. Under the Bankruptcy Code, the look-back period for constructive fraudulent transfer claims is two years before the commencement of the bankruptcy case. The look-back period under state law can vary, depending on the state, and can be up to six years. If a transfer is avoidable, for whatever reason, the project company may be able to cancel the security interest and force a return of the property, which may be used to pay all creditors. It should be noted that not all transfers made during the applicable look-back period are avoidable, and these inquiries are generally very fact-intensive.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Bankruptcy Code excludes governmental entities (other than municipalities) and foreign or domestic insurance companies and banks from the category of persons who may be debtors in a bankruptcy case. Moreover, the Bankruptcy Code has specific provisions for certain types of persons who are permitted to be debtors, such as railroads, municipalities, stockbrokers, commodity brokers, and clearing banks.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Outside of court proceedings, creditors may be permitted to exercise self-help remedies depending upon the nature of the collateral and the provisions of the applicable securities agreements and governing law. Under the UCC, for example, secured creditors may exercise control over collateral, such as bank accounts and certificated securities, without first commencing a court proceeding, provided that certain formalities are complied with and that the exercise of control can be achieved without any breach of the peace.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

One possibility is a debt restructuring. A debt restructuring can be used to recapitalise or reorganise the capital structure (debt and/or equity) of an entity and its subsidiaries outside of a bankruptcy proceeding. Under a debt restructuring, cramdown of dissenting creditors is not available.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in the USA.

The United States does not impose personal liability on directors for insolvent trading.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

While the United States generally has a liberal policy toward foreign direct investment, there are certain restrictions with respect to ownership of land with energy resources, as well as energy production facilities, assets and transmission infrastructure, under both state and Federal laws. For instance, mining of coal, oil, oil shale and natural gas on land sold by the Federal government is permitted by U.S. citizens, corporations and other U.S. entities only. Ownership and control of nuclear power facilities and leasing of geothermal steam and similar leases of Federal land or licences to own or operate hydroelectric power facilities are also generally restricted to U.S. persons only. However, a U.S.-registered corporation that is foreign-owned or -controlled may own hydroelectric power facilities.

Under the Exon-Florio Act of 1988, as amended ("Exon-Florio"), which is administered by The Committee on Foreign Investment in the United States (an inter-agency committee coordinated by the Department of Treasury), the President may block an investment or acquisition (or order that such investment or acquisition be unwound) after conducting an investigation that establishes that a foreign interest exercising control or influence on relevant U.S. resources, assets, infrastructure or technology "might take action that impairs the national security" that cannot be adequately addressed by any other provision of law.

As noted above in question 4.1, a foreign entity cannot hold a U.S. nuclear plant operating licence issued by the NRC or otherwise

control the licensee. A foreign entity cannot directly hold a FERC hydro-electric licence but may own or control a U.S. company that holds such a licence.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

The United States has concluded a number of bilateral treaties that protect investor rights to establish and acquire businesses, freedom from performance requirements, freedom to hire senior management without regard to nationality, rights to unrestricted transfer in convertible currency of all funds related to an investment, and, in the event of expropriation, the right to compensation in accordance with international law.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Under the doctrine of eminent domain, the U.S. Federal government or any of the U.S. state governments may take private property without the property owner's consent, so long as just compensation is paid to the property owner.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Regulatory jurisdiction over the electric power sector in the United States is bifurcated between Federal and state authorities. State regulatory authorities retain jurisdiction over the siting of electric power generation, transmission and distribution facilities. In most of the United States, FERC has authority over wholesale sales of electric power, and power may not be sold at wholesale until FERC has granted authority to sell at negotiated, "market-based rates" ("MBR Authority"). The owners of certain small (not larger than 20 MW) qualifying facilities are exempted from the need to obtain MBR Authority, although owners of facilities larger than 1 MW must file a form with FERC in order to qualify. As noted in question 4.1, FERC lacks jurisdiction in the non-contiguous states (Alaska and Hawaii) and in the intrastate-only ERCOT region.

Dams and hydroelectric facilities on navigable waters are also subject to licensing by FERC, subject to exemption for very small projects. Interstate natural gas pipelines and underground natural gas storage projects are subject to FERC certificate authority.

Nuclear energy projects and the operators of such projects are subject to licensing by the NRC.

The U.S. Environmental Protection Agency ("EPA") governs the issuance of most Federal environmental permits. Additional environmental permitting can be required by state and other Federal governmental authorities.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

There are a number of registration and filing requirements for financing or project documents that depend on the nature of the project and identity of the parties. For example, FERC requires approval of issuances of securities or assumptions of liabilities (e.g. incurrence of debt), subject to certain exceptions, for companies subject to its electric power jurisdiction. FERC customarily grants electric power generators with MBR Authority blanket approval for jurisdictional financings, and the owners of qualifying facilities that are exempt from FERC rate regulation are also exempt from FERC regulation of financings.

Please refer to question 18.2 for SEC-related requirements.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Please see questions 6.1 and 7.1 above. In addition, the operation of certain U.S. telecommunications infrastructure that is licensed by the FCC may be subject to direct or indirect foreign ownership restrictions, and, with the exception of broadcast radio and television assets, in many cases waivers of such foreign ownership restrictions are available for investors that are domiciled in countries that provide reciprocal market access for U.S. investors to own or invest in similar telecommunications infrastructure.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Federal, state and private royalties are payable on the extraction of natural resources, as applicable.

In general, no specific Federal taxes are imposed on the extraction of natural resources, although income taxes are imposed on profits from sales and an excise tax is imposed on the sale of coal. Income taxes may apply to sales outside of the United States to the extent such sales are related to business conducted in the United States.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

The United States does not generally impose controls or fees on foreign currency exchange. However, U.S. persons, which include U.S. companies and their foreign branches, are prohibited from engaging in transactions with individuals or entities that the Office of Foreign Assets Control of the U.S. Department of Treasury designates as individuals or entities owned or controlled by countries against which the United States has imposed sanctions or that the United States has designated as terrorists or narcotics traffickers.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Other than the withholding taxes discussed in question 17.1, there are no such generally applicable restrictions.

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

Yes, they can.

**7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in the USA or abroad?**

Apart from the withholding taxes discussed under question 17.1, New York law financing documents, which often impose restricted payment conditions on the issuance of dividends, and shareholders agreements typically contain restrictions. In addition, project companies subject to FERC regulation of issuances of securities and assumption of liabilities under Section 204 of the Federal Power Act, other than blanket authority under MBR Authority (discussed in question 7.1 above), are subject to certain restrictions, such as restrictions requiring parent debt obligations to follow up to the parent company if a project company borrows at the public utility level and "dividends up" the proceeds to its non-public utility parent.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

The Clean Air Act and the Clean Water Act are generally the most material Federal statutes governing environmental permitting for power projects. Permits related to air emissions and water discharges under these statutes and similar state laws may be required prior to the start of construction by the EPA or state authorities.

Any major Federal action or decision, including the granting of certain permits by the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers or the approval of a loan guarantee by the DOE, is subject to comprehensive environmental review under the National Environmental Policy Act. Some states, notably California, require separate state-level comprehensive environmental review of discretionary governmental actions relating to power project permitting and siting.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

Outside of the nuclear industry, privately owned and financed project companies are not subject to governmental oversight for procurement.

## 8 Foreign Insurance

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

Such restrictions are applicable on a case-by-case basis depending on the location and nature of the project, the type of project and the identity of the project parties.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Such restrictions are applicable on a case-by-case basis depending on the location and nature of the project, the type of project and the identity of the project parties.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

Foreign workers employed by a project company within the United States are required to have work authorisation in accordance with U.S. immigration laws. This can be achieved via various "non-immigrant" or temporary visa categories which are typically based on employer sponsorship. In addition, work authorisation might be obtained via permanent resident status (also known as green card or immigrant status), often through sponsorship from an immediate family member who is a U.S. citizen.

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

There may be customs duties on imported project equipment, which are determined based upon the country of origin of the equipment unless a relevant trade agreement eliminates or reduces certain of these tariffs.

**10.2 If so, what import duties are payable and are exceptions available?**

The Harmonized Tariff System provides duty rates based on the classification of the imported equipment.

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

Yes, *force majeure* exclusions are available and enforceable and are applied such that one or both parties are excused from performance of the project agreement, which often triggers *force majeure* across other related project agreements. Some *force majeure* provisions, however, will not excuse parties from any monetary payments due. A typical *force majeure* provision will describe the events which constitute *force majeure*, which often include natural *force majeure*, such as acts of God and political *force majeure*, such as war or terrorism.

## 12 Corrupt Practices

**12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?**

The Foreign Corrupt Practices Act of 1977 (the "FCPA") prohibits the bribery of foreign government officials. The law contains two sets of provisions: (i) it prohibits corrupt payments to officials and agents of foreign governments by U.S. persons; and (ii) it requires accounting practices to accurately reflect payments to foreign officials and agents.

Among other penalties, (i) the U.S. Department of Justice may impose criminal penalties of up to US$2 million against offending

firms and fines of up to US$100,000 and imprisonment for up to five years for offending officers, directors, stockholders, employees and agents, and (ii) the Securities and Exchange Commission or the Attorney General may bring civil actions, which include penalties of up to US$10,000 for any firm, director, officer, employee or agent of such firm.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project agreements may be governed by the law of any state but may be subject to the doctrine of *lex situs* (i.e., the rule that the law applicable to proprietary aspects of an asset is the law of the jurisdiction where the asset is located). It is very common that project agreements are governed by New York law.

### 13.2 What law typically governs financing agreements?

New York law typically governs financing documents since the commercial laws and legal precedents in the state of New York tend to be more settled than in other states, making lenders more comfortable. Security documents, such as the mortgage, may be legally required to be governed by the law of the state in which the collateral is located.

### 13.3 What matters are typically governed by domestic law?

Please see question 13.1 above.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes, foreign law may govern a contract. However, the Foreign Sovereign Immunities Act provides an exception to immunity through waiver, which may be explicit or implicit.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, they are.

### 15.2 Is the USA a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes, the United States is a contracting state to the New York Convention, which requires courts of contracting states to give effect to arbitration agreements and recognise and enforce awards made in other states, subject to reciprocity and commercial reservations. The United States is also party to (i) the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), which governs international arbitral awards where expressly agreed by the parties or where "a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified or acceded to the Panama Convention and are member States of the Organization of American States" only, and (ii) the International Convention on the Settlement of Investment Disputes, which is applicable to disputes between a government entity and a national of another signatory state.

### 15.3 Are any types of disputes not arbitrable under local law?

Yes, certain cases involving family law and criminal law are not arbitrable. However, claims under securities laws and Federal antitrust laws have been found by the U.S. Supreme Court to be arbitrable.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

With few exceptions, such as small disputes at the local court level, there are no broad categories of commercial disputes that must be resolved by arbitration absent an agreement of the parties to that effect.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Generally, no.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Withholding of U.S. Federal income tax at a rate of 30% is generally required on payments of interest, dividends, royalties and other amounts (not including principal on loans or distributions by corporations that are treated as returns of capital) to foreign persons unless attributable to a branch office maintained by the recipient within the United States. The United States maintains treaties with numerous jurisdictions that reduce or eliminate these withholding taxes on amounts paid to qualified residents of the counterparty treaty country.

From a U.S. tax perspective, amounts received from a guarantor or from the proceeds of property pledged as collateral are characterised and taxed in the same manner as amounts paid on the underlying claim would have been taxed.

Under the Foreign Account Tax Compliance Act ("FATCA"), foreign financial institutions will be required to report directly to the U.S. Internal Revenue Service information about financial accounts held by U.S. taxpayers. Foreign entities in which U.S. taxpayers hold a substantial ownership interest will be required to certify the identity of those U.S. owners. Compliance will be enforced by withholding of tax at a rate of 30% on interest and other amounts paid to the foreign entity, including principal and returns of capital. While not reduced or eliminated by existing treaties, the United States has entered into various intergovernmental agreements to address FATCA's information reporting requirements and is continuing to negotiate additional such agreements.

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There are very few Federal incentives targeted to foreign investors or lenders.

No Federal taxes are required for the effectiveness or registration of an agreement. Various documentary recording and transfer taxes apply at the state level.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in the USA?**

The above questions and answers address most of the main material considerations for project financings governed by New York law in the United States.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Project bonds are securities and therefore are subject to the various U.S. securities offering and fraud laws (principally the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934). Under the Securities Act, securities in the United States must be sold pursuant to an effective registration statement filed with the U.S. Securities Exchange Commission (the "SEC") or pursuant to an exemption from filing. Very few, if any, project bonds are sold in SEC-registered offerings. The most common exemptions are offerings pursuant to Section 4(2) of the Securities Act and Rule 144A and Regulation S thereunder. Rule 144A project bond offerings require a comprehensive offering document that describes in detail the project, the project and finance documents, the risks associated with the project along with a summary of the bond terms, a description of project modelling, information about the sponsors and various other disclosures. The underwriters and their legal counsel perform extensive due diligence (including the receipt of 10b-5 statements from counsel) to mitigate securities law fraud liability. Offerings solely under Regulation S and Section 4(2) typically have much less disclosure and diligence and the disclosure is more similar to that used in a typical bank deal.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in the USA.**

While Islamic project financing is relatively new to the U.S. market, there are generally three types of financing structures used in Islamic project financing globally – (i) *Istisna'a* (or *Istina'a*)-*Ijarah* (construction contract-lease), (ii) *Wakala-Ijarah* (agency-lease), and (iii) *Sharikat Mahassa-Murabaha* (joint venture-bank purchase and sale) structures.

Under the *Istisna'a-Ijarah* structure, which is believed to be the more popular structure in Islamic project financing, an *Istisna'a* instrument (similar to a sales contract) is usually applied to the construction phase and an *Ijarah* instrument (similar to a lease-to-own agreement) is usually applied to the operations phase. During the construction phase, the borrower procures construction of project assets and then transfers title to assets to the lenders. As consideration, a lender makes phased payments to the borrower (equivalent to loan advances). During the operations phase, the lenders lease project assets to the borrower. The borrower, in turn, makes lease payments (equivalent to debt service). Unlike in traditional project financing, the lender, as the owner of the underlying assets, can be exposed to a number of potentially significant third-party liabilities, including environmental risk.

The *Wakala-Ijarah* structure differs from the *Istisna'a-Ijarah* structure as the borrower is employed as the lender's agent per an agency (*Wakala*) agreement. The borrower/lender relationship is different from the *Istisna'a-Ijarah* structure in that the borrower procures the construction as the lender's agent.

A less commonly used structure is the *Sharikat Mahassa-Murabaha* structure. Under this structure, the borrower and the lenders enter into a joint venture (*Sharikat Mahassa*) agreement which is not disclosed to third parties. A *Murabaha* transaction is one in which a bank finances the purchase of an asset by itself purchasing that asset from a third party and then reselling that asset at a profit to the bank pursuant to a cost-plus-profit agreement, akin to a loan. Each member of the joint venture holds *Hissas* (shares) in the joint venture purchased by capitalising the *Sharikat Mahassa*. The *Murabaha* portion of the transaction involves sales of *Hissas* from time to time by the lenders to the borrower in compliance with *Shari'ah* law.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Generally, under U.S. state and Federal law, contracting parties may select any law as the governing law of the contract so long as it is sufficiently defined and capable of enforcement. However, there is limited case law and no conclusive rulings by U.S. courts on whether *Shari'ah* law would be recognised as a system of law capable of governing a contract.

In a recent U.S. bankruptcy court case, *In re Arcapita Bank, B.S.C.(c), et al.*, Case No. 12-11076 (SHL) (Bankr. S.D.N.Y.), an investor of the debtors objected to the debtors' motion to approve debtor-in-possession and exit financing, asserting, among other things, that the financing was not *Shari'ah*-compliant. In statements made on the record, the court noted that the financing agreement was governed by English law and expressly provided that no obligor was permitted to bring a claim based on *Shari'ah* compliance of the finance documents. The court then appeared to adopt the English courts' approach of avoiding ruling or commenting on compliance of an agreement with *Shari'ah* law, citing a recent English court case that found that, irrespective of *Shari'ah* compliance, *Shari'ah* law was not relevant in determining enforceability of a financing agreement governed by English law and that *Shari'ah* principles are far from settled and subject to considerable disagreement among clerics and scholars. However, the precedential value of the *Arcapita* bankruptcy court's refusal to consider whether the financing was *Shari'ah*-compliant may be

limited given that the district court dismissed the objector's appeal of the bankruptcy court's approval of the financing (along with an appeal asserted by the objector of confirmation of the debtors' chapter 11 plan of reorganisation) as equitably moot.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in the USA? If so, what steps could be taken to mitigate this risk?**

Generally, no.


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