The Projects and Construction Review

Second Edition

Editor

Júlio César Bueno

Law Business Research

The Projects and Construction Review

SECOND EDITION

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EDITOR'S PREFACE

Júlio César Bueno

> *La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque.* Michel Villey, *Critique de la pensée juridique moderne* (Dalloz (Paris), 1976).

In this preface I would like to recognise the great contributions of Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers, to the area of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), UK (Phillip) and Australia (Doug) – they have equally influenced lawyers, bankers, owners, contractors, engineers, designers, lenders and public authorities in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package. I am very happy to have three chapters they have specifically prepared for the introductory part of this book, discussing new trends in project finance, dispute resolution and relationship contracts.

I also thank all the law firms and their members who graciously agreed to contribute their countries' chapters. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by these leading experts in 29 countries has shown us that in order to understand the world we must first comprehend what happens in our own communities; to further advance our understanding of the law, we must resist the modern view that all that matters is global and what is local is of no importance. New jurisdictions covered in this year's edition include: Australia, India, Korea, Qatar and Spain.

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP-IBA), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL) and the Forum Committee on the Construction Industry of the American Bar Association (ABA). We are also celebrating the recent creation of the Latin American Society of Construction Law and its chapter in Brazil. All of

these institutions and associations – ICP-IBA, ACCL, SCL and ABA – have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice. I would like to thank their leaders and members for their important support in the preparation of this book.

I hope you enjoy this second edition of *The Projects and Construction Review* and look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
July 2012

Chapter 1

INTERNATIONAL PROJECT FINANCE

Phillip Fletcher and Andrew Pendleton[1]

As the population of the world continues to grow, consumer demand for both basic and ever more sophisticated products increases commensurately. The foundations for satisfying such demand are built in the oil and gas, natural resources, telecommunications, petrochemicals, transportation and power sectors. Large-scale investment is therefore needed across a broad spectrum of industries, and neither governments nor private sources on their own can meet that need in full. To be successful, investment projects are likely to amass funding and other commitments from a combination of public and private sector participants and involve increasingly sophisticated financing arrangements.

As the speed of development accelerates, the scale of individual projects must keep pace. At the same time, scarcity of supply drives exploration for resources to more remote locations and the cost of extracting those resources has risen. The result? Ever larger financings occurring at a time when traditional commercial bank sources are facing severe market and regulatory constraints. The consequent competition for funding only encourages further the development of 'mega projects' under the direction of experienced and influential sponsors. As any successful sponsor must call on a widening variety of finance sources, there is a continuing need for lawyers capable of structuring the most innovative and complex transactions.

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

i What is project finance?

In essence, project finance is simply a form of secured lending, combined with intricate (but balanced) risk allocation arrangements, and much of the legal expertise is drawn

1 Phillip Fletcher is a partner and Andrew Pendleton is a senior associate at Milbank, Tweed, Hadley & McCloy LLP.

from the discipline of banking. Transactions are characterised by lenders extending credit – often, very large amounts – to a newly formed, thinly capitalised company whose principal assets at the time of closing consist of little more than a collection of contracts, licences and ambitious plans: hence the focus on prudent legal analysis.

To reduce the discipline to its constituent parts is, however, to miss the magic – or alchemy if you prefer – of project finance: the conversion of an assortment of paper assets into a viable economic undertaking. The process is akin to creating an economic 'ecosystem' in which inputs are sourced and processed, and outputs are sold and consumed, with the resultant revenues allocated carefully to predetermined uses, all pursuant to contracts entered into before the project has even been constructed.

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

Economic growth has been particularly rapid in Brazil, Russia, India and China (the BRIC countries). Each of their domestic project finance markets has been robust enough to meet demand without international funding, with the result that project financings in those countries are now often documented under domestic law by leading local lawyers rather than by international firms. Were their domestic financing capacities to become stretched (as may already be the case in India and Brazil), we can expect to see a return to the involvement of both international lenders and lawyers. Significant investment is also taking place in the CIVETS group (Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa) and other emerging economies. In virtually all regions of the world, concerns over climate change are leading to investment both in low carbon power and in energy efficiency, while ever-increasing urbanisation necessitates investment in utilities as well as infrastructure.

ii The role of a project finance lawyer

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

With the expansion of project finance into new industries and regions, the attendant legal issues have become increasingly complex, particularly in the absence of directly relevant precedents and other legal uncertainty, making the prediction of potential difficulties correspondingly more challenging. Ever-shifting market standards,

coupled with the absence of standard form documentation for projects, contribute variety. The result of this is a need for project finance lawyers with a real understanding of the borrower's business (including its susceptibility to a range of external risks – be they political, geological, economic, meteorological or anything else) and the practical detail of all aspects of the underlying project, from the security of feedstock and fuel supply to the liquidity and volatility of offtake markets to the ecological and social impact of the project on the environment in which it operates.

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

iii Risk assessment and allocation

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

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

At the inception of a project, there will, inevitably, be differing views on both the likelihood of future adverse events and their potential impact. An essential element of the lawyer's role in helping the parties assess a project involves the analysis of the

potential risks associated with the project, the way in which those risks have been allocated among the parties and the extent to which that allocation is appropriate in the circumstances (having regard to, but without slavishly following, precedents set in comparable circumstances). This assessment may depend on whether the most material risks have been allocated sensibly to parties able to bear them under contracts that will withstand legal challenge. For example, construction risk is often allocated to engineering and equipment manufacturing firms under market-tested contractual forms featuring detailed testing and liquidated damages regimes; supply and offtake risk is generally managed through a range of firm capacity contracts, 'take or pay'-style commitments or mere supply or purchase undertakings with limited quantity or price commitments. Which of these many options makes sense in any particular context is often the key to determining the 'bankability' of a particular project.

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

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

iv Environmental and social issues

The construction and operation of a project will have an environmental and social impact on the project's locale. Lenders will generally require, at a minimum, that the project company undertakes to comply with all applicable domestic environmental and social laws and regulations. Credit institutions financing a project may also require compliance with World Bank or similar standards, including the voluntary set of guidelines known as the Equator Principles, not only to insulate the project and its lenders from risk, but also to preserve the lenders' reputations. Among other things, those standards require the development of, and compliance with, an agreed environmental and social management plan. The principal areas of focus include labour and working conditions, pollution prevention and abatement, community health, safety and security, biodiversity

conservation, sustainable natural resource management, and protection of indigenous peoples and cultural heritage. Virtually every large-scale project seeking access to the financial markets will therefore need to evidence a high level of environmental and social compliance.

v The concerns of secured creditors

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

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

One of the principal reasons that a lender takes security over a borrower's asset is to ensure that, if its loan is not repaid when due, it will be entitled to require the sale of the underlying asset and the application of the resulting proceeds in repayment of the loan (to the exclusion of the borrower's unsecured creditors). It is likely, however, that the process of enforcing security will be expensive, time-consuming and uncertain in outcome. In practice, therefore, enforcement of security is something of a last resort. In the context of project finance, it is probably correct to say that the most important reason for a lender taking security is to maximise the strength of its bargaining position as against other interested parties (notably the project's trade creditors, the host government and the project company's shareholders). The fact that the lender is entitled to enforce its security (with no obligation to share the benefits of the enforcement with anyone else) ultimately means that holding security puts it in the best possible position from which to negotiate suitable restructuring arrangements for the project.

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

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

concession agreement or enabling legislation, the extent of the security granted will be a matter for negotiation between the lenders and the sponsors.

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

vi Host country risk factors

Location

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

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

Corporate governance

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

Regulation and authorisations

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

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

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

Taxation

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

Duties and trade restrictions

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

Legal certainty and change in law

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

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

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

in some cases, its principal investors, including its lenders) for the purpose of providing appropriate investor protections.

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

vii Governing law issues

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

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

In contrast, the choice of law can have particular significance in relation to a range of commercial contracts. For instance, parties may find it attractive that Article 2 of the Uniform Commercial Code as in effect in the state of New York allows key price terms

in contracts for the sale of goods and certain commodities to be left open for resolution by future agreement among the parties (absent which through resolution by a court). In contrast (subject to various exceptions), English law may find that such a contract fails for uncertainty.

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

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

viii Choice of forum issues

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

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

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

c Will the outcome differ if it does not?

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

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

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

When considering the choice of forum, another important question is whether the dispute should be the subject of judicial or arbitration proceedings. There are obvious advantages to using the courts of a country with long histories of case law and a binding (and comprehensible) precedent system, and established procedural laws and unbiased judicial oversight are things that provide comfort to sponsors and lenders alike. In many

jurisdictions, the courts can compel parties to disclose facts or documents and may be able to order interim relief, such as injunctions that prevent a party from moving assets out of the jurisdiction. Further, because arbitration is a product of contract, only parties that have specifically consented to the arbitration of a dispute can be compelled to proceed in that forum.

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

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

ix Closing the deal

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

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

Project finance lawyers must also organise the documentation process and ensure that each of the parties understands sufficiently the issues in question. Closing a project finance transaction is often as much about process management as legal analysis and drafting. With assets, sponsors, lenders and their respective advisers based in a broad range of countries and time zones, organisational challenges can be significant. Managing the

logistics of complex negotiations across the globe requires a mastery of communications technology. Although English is the dominant language of project finance, it can also be a significant hindrance to the closing of a deal if the lawyers responsible for orchestrating the closing are not conversant in at least some of the native languages of the key project participants.

The ability of international counsel to communicate with local counsel in a broad range of jurisdictions is absolutely crucial to an international transaction. Local lawyers who have trained at international firms will often be adept at conveying legal issues in terms that are readily understood by their international counterparts. However, guidance from books such as this is of particular value in ensuring that all of the lawyers on all sides of the transaction have a common view as to the key legal issues that must be considered by the parties.

Appendix 2

ABOUT THE AUTHORS

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Phillip Fletcher is a partner in Milbank, Tweed, Hadley & McCloy LLP's London office and serves as the practice group leader of the firm's global project finance group. He focuses on representing parties in the acquisition, development and financing of oil and gas, natural resources, independent power, satellite and other infrastructure projects across Europe, the Middle East and Africa. He has particular expertise in multi-sourced financings, including those through official credit agencies, the capital markets and Islamic institutions. Mr Fletcher has been recognised as a leading project finance lawyer by a number of journals, among them, the *International Who's Who of Project Finance Lawyers* (which has designated him as the world's 'Most Highly Regarded' projects lawyer), *Chambers UK* (which ranks him among the first tier of projects lawyers in London), *Chambers Global* (which ranks him as a leader in both the Middle East and African projects markets), *Euromoney* (which ranks him among the top 25 projects lawyers in the world), the *Legal 500* and *PLC*. Mr Fletcher serves on the advisory board of the *International Financial Law Review* and is a member of the Council on Foreign Relations. He is qualified to practise under both English and New York law.

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Andrew Pendleton is an associate in the project finance group based in the London office of Milbank, Tweed, Hadley & McCloy LLP. He has experience advising lenders and sponsors on a variety of international project financings. His sector and regional representations include petrochemicals, oil and gas, natural resources, power, satellites and other infrastructure projects in Europe, the Middle East, India and Africa. Mr Pendleton has also contributed to various legal publications. He is a co-author of the *Oxford University Press Guide to International Project Finance: Law and Practice*. Mr Pendleton is qualified to practise under English law.

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