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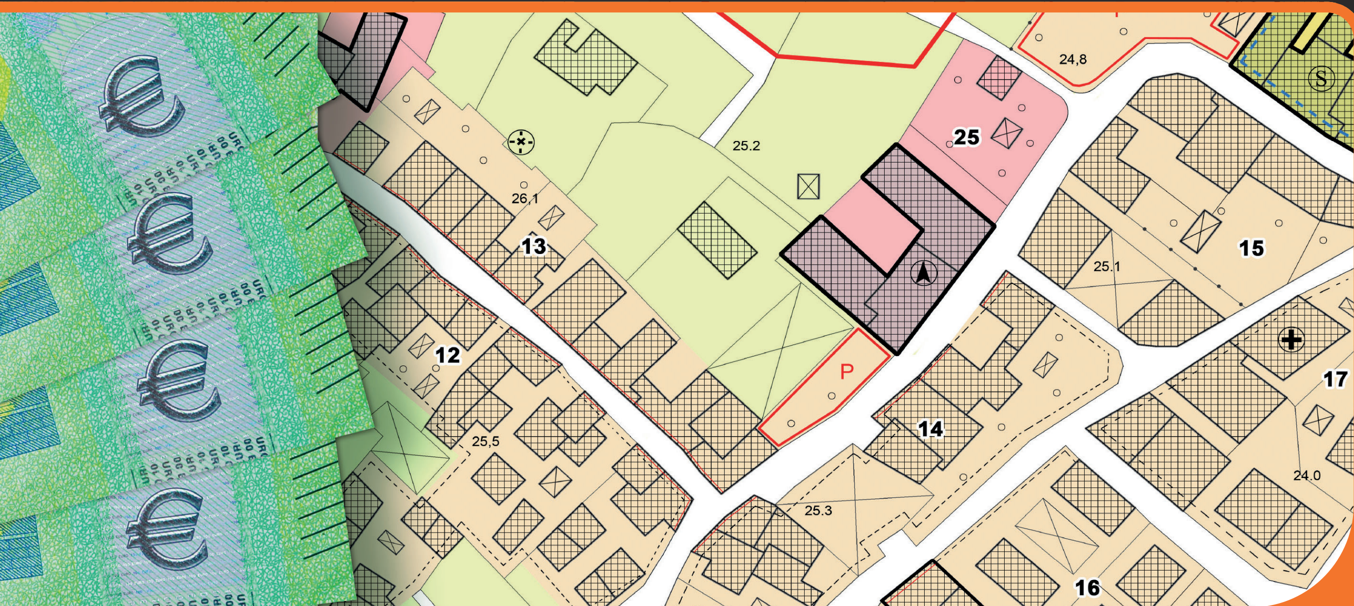

Practical cross-border insights into project finance

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Project finance in the United States ("U.S.") remains a mature and highly active market, with a large volume of transactions continuing to be executed across a diverse range of industries and asset classes.

Russia's invasion of Ukraine, and the unprecedented sanctions that have followed from the Western world, have caused substantial shifts in demand in global energy markets. The situation remains fluid at the beginning of 2022, but the need to find alternative gas sources to meet shortfalls in European supply has underlined the importance of continued investment in midstream and export oil and gas infrastructure in the U.S. In electricity markets, innovation and the growing demand by state governments, investors and energy consumers for a diverse and clean energy mix are driving investment into offshore wind, solar and battery storage. Industry research groups estimate that the U.S. may have clean energy generation capacity exceeding 29 gigawatts in 2022.

Demand for clean energy from investors and consumers is driving a continued transition in markets and associated infrastructure rollouts. Consumers are increasingly choosing to purchase, and governments are seeking to incentivise, electric and fuel-cell powered vehicles. Clean energy sources are also sought to power significant investments in green hydrogen hubs planned in and around traditional oil and gas centres on the Gulf Coast. While supply chain bottlenecks have intensified capital investment in ports, airports, and rail and transit, capital sources continue to redefine the traditional conception of "infrastructure" with increasing investment in energy efficiency, data centres, battery storage and communications infrastructure.

I. Crude and Natural Gas Midstream Infrastructure Under Strain

U.S. crude exports have continued at a historically high level, with exports hovering at around 3 bbl/day at the beginning of 2022. The consistent petroleum production growth since the shale boom of 2008 continues to highlight constraints in the midstream crude sector, particularly relating to transmission, treatment and storage terminals. In recent years, prices for NYMEX WTI (a physical futures contract) traded in negative territory for brief periods, as buyers could not find sufficient storage at the delivery point in Cushing, Oklahoma or transportation capacity from Cushing to other storage hubs. Long term solutions to these deficiencies are challenged by the transition away from fossil fuels – as exemplified by the revocation of the federal permit for TransCanada's $9 billion Keystone XL oil pipeline shortly after the commencement of the Biden administration in 2021. We expect these headwinds for oil transmission pipelines to spur greater demand for oil storage infrastructure and continued use of "crude by rail".

Gas transmission infrastructure also remains under strain – between 2017 and 2019, the volume of vented or flared gas (a by-product of crude oil production) in the Permian Basin increased sixfold to an all-time high of 1.15 Bcf/d. Gas flaring which has reduced in recent years as transmission infrastructure has come online, is a key contributor to U.S. carbon emissions and, increasingly, an ESG concern for lenders, investors and offtakers of U.S. gas and LNG projects. In recent years, some oil producers have resorted to paying third parties with gas transportation capacity to take their gas so that they can keep producing crude oil, with the Waha hub (located in the Permian Basin) spot price dipping into negative figures on a number of occasions in 2020 and 2019.

The sharp growth in demand for gas transportation infrastructure has led to various sponsors pursuing large gas transmission projects, with Kinder Morgan having brought its 2 Bcf/d Gulf Coast Express pipeline online in September 2019, and its 2.1 Bcf/d Permian Highway project online on New Year's Day, 2021. In addition, the 2.0 Bcf/day Whistler pipeline was commissioned in 2021. All three projects run from the Waha hub towards the Gulf Coast. Gas transportation infrastructure is crucial to the continued development of the U.S. LNG export industry, which has been exporting record volumes to the European Union following Russia's invasion of Ukraine and is expected to continue to do so following the cessation of the Nord Stream 2 project for export of gas from Russia to Germany.

II. U.S. Becomes the Leading Exporter of LNG

The shale boom has also fuelled LNG export growth. The U.S. exported 7.7 million tons of LNG in December 2021, surpassing Qatar and Australia for the first time. The Calcasieu Pass LNG and Train 6 of Sabine Pass LNG projects, both of which commenced commissioning in late 2021, are due to complete commissioning in 2022. At such time, the U.S. will have the largest volume of LNG export capacity globally – by the end of 2022, U.S. nominal capacity is predicted to reach 11.4 Bcf/d, with peak capacity increasing to 13.9 Bcf/d.

The LNG boom in the U.S. shows no sign of abating; global spot gas prices hit record highs even before the onset of Europe's latest supply crisis. In October 2021, FERC approved requests to increase LNG production capacity from Sabine Pass and Corpus Christi LNG by an aggregate amount of 0.7 Bcf/d. The expansion of export capacity from zero (the U.S. first exported

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LNG as recently as February 2016) to global leading levels in a six-year period has primarily been financed by project finance capital, and new facilities (including Golden Pass LNG, the eighth U.S. LNG export facility) are expected to rely on project finance to meet their considerable financing needs.

The hydrogen economy continues to gather momentum as a low-carbon alternative to fossil fuels. The Department of Energy issued its "Hydrogen Program Plan" in November 2020, with a particular focus on coordinating governmental efforts to promote R&D for hydrogen technologies, and the Biden administration's return to the Paris Agreement has spurred greater focus on green hydrogen capital investment. Other renewable fuel sources are attracting capital, with renewable natural gas, ethanol and isobutanol projects benefiting from certain energy intensity tax credits in various states including California.

III. Politicisation of Energy Regulatory Matters

In the U.S. it has become increasingly contentious and challenging to permit and build natural gas infrastructure. Some local opposition to energy infrastructure projects has always been anticipated, however, the debate over energy infrastructure is no longer a local issue. Interest groups have become more sophisticated and coordinated and have taken a national approach, and many new midstream and oil and gas assets are subjected to challenges by environmental groups. Moreover, under the U.S. federal system, where power is divided between Federal and state authorities, the interests and objectives of those decision makers can often come into conflict. FERC is the lead agency for the environmental review under the National Environmental Policy Act ("NEPA") required prior to a major federal action. However, state authorities are responsible for key decisions. Environmental groups and states such as New York, New Jersey and Oregon, which have generally been opposed to further midstream development, have brought contentious litigation that has led to delays, denials and vacation of these permits.

In December 2021, after over a decade of litigation involving environmental groups and property owners, the Jordan Cove project's developer notified FERC that it would abandon the LNG terminal and associated pipeline project, citing its inability to obtain the necessary permits from the State of Oregon after FERC declined to overrule the state's denial of a water quality permit in January 2021.

Key points of contention have recently included Section 401 of the Federal Clean Water Act, which requires a state water quality certification prior to construction of facilities that may result in a discharge of pollution in that state, and Section 404 of the Federal Clean Water Act, which requires a permit prior to discharge of dredged fill material into wetlands or waters of the U.S. ("WOTUS"). In 2021, the Biden administration announced that it intended to tighten the definition of WOTUS that had been relaxed by the Trump administration, with the goal of essentially reinstating Obama-era regulations. While the Trump administration sought to curtail the scope of this authority, the Biden administration has indicated it would take a different approach.

In addition to the revocation of the permit to complete the Keystone XL pipeline mentioned above, within the first week of President Biden's inauguration, the administration also issued an order (Executive Order 14008) suspending oil and gas leasing and permitting on federal lands and waters. Oil and gas companies and 14 states sued over the order, and a Louisiana district court issued a preliminary injunction on June 15, 2021. On August 16, 2021, the Department of the Interior appealed the preliminary injunction, and the litigation remains ongoing. In addition, the Department of the Interior released a report in November 2021 that had been required under Executive Order 14008 and suggested significant reforms, including adjusting royalty and bonding rates, prioritising leasing in areas with known resource potential, and avoiding leasing that conflicts with recreation, wildlife habitat conservation and cultural resources.

The Biden administration's introduction of H.R. 5376, commonly known as the "Build Back Better Act" is reflective of this administration's emphasis on renewable energy. Introduced in the House in September 2021, the Build Back Better Act would provide funding for, among other things, electric vehicles, energy-efficiency and clean energy projects, with the goal of cutting greenhouse gas pollution in 2030 by approximately 50% below 2005 levels. The enormous growth in the U.S. renewables market has been assisted by a substantial amount of tax equity investment, where financial institutions and large corporations invest capital in renewable energy transactions (principally wind and solar projects) with the return on their investments derived in significant part from expected tax benefits (tax credits and depreciation deductions).

The Build Back Better Act also sought to make significant extensions and modifications to the green energy tax incentive framework, including extension of the production tax credit ("PTC") through the end of 2026 and of the investment tax credit ("ITC") for projects that begin construction before 2027. The House passed the Build Back Better Act in November 2021, but the Act ultimately did not garner the full support of Democratic senators and, as of February 2022, appears unlikely to pass. There is nevertheless significant momentum behind an economy-wide transition to cleaner energy sources. As of the end of 2021, 31 states and the District of Columbia have adopted renewable portfolio or clean energy standards, and 20 states have committed to a 100% clean energy plan by 2050.

Recent changes at FERC also demonstrate the Biden administration's objectives of increasing renewable energy production while moving the U.S. away from traditional fossil fuels. In January 2021, President Biden named Richard Glick, a sitting commissioner and a Democrat, as chairman of FERC. Glick has historically voted against policy decisions that weakened clean energy production and development, such as FERC's original minimum offer price rule ("MOPR") order, which set minimum bids for state-subsidised electricity generators in PJM Interconnection, L.L.C. ("PJM") capacity auctions. The effect of the original MOPR was to penalise capacity bids from renewable generators in PJM Member States with Renewable Portfolio Standards and clean energy targets. Responding to pressure from several Member States threatening to withdraw from the market, PJM in February 2021 began a stakeholder process to revise the original MOPR, leading to a narrower MOPR that ultimately became effective by operation of law in September 2021 after the then-sitting FERC commissioners deadlocked 2-2 along party lines as to whether to approve the proposal. Among other things, the new "focused" MOPR exempts renewable generators that would have otherwise been subject to the original MOPR. Glick has called the MOPR process unsustainable and pledged to work with grid operators "to find a better approach that accommodates and not blocks state policies", according to trade publications.

Glick has also been a vocal advocate for the reform of FERC's natural gas pipeline certification process, and in February 2021, FERC announced it would reopen a Notice of Inquiry ("NOI") proceeding seeking comment on changes to its 1999 certification policy for new natural gas pipelines. Among other inquiries, FERC is considering how the agency should weigh a proposed project's environmental justice and climate change impacts. The proceeding follows Chairman Glick's separate comments indicating that FERC must ensure its decisions do not unfairly impact historically marginalised communities and his creation of a new senior counsel position tasked with integrating

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environmental justice and equity concerns into agency decisions. Recent D.C. Circuit rulings rejecting FERC's analysis of climate impacts in connection with proposed LNG facilities and an associated pipeline in Texas have put the commissioners under increased pressure to clarify their approach.

More change at FERC is expected in 2022 as Chairman Glick for the first time obtained a 3-2 Democratic majority in November 2021 with the U.S. Senate's unanimous confirmation of Willie Phillips Jr. to fill the vacancy left by former FERC Commissioner Neil Chatterjee, a Republican. With the new Democratic majority, agency observers expect Glick will move forward as soon as possible on several key rulemakings in 2022, including possible reforms to transmission planning, cost allocation, and the generation interconnection process, which has broad support at FERC, as well as the more controversial natural gas pipeline NOI proceeding.

IV. Challenges and Opportunities in Electricity Markets

As investment and grid composition has moved from traditional thermal generation sources towards a more intermittent but emission-free renewable generation, reliability planning is increasingly a challenge for regulators and market participants. This challenge was brought into sharp focus in February 2021, where Texas was confronted with unseasonably severe winter conditions causing energy spot prices to spike by more than 10,000%, highlighting the importance of a regulatory framework and market design that are robust in allocating load, demand and grid integrity during challenging weather events. In the face of these challenges, we have seen increased interest in the development of demand response and distributed generation and storage assets.

Storage solutions, such as pumped-storage hydro and battery storage, can operate as alternatives to gas-peaking plants in periods of peak demand, enhancing reliability and assisting in managing the continual integration of renewable energy into the grid. Offshore wind, which has greater consistency of wind resource and is generally located closer to load centres, is also expected to expand significantly in the U.S. with the Biden administration's support and as developers leverage technical expertise from Europe. The challenges in delivering and financing these capital-intensive projects include the lengthy and multi-faceted construction process, reliance on a global supply chain and a multi-contract procurement model and they rely on certainty of financing and revenue sources.

V. Growth in Renewable Energy Generation

Renewable energy continues to be more broadly consumed than coal across sectors in the U.S., and is used in the electric power, industrial, transportation, residential as well as commercial sectors. Renewables are expected to account for most new electricity generating capacity in 2022, of which approximately half is expected to be solar, surpassing in GW the solar additions made in 2021. 2021 saw the addition of 17.1 GW of wind capacity in the U.S., a record to date. U.S. wind projects are predominantly developed by independent power producers and are project financed. Industry participants will be watching for delays and increased costs associated with worldwide supply chain disruptions.

While the outlook for offshore projects had been clouded by regulatory delays under the prior administration, the 2022 outlook for offshore wind projects in the U.S. is favourable. In January 2021, the Biden administration issued an executive order directing the Secretary of the Interior to identify steps to double renewable energy production from offshore wind by 2030, to 30 GW. Today, 42 MW of offshore wind are operational off the Eastern coast of the U.S.

The lead U.S. governmental agency responsible for issuing permits for wind projects located on the outer continental shelf is the Bureau of Ocean Energy Management ("BOEM"), an administrative entity within the U.S. Department of the Interior. BOEM held an auction in late February 2022 for offshore wind leases totalling over 480,000 acres off the coast of New York and New Jersey. In parallel, the states of New York and New Jersey are conducting offshore renewable energy certificate offtake auctions. The resulting offshore wind development is expected to create up to 7 GW of wind-powered energy.

Projects in development prior to the administration turnover have also proceeded despite significant challenges. The recently closed Vineyard Wind project originally expected its Final Environmental Impact Statement ("EIS") pursuant to NEPA in June 2019. This was delayed by an announcement from BOEM that it would prepare a Supplemental EIS in order to evaluate the cumulative environmental impacts of multiple offshore wind energy projects. Vineyard Wind ultimately withdrew from the federal review process in December 2020, which allowed the determination on permitting for the project to be deferred to the incoming Biden administration. On July 15, 2021, BOEM issued its approval of the project's COP with the project reaching financial close in September 2021. The project is expected to deliver its first power in 2023.

VI. Adoption of Public Private Partnerships in the U.S.

There is bipartisan recognition in the U.S. of a critical need to repair, replace and expand the country's ageing roads, bridges, dams and other infrastructure. The American Society of Civil Engineers has estimated that the U.S. needs to spend some $4.5 trillion by 2025 to fix existing infrastructure that has shown significant deterioration. Increasingly, to assist in satisfying infrastructure needs, procurement authorities have been looking to the example of public-private partnerships (also known as "PPPs" or "P3s"). In a PPP, public agencies and private investors cooperate in financing, construction, operation and maintenance of a project. This device is designed to transfer risk and responsibility for infrastructure assets to private operators under a competitive process that provides for appropriate risk allocation between the parties and access to private capital and expertise.

PPPs have been utilised in states such as Texas, California, Florida and Virginia, where enabling statutes to undertake substantial infrastructure projects have been enacted. Colleges and universities have also turned to PPPs to unlock funding for capital improvements to campus energy systems and parking assets. In November 2020, the University of Idaho announced a 50-year concession with a private company to take over the university's centralised district energy system, following in the footsteps of the University of Iowa (which transferred its utility plant to a private concessionaire in March 2020). By maintaining ownership of the physical assets but transferring operations and maintenance of the facilities to the private concessionaires, public participants in PPPs can make their physical operations and energy use more efficient while accessing long-term capital that enables them to upgrade capital facilities and meet energy demands.

The PPP model has been applied most regularly for transportation infrastructure (including roads, bridges, airport facilities, rail projects and parking concessions), water supply and treatment facilities and social infrastructure projects (including courthouses, public universities and military housing). Familiarity with the model and its adoption by procurement authorities has been mixed in the U.S., and there is varying consistency in terms across deals. This has meant that the model has been used most often for mega-projects that can absorb the transaction costs, though we expect the use of PPPs to be adopted more widely as market participants become more familiar with this procurement method.

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The Infrastructure Investment and Jobs Act (the "IIJA") signed into law in November 2021 is a step in the direction of standardising project structures and terms. Among other items, the IIJA sets out requirements for transportation projects using the PPP model; such requirements include performance of a value for money analysis and review of the project and of the private investor for compliance with the applicable PPP agreement. The significant funds made available through the IIJA – $1 trillion – are likely to provide an incentive for additional PPP projects to be undertaken in the US. The legislation also streamlines the lengthy and complex federal environmental review process for projects by codifying the "One Federal Decision" initiative, which is expected to improve the predictability of review processes, reduce unnecessary delays, and generally minimise project development risks for sponsors.

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

The U.S. remains one of the world's oldest and largest markets for project financings, with a constant volume of deals in energy and infrastructure. There is an extraordinary diversity of deals across industries and financing sources, including tax equity investors, bank syndicates, bond markets and direct lenders. Massive investment has been made in large-scale utility solar facilities, including major financial closings for SB Energy's 1.7 GW of projects in Texas and California, Terra-Gen's Edwards Sanborn solar and storage facilities in California and the 618 MW Highlander Solar Project in Virginia. Offshore wind reached a significant milestone in 2021, with Vineyard Wind reaching financial close on its 800 MW first phase in September 2021. This is the largest offshore wind farm financed in the U.S. to date, with other substantial offshore wind projects under development such as the 816 MW Empire Wind Project and 880 MW Sunrise Wind Project in New York. Significant investments are also being made in large infrastructure projects such as JFK airport in New York and development of new LNG projects or the expansion of existing facilities.

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 project assets, including a security agreement covering personal property of the project company.

The Uniform Commercial Code ("UCC") provides a well-developed and predictable framework for lenders to take a security interest in 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, for a security interest to be enforceable, the borrower must have rights in the personal property, the lender must give value and the parties must enter into a security agreement. Such 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 grantor's personal property assets. Filing a UCC-1 financing statement describing the collateral in the appropriate filing office perfects the lender's security interest in most personal property assets owned by the applicable grantor.

Lenders usually also require the direct owner(s) of the project company to grant a pledge of its ownership interests. The grant of an equity pledge allows lenders to exercise remedies over the ownership and governance rights in the project company in addition to the assets owned by that company.

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?

A lien 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, deed to secure debt, leasehold mortgage or leasehold deed of trust. In most states, the recording of these instruments will also perfect a security interest in fixtures; however, depending on the jurisdiction, a UCC-1 fixture filing may also be required.

To create a lien on real property by mortgage or deed of trust, such instrument will: (i) identify the legal names of the lender and the borrower; (ii) describe the obligations being secured by such instrument; (iii) contain a granting clause describing the secured property; (iv) contain a legal description of the land being mortgaged; and (v) be signed and notarised. Such instrument must be recorded in the recorder's office of the county where the real property is located in order to provide notice to third parties of the existence of the lien created thereby and to perfect the security interest in the fixtures described therein. For pipeline, electric transmission, railway and similar financings it is also customary practice to file a central "transmitting utility" filing with the Secretary of State in the applicable state where the real property is located. This filing perfects a security interest in fixtures with respect to transmitting utilities throughout the applicable state and affords certain other benefits under the UCC.

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, depending on the nature of the receivable. A security interest in assets classified under the UCC as "accounts", "chattel paper", "commercial tort claims" and "general intangibles" is generally perfected by filing a UCC-1 financing statement, although for "commercial tort claims" the claims subject to the security interest must be specifically identified. A security interest in "letter of credit rights" that serve as a "supporting obligation" to other collateral (such as an account) is automatically attached and perfected if the security interest in the underlying collateral is attached and perfected. If the "letter of credit rights" do not constitute a "supporting obligation", the security interest in such letter of credit rights must be perfected by control and requires the consent of the issuer of the letter of credit. There are provisions in the UCC that override certain (but not all) restrictions on assignment and specific statutory requirements may apply in respect of the assignment of receivables from governmental entities (the Assignment of Claims Act applies in respect of Federal claims).

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

Yes. Perfection of rights in deposit accounts and money deposited in those accounts is achieved by control rather than by the filing of a UCC-1 financing statement (subject to special rules that apply to

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proceeds of collateral in which the secured party had a perfected interest). Control in accounts is generally achieved by the secured party entering into an agreement with the debtor and the depositary bank under which the depositary bank agrees to comply with the secured party's instructions on disbursement of funds in the deposit account without further consent by the debtor.

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

Yes. Filing of a UCC-1 financing statement can perfect a security interest in the shares of a company; however, it is common for the lender to take possession of a stock certificate and a signed blank transfer power to ensure it has priority over other secured creditors. In respect of limited liability companies or limited partnerships (as distinct from corporations), the applicable entity would need to "opt in" to Article 8 of the UCC under its organisational documents to elect to have the ownership interests in that entity treated as a "security" that can be perfected by possession of a certificate and transfer power. If an ownership interest is an "uncertificated security", then the lender can achieve a priority position through a control agreement with the issuer and holder of the ownership interest.

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 certain property may apply.

For transactions involving a real estate mortgage, lenders will almost always require the borrower to purchase a title insurance policy insuring the lien and priority of the mortgage as shown on a report prepared by a private title company. Title insurance rates are set on a statutory basis and vary from state to state but are generally the most significant cost incurred by borrowers in relation to security over project assets. A real estate mortgage (or comparable instrument depending on the jurisdiction) needs to be notarised, and in some jurisdictions signed by one or more witnesses, and recorded in the county and state in which the real property is located. In addition, some states impose mortgage recording taxes, intangibles taxes, stamp taxes or other similar taxes, in addition to per page recording fees, in connection with the recording of the mortgage, which are generally calculated based on the amount secured by the mortgage. In states that impose such taxes, the amount secured by a mortgage is generally capped at the lesser of the fair market value of the property and the loan amount.

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. A UCC-1 financing statement is typically filed on the same day as closing and may be filed prior to that date. For transactions involving a real estate mortgage, the longest lead-time item is typically the process of obtaining a real estate survey and preliminary title report and obtaining certain deliverables necessary for the title insurance company to provide requested endorsements. This process can take one to two months depending on how large the property is or the location of the property.

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 your jurisdiction 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?

Yes. Under New York law-governed security documents where there are multiple lenders or syndication is contemplated, 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 your jurisdiction, 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?

See question 3.1 above. New York law recognises the concept of a security trust, although a collateral agent is customarily appointed to hold collateral for the benefit of lenders.

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?

The cost and time required to execute enforcement decisions depends on the location and nature of the project and the identity of the project parties. For example, a direct or indirect change in control over electric power assets subject to the jurisdiction of 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 ERCOT region, which is subject to the jurisdiction of the State of Texas. 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 hydroelectric licensing rules, or an interstate natural gas pipeline or underground gas storage facility that holds an 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.

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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: (i) the possible imposition of the automatic stay under the Federal Bankruptcy Code, Title 11 of the U.S. Code ("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. The consummation of collateral disposition transactions may require notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (as amended) and expiration or termination of a waiting period prior to completion. An exemption applies to certain acquisitions by a creditor in the ordinary course of business (such as in connection with an acquisition in foreclosure, default, or a *bona fide* debt workout). There are certain restrictions on the exemption's applicability to sales out of bankruptcy and subsequent disposals by the creditor.

Finally, note that certain incentives or benefits in favour of a project company may be affected by enforcement action. For example, in California, newly constructed solar systems benefit from a one-time exclusion from property tax reassessment, which can greatly reduce property taxes payable because, for local property tax purposes, the subject property's value is determined without reference to its improvement by the newly added solar system. The benefit of this property tax exclusion may be lost where, as a result of a foreclosure, a person or entity directly or indirectly obtains more than 50% of the project company's capital and more than 50% of the project company's profits (or more than 50% of the voting shares if the project company is a corporation). Lenders to back-leverage renewable energy transactions upstream of a tax equity investment also need to be familiar with the potential consequences of certain tax-exempt and other disqualified persons taking an indirect ownership interest in the project company, which can result in a partial recapture of the tax credits and a corresponding reduction in cash flows received from the tax equity investment.

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. As noted in question 4.1 above, foreign investors or creditors may also need to structure their holdings to avoid adverse consequences of taking a direct or an indirect ownership interest in any tax equity investment.

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 only through an order of the Bankruptcy Court. In addition, in certain limited circumstances, the Bankruptcy Court may extend the automatic stay to protect entities that 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, a secured creditor is generally entitled to "adequate protection" of its interest in a debtor's collateral, and there are limits on the ability of the project company to use some types of collateral, or to dispose of collateral, without the secured creditor's consent. In particular, the project company will not be permitted to use cash collateral (cash and cash equivalents) without the agreement of the secured party or an order of the Bankruptcy Court.

In any sale of collateral (other than ordinary-course-of-business sales, such as sales of inventory in normal business operations) during a bankruptcy case, the secured creditor generally has the right to "credit-bid" its claim against the debtor, although that right can be limited by the Bankruptcy Court for cause. The determination of cause is fact-intensive, and in several recent cases Bankruptcy Courts have found that such cause existed, in order to facilitate an auction with active, competitive bidding. 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 the plan provides for the auction of the secured creditor's collateral without giving the secured creditor the right to credit-bid. But it is still possible to cramdown 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). Although particular 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 certain circumstances, a debtor (or trustee) may surcharge collateral for the costs of preserving or disposing of it.

Under the Bankruptcy Code, the term "transfer" is broadly defined, and includes the grant or perfection of a security interest. The grant of a security interest to a lender may be "avoided", or set aside, if the security interest is unperfected. In addition, a lender's perfected security interest may be avoided as either a "preference"

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or a "fraudulent transfer". It is important to note that there is no requirement for there to be actual fraud or wrongdoing for a transfer to be avoided under either of these theories.

A lender's security interest in a project company's property may be avoided as a preference if: (i) the lender perfects the security interest during the 90 days (or one year, if the lender is an "insider" of the project company) preceding the commencement of the project company's bankruptcy case; (ii) that transfer is made for or on account of an antecedent debt owed by the project company to the lender; (iii) the transfer enables the lender to receive more than it otherwise would have received in a liquidation of the project company; and (iv) the lender has no affirmative defence (which includes that the transfer was a contemporaneous exchange for new value, that the lender gave subsequent new value, or that the transfer was in the ordinary course of business) to such preference.

Under the Bankruptcy Code and applicable state laws, a constructive fraudulent transfer claim can be asserted to avoid a transfer that the project company made to the lender if both: (i) the project company made the transfer in exchange for less than reasonably equivalent value; and (ii) the project company at the time of the transfer was, or was thereby rendered, insolvent, inadequately capitalised, or unable to pay its debts as they matured. For this purpose, the securing or satisfaction of a present or antecedent debt of the project company will generally constitute reasonably equivalent value (although it may be an avoidable preference).

Under the Bankruptcy Code, the look-back period for constructive fraudulent transfer claims is two years before the commencement of the bankruptcy case. Under state laws, the look-back period can vary, depending on the state, and can be up to six years. If a transfer is avoidable as either a preference or a fraudulent transfer, 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 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 from the category of entities that are eligible to be debtors in a bankruptcy case: governmental entities (other than municipalities); domestic insurance companies; domestic banks; foreign insurance companies engaged in such business in the U.S.; and foreign banks with a branch or agency in the U.S. In addition, the Bankruptcy Code has special provisions for particular types of eligible entities, such as railroads, municipalities, stockbrokers and commodity brokers.

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, provisions of the applicable security agreements, and the governing law. For example, the UCC generally authorises a secured creditor, after default, to take possession of, to collect on, and to dispose of (such as by public or private sale), personal-property collateral without first commencing a court proceeding, provided that the secured creditor complies with particular formalities and proceeds without 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 consensual, out-of-court debt restructuring, which can be used to recapitalise or reorganise the capital structure (debt and/or equity) of an entity and its subsidiaries outside of a bankruptcy case. Under such 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 your jurisdiction.

The U.S. does not impose personal liability on directors for insolvent trading. Under the law of some states, however, directors of an insolvent company may be found to have fiduciary duties not only to the company's shareholders, but also to its creditors, and a director's breach of those fiduciary duties may give rise to personal liability.

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 U.S. 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, only U.S. citizens, corporations and other U.S. entities are permitted to mine coal, oil, oil shale and natural gas on land sold by the Federal government. 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 Defense Production Act of 1950, as amended by the Exon-Florio Act of 1988 and the Foreign Investment Risk Review Modernization Act of 2018, the President of the U.S. maintains authority to review any foreign investment in a U.S. business in order to assess associated impacts on U.S. national security. Such authority has been delegated to the Committee on Foreign Investment in the U.S. ("CFIUS"), an inter-agency committee co-ordinated by the U.S. Department of the Treasury that monitors foreign investment activity for U.S. national security concerns and may initiate investigations of, and order the unwinding of, certain foreign investment transactions that raise U.S. national security concerns that cannot be effectively mitigated. U.S. project companies, and their potential foreign investors, may be exposed to obligations and risks relating to the CFIUS regulatory regime in the context of merger, acquisition, and investment transactions, particularly given the sensitive nature of the energy and infrastructure sectors in which such companies operate.

As noted in question 4.1 above, 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 an FERC hydroelectric licence, but may own or control a U.S. company that holds such a licence.

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

The U.S. 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 U.S. 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 U.S., 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 an MBR Authority, although owners of such facilities larger than 1 MW must file a form with FERC in order to qualify. As noted in question 4.1 above, FERC lacks jurisdiction over wholesale sales of electric power in the non-contiguous states (Alaska and Hawaii) and in the intrastate-only ERCOT region, although FERC maintains books and records jurisdiction under the Public Utility Holding Company Act of 2005 in such regions.

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.

FERC has jurisdiction over the rates charged by petroleum pipelines for interstate shipments. The states retain jurisdiction over petroleum pipeline permitting and over rates for intrastate shipments. A separate Federal authority, the Pipeline and Hazardous Materials Safety Administration, under the Department of Transportation, has jurisdiction over pipeline safety regulation for both natural gas and petroleum pipelines.

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

The Environmental Protection Agency ("EPA") governs the issuance and enforcement of most Federal environmental permits. Environmental permits can also be required by state, local 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, pursuant to Section 204 of the Federal Power Act, 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 certain qualifying facilities are exempt from FERC regulation of financings. It should be noted that FERC will not regulate such financing approvals if a state regulatory authority with jurisdiction actively regulates the proposed financing.

Please refer to question 18.2 below for requirements related to the Securities and Exchange Commission ("SEC").

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 4.1, 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. Domestic crude oil used in or exported from the U.S. is also subject to Federal tax. Income taxes may apply to sales outside of the U.S. to the extent such sales are related to business conducted in the U.S.

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

The U.S. does not generally impose controls or fees on foreign currency exchange. However, U.S. persons and foreign persons engaged in business in the U.S. are subject to U.S. Federal and state income taxes on foreign currency exchange gains.

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 below, there are no such generally applicable restrictions. However, under

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the U.S. tax laws, certain very large U.S. companies that make deductible payments of interest to foreign affiliates may be subject to minimum taxes.

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

Yes, they can. A company that establishes an account with a U.S. financial institution is generally required to provide information regarding its "beneficial owners" to such financial institutions, and to provide certain other information in accordance with U.S. AML laws. Additionally, in January 2021, Congress enacted the Corporate Transparency Act (the "CTA"), which will require certain U.S. companies and foreign companies registered to do business in the U.S. to provide information regarding their beneficial owners to the U.S. Financial Crimes Enforcement Network ("FinCEN"). The CTA requires the U.S. Treasury Department to issue regulations implementing these reporting requirements by January 1, 2022.

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 your jurisdiction or abroad?

Corporate law restrictions will depend upon the laws of the state in which the project company is incorporated or formed and its corporate form. In most project finance transactions, project companies are pass-through entities and typically the organisational form used is a Delaware limited liability company. Delaware limited liability companies are subject to a restriction under the Delaware Limited Liability Company Act (the "Delaware Act") on paying distributions where the liabilities of the limited liability company to third parties exceed the fair value of its assets. However, this protection does not effectively extend to creditors, as the Delaware Act limits standing to bring derivative claims against the manager of the limited liability company to its members (i.e. the owners) and their assignees (see *CML V, LLC v. Bax*, 6 A.3d 238 (Del.Ch. 2010)).

Apart from the withholding taxes discussed under question 17.1 below, 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 at question 7.2 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 that would impact power project construction and operation. Permits related to air emissions and water discharges under these statutes and similar state laws may be required by the EPA or by other Federal, state or local governmental authorities prior to the start of construction and for operation. In addition, known or likely contamination could be governed by the Federal Superfund statute and other laws.

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 a comprehensive environmental review under NEPA. Some states, notably California and New York, require a similar state-level comprehensive environmental review of discretionary governmental actions relating to power project permitting and siting. There are opportunities for public notice, comment and challenge in the application process for some permits and pursuant to NEPA.

While not administered by a governmental authority, the Equator Principles are a voluntary international framework that may be applied to a project by a participating financial institution and serves as a benchmark for determining, assessing and managing environmental and social risk in projects. As of January 21, 2022, 126 financial institutions in 37 countries have adopted the Equator Principles.

Historically, domestic projects have often been excluded from additional requirements, based on an assumption that compliance with the Federal and state environmental laws would be sufficient to satisfy the Equator Principles' due diligence and operational requirements. As a result, representations and covenants expressly related to the Equator Principles were often either not included in the applicable project/financing agreements or limited to general statements of material compliance with the Equator Principles. However, the most recent version of the Equator Principles, referred to as Equator Principles IV or EP4, took effect in October 2020 and imposes additional obligations and a higher level of scrutiny on U.S. projects. This, in turn, could increase the scope and extent of Equator Principles-specific representations and covenants in U.S. projects' construction, operation and financing agreements. In addition, EP4 increased the scope of the assessment of a project's environmental and social impact that must be conducted for each transaction (potentially beyond an Independent Engineer's review), which could pose significant timing considerations for a transaction.

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?

Yes, subject to any case-specific restrictions, insurance policies over project assets may be payable to foreign (secured) creditors where policies designate such person as a loss payee.

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9 Foreign Employee Restrictions

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

Generally, and subject to state law, foreign persons may be appointed as corporate officers or directors of a project company. To be employed by a project company or receive a salary or compensation for services provided within the U.S. as a foreign person, there is a requirement to have a 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 employer (which can be a difficult and lengthy process) or from sponsorship by an immediate family member who is a U.S. citizen (which may be less difficult than employer sponsorship but is generally a lengthy process).

Note that for most project finance transactions, employees are engaged by the operator and asset manager and not directly by project companies.

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 some of these tariffs.

The Jones Act generally requires that U.S. flagged ships be used to transport goods between U.S. ports, which may affect development of offshore projects.

See question 12.2 for a summary of the Uyghur Forced Labor Prevention Act. The Xinjiang Region is a major global source of polysilicon, which is a key component of photovoltaic solar modules and is a high-priority sector for enforcement of this Act. As a result, the solar development industry has now generally adopted extensive diligence procedures on the source of photovoltaic modules to avoid procuring this equipment from manufacturers with known connections to the Xinjiang Region.

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

The Harmonised Tariff Schedule 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, in whole or in part, or are entitled to suspend performance or claim an extension of time for performance. Invocation of a *force majeure* clause can trigger *force majeure* across other related project agreements, and thus it is important to ensure that the *force majeure* provisions "mesh" with those found in related project agreements. *Force majeure* provisions typically do not excuse parties from any monetary payments that mature prior to the occurrence of the *force majeure* event.

A typical *force majeure* provision will set forth a non-exhaustive list of events that constitute *force majeure*, which often include natural *force majeure*, such as acts of God, and political *force majeure*, such as war or terrorism, as well as the effect on the parties' rights and obligations if a *force majeure* event occurs.

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 ("FCPA") contains two sets of relevant provisions: (i) its anti-bribery provisions prohibit U.S. persons and persons otherwise subject to U.S. jurisdiction from making corrupt payments (including bribes, kick-backs, and other improper payments) to officials and agents of foreign governments and state-owned enterprises; and (ii) its accounting provisions require companies whose securities are listed on stock exchanges in the U.S. to (a) make and keep books and records that accurately and fairly reflect the transactions of the company (including transactions involving foreign government officials or agents), and (b) devise and maintain an adequate system of internal accounting controls.

Among other penalties, (i) for violations of the FCPA's anti-bribery provisions, the U.S. Department of Justice ("DOJ") may impose criminal penalties of up to $2 million against offending companies and fines of up to $250,000 and imprisonment for up to five years for offending officers, directors, stockholders, employees, and agents, and (ii) for violations of the FCPA's accounting provisions, the DOJ and the SEC may bring civil and criminal actions, which include criminal penalties of up to $25 million against offending companies and of up to $5 million and imprisonment for up to 20 years for offending directors, officers, employees, or agents of such firm.

The projects sector can involve heightened risk from an FCPA perspective, particularly in contexts involving meaningful interactions with non-U.S. governments, including through suppliers or distributors. Infrastructure and energy projects often involve greater government oversight, which incrementally enhances the risk of corrupt or improper payments in dealings with government officials. Project companies should be mindful of their exposure to compliance risks under the FCPA and other anti-corruption laws and should develop policies and procedures to promote ethical behaviour and prevent bribes and other corrupt practices.

U.S. economic sanctions and import/export control laws and regulations (particularly those relevant for the projects sector)

Under U.S. economic sanctions laws and regulations, U.S. persons (which include U.S. companies and, under certain programmes, their foreign subsidiaries and branches) are generally prohibited from engaging in transactions involving persons targeted under U.S. sanctions programmes, subject to limited exceptions. Such persons targeted under U.S. sanctions programmes include foreign individuals or entities that are, or are owned or controlled by one or more individuals or entities that are, (i) identified on a U.S. sanctions-related list of designated parties (including the

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Specially Designated Nationals and Blocked Persons List ("SDN List") maintained by the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC")), (ii) organised or resident in a country or territory that is the subject of comprehensive sanctions imposed by the U.S. (currently, the Crimea, Donetsk and Luhansk regions of Ukraine, Cuba, Iran, North Korea, and Syria), or (iii) otherwise the subject or target of economic or financial sanctions imposed by the U.S. government (including OFAC and the U.S. Department of State).

U.S. sanctions programmes prescribe trade and commercial restrictions focused on individuals, entities, commodities, and economic sectors of concern, including the energy sectors of certain targeted jurisdictions, based on involvement in or connection to activities or developments that threaten U.S. national security or foreign policy interests, such as human rights abuses, narco-trafficking, terrorism and nuclear proliferation.

U.S. export control laws and regulations govern the export and re-export of U.S.-origin commodities, software, and technology. The U.S. Department of Commerce's Bureau of Industry and Security administers U.S. laws and regulations governing the export of items falling under the purview of the Export Administration Regulations, while the U.S. Department of State's Directorate of Defense Trade Controls regulates the export of defence articles and defence services, which are covered by the United States Munitions List and the International Traffic in Arms Regulations. Primary responsibility for the administration of import controls rests with Customs and Border Protection ("CBP"), which can issue Withhold Release Orders preventing goods from being released from U.S. ports of entry.

U.S. economic sanctions and import/export control laws may change based on evolving foreign policy considerations and national security interests. For example, in recent years, the U.S. has responded to developments relating to forced labour and human rights abuses in the Xinjiang province of China by imposing blocking sanctions on a number of Chinese individuals and entities. Also, the passage of the Uyghur Forced Labor Prevention Act in December 2021 created a rebuttable presumption that all goods manufactured, wholly or in part, in the Xinjiang province are produced through forced labour and therefore barred their release by CBP from U.S. ports of entry.

More recently, in February and March 2022, in response to actions by Russia that threaten the territorial integrity of Ukraine, the United States implemented a number of new sanction- and export control-related measures targeting the Russian government and its officials, as well as Russian state-owned entities, banks and oligarchs, among others. Such measures have included blocking sanctions, restrictions on banking transactions, prohibitions on dealings relating to new debt and equity and heightened export restrictions on wide categories of items. Specifically, OFAC added Nord Stream 2 AG, the project company established to construct and operate the Nord Stream 2 gas pipeline from Russia to Germany, to the SDN List. Designations of entities and individuals on the SDN List as part of such Russia-related measures have resulted in broad prohibitions on dealings involving such entities or individuals or any entity that is 50 per cent or more owned, directly or indirectly, by any of them individually or collectively.

Project companies should be mindful of their compliance obligations under U.S. economic sanctions and import/export controls that would restrict their ability to engage with certain counterparties or to import or export certain items or services. For example, solar panels used by solar project companies are produced using polysilicon, a raw material that is often sourced from the Xinjiang province, raising concerns and implicating risks under U.S. economic sanctions and import controls. Project companies should be aware of relevant restrictions and implement appropriate due diligence and screening procedures for compliance with U.S. economic sanctions and export/import controls, including with respect to their dealings with agents and suppliers.

'Know-your-customer' and customer identification obligations for investors providing financing to project companies

Under the Currency and Foreign Transactions Reporting Act of 1970 (as amended by the USA PATRIOT Act of 2001) and the implementing regulations issued thereunder (collectively referred to as the Bank Secrecy Act), U.S. financial institutions are required to establish and implement an effective anti-money laundering ("AML") compliance programme. The elements of an effective AML compliance programme include, among others, internal policies and procedures designed to detect and report suspicious activity and ensure the identification, recordation and reporting of currency transactions that exceed certain monetary thresholds.

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).

13.2 What law typically governs financing agreements?

New York law typically governs financing documents given the status of New York City as a major financial centre that provides for a reasonably settled and certain application of commercial laws and legal precedents and which permits liberal enforcement of the choice of New York law. Certain security documents, such as a real estate 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 questions 13.1 and 13.2 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 typically recognised by local courts.

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

Yes, the U.S. 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 U.S. made a reservation that it will apply the New York Convention only to awards made in the territory of another Contracting State and only to disputes arising out of legal relationships (whether contractual or not) that are considered commercial under the relevant national law.

The U.S. is also party to: (i) the Inter-American Convention on International Commercial Arbitration ("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 Organisation of American States" only; and (ii) the International Convention on the Settlement of Investment Disputes ("Washington Convention"), 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 disputes involving family law and criminal law are not arbitrable. Claims under securities laws, Federal antitrust laws and the civil provisions of the Racketeer Influenced and Corrupt Organisations Act 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 U.S. The U.S. maintains treaties with numerous jurisdictions that reduce or eliminate these withholding taxes on amounts paid to qualified residents of the counterparty treaty country. In addition, interest paid to foreign persons, other than banks on loans made in the ordinary course of business, is exempt from this withholding tax if certain requirements are satisfied, including that the loan is not in bearer form and the lender is unrelated to the borrower.

Even where an exemption may be available, under the Foreign Account Tax Compliance Act ("FATCA"), interest paid to a foreign financial institution (whether such foreign financial institution is a beneficial owner or an intermediary) may be subject to U.S. Federal withholding tax at a rate of 30% unless: (a) (1) the foreign financial institution enters into an agreement with the U.S. Internal Revenue Service to withhold U.S. tax on certain payments and to collect and provide to the U.S. Internal Revenue Service substantial information regarding U.S. account holders of the institution (which includes, for this purpose, among others, certain account holders that are foreign entities that are directly or indirectly owned by U.S. persons), or (2) the institution resides in a jurisdiction with which the U.S. has entered into an intergovernmental agreement ("IGA") to implement FATCA, and complies with the legislation implementing that IGA; and (b) the foreign financial institution provides a certification to the payor for such amounts that it is eligible to receive those payments free of FATCA withholding tax. The legislation also generally imposes a U.S. Federal withholding tax of 30% on interest paid to a non-financial foreign entity (whether such non-financial foreign entity is a beneficial owner or an intermediary) unless such entity (i) provides a certification that such entity does not have any "substantial United States owners", or (ii) provides certain information regarding the entity's "substantial United States owners", which will in turn be provided to the U.S. Internal Revenue Service.

Additionally, partnerships (or entities treated as partnerships for U.S. tax purposes) that are engaged in a U.S. trade or business must generally withhold on income allocated to owners regardless of whether there are distributions made to such owners.

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.

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 at foreign investors or lenders other than the broad exemption from withholding tax on interest payment described in question 17.1 above.

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 your jurisdiction?

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

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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 ("Securities Act") and the Securities Exchange Act of 1934). Under the Securities Act, securities in the U.S. must be sold pursuant to an effective registration statement filed with 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(a)(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, limited information about the sponsors and offtakers and various other disclosures. The underwriters and their legal counsel perform due diligence (in order for counsel to provide 10b-5 statements) to mitigate securities law fraud liability. Offerings solely under Regulation S and Section 4(a)(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 your jurisdiction.

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 borrower 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 the U.S. Bankruptcy Court case of *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 your jurisdiction? If so, what steps could be taken to mitigate this risk?

No, subject to state usury laws restricting excessive interest.

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