ICLG

The International Comparative Legal Guide to:

Project Finance 2015

4th Edition

A practical cross-border insight into project finance

Published by Global Legal Group, with contributions from:

Abuda Asis & Associates
Advokatfirmaet Ræder DA
Ali Budiardjo, Nugroho, Reksodiputro
Angola Legal Circle Advogados (ALC Advogados)
BMT Law Chambers
Boga & Associates
Bonelli Erede Pappalardo
Brigard & Urrutia
Clayton Utz
Cuatrecasas, Gonçalves Pereira
El-Borai & Partners
Etude Kabinda/Avocats DRC
Gorrissen Federspiel
GRATA Law Firm
Hajji & Associés
Heuking Kühn Lüer Wojtek
Khan Corporate Law
Koep & Partners
Kyriakides Georgopoulos Law Firm
Leges Advokat
Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados
Milbank, Tweed, Hadley & McCloy LLP
Minter Ellison Rudd Watts
Mozambique Legal Circle Advogados (MLC Advogados)
Nagashima Ohno & Tsunematsu
Odvetniki Šelih & partnerji, o.p., d.o.o.
Petrikić & Partneri AOD in cooperation with CMS Reich-Rohrwig Hainz
Philippi, Prietocarrizosa & Uría
Ploum Lodder Princen
Severgnini, Robiola, Grinberg & Tombeur
Torres Plaz & Araujo
Vieira de Almeida & Associados, Sociedade de Advogados, RL
Walder Wyss Ltd.

GLG
Global Legal Group

GLG
Global Legal Group

Contributing Editor
John Dewar, Milbank, Tweed, Hadley & McCloy LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Commercial Director
Antony Dine

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Sub Editor
Nicholas Catlin

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
April 2015

Copyright © 2015
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-910083-39-0
ISSN 2048-688X

Strategic Partners

General Chapter:

1	**Why the World Needs Project Finance (and Project Finance Lawyers…)** – John Dewar & Oliver Irwin, Milbank, Tweed, Hadley & McCloy LLP		1

Country Question and Answer Chapters:

2	**Albania**	Boga & Associates: Renata Leka & Besa Velaj (Tauzi)	8
3	**Angola**	Angola Legal Circle Advogados (ALC Advogados): Catarina Levy Osório & Irina Neves Ferreira	17
4	**Argentina**	Severgnini, Robiola, Grinberg & Tombeur: Carlos María Tombeur & Matías Grinberg	25
5	**Australia**	Clayton Utz: Bruce Cooper & Peter Staciwa	33
6	**Botswana**	Khan Corporate Law: Shakila Khan	44
7	**Brazil**	Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados: Pablo Sorj & Filipe de Aguiar V. Carneiro	52
8	**Chile**	Philippi, Prietocarrizosa & Uría: Marcelo Armas M. & Daniel Parodi N.	62
9	**Colombia**	Brigard & Urrutia: Manuel Fernando Quinche & César Felipe Rodríguez	70
10	**Congo – D.R.**	Etude Kabinda/Avocats DRC: Dr. Alex Kabinda Ngoy & Ms. Dolores Kimpwene Sonia	78
11	**Denmark**	Gorrissen Federspiel: Morten Lundqvist Jakobsen & Tina Herbing	87
12	**Egypt**	El-Borai & Partners: Dr. Ahmed El Borai & Dr. Ramy El Borai	95
13	**England & Wales**	Milbank, Tweed, Hadley & McCloy LLP: Clive Ransome & Munib Hussain	103
14	**Germany**	Heuking Kühn Lüer Wojtek: Adi Seffer	118
15	**Greece**	Kyriakides Georgopoulos Law Firm: Ioanna I. Antonopoulou & Elisabeth V. Eleftheriades	126
16	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Emir Nurmansyah & Freddy Karyadi	137
17	**Italy**	Bonelli Erede Pappalardo: Catia Tomasetti & Simone Ambrogi	151
18	**Japan**	Nagashima Ohno & Tsunematsu: Masayuki Fukuda	161
19	**Kazakhstan**	GRATA Law Firm: Shaimerden Chikanayev & Lola Abdukhalykova	167
20	**Kosovo**	Boga & Associates: Sokol Elmazaj & Sabina Lalaj	177
21	**Morocco**	Hajji & Associés: Amin Hajji	185
22	**Mozambique**	Mozambique Legal Circle Advogados (MLC Advogados): Paula Duarte Rocha & Ana Berta Mazuze	192
23	**Namibia**	Koep & Partners: Peter Frank Koep & Hugo Meyer van den Berg	201
24	**Netherlands**	Ploum Lodder Princen: Tom Ensink & Alette Brehm	209
25	**New Zealand**	Minter Ellison Rudd Watts: Tom Fail & Steve Gallaugher	217
26	**Norway**	Advokatfirmaet Ræder DA: Marit E. Kirkhusmo & Kyrre W. Kielland	226
27	**Philippines**	Abuda Asis & Associates: Cornelio B. Abuda & Jehremiah C. Asis	236
28	**Portugal**	Vieira de Almeida & Associados, Sociedade de Advogados, RL: Teresa Empis Falcão & Ana Luís de Sousa	244
29	**Serbia**	Petrikić & Partneri AOD in cooperation with CMS Reich-Rohrwig Hainz: Milica Popović & Ksenija Boreta	254
30	**Sierra Leone**	BMT Law Chambers: Glenna Thompson	263
31	**Slovenia**	Odvetniki Šelih & partnerji, o.p., d.o.o.: Blaž Ogorevc & Tilen Terlep	271
32	**Spain**	Cuatrecasas, Gonçalves Pereira: Héctor Bros & Jaume Ribó	281
33	**Switzerland**	Walder Wyss Ltd.: Thomas Müller-Tschumi & Alexandre Both	292
34	**USA**	Milbank, Tweed, Hadley & McCloy LLP: Eric F. Silverman & Simone M. King	301
35	**Uzbekistan**	Leges Advokat: Nizomiddin Shakhabutdinov & Nail Hassanov	312
36	**Venezuela**	Torres Plaz & Araujo: Federico Araujo & Juan Carlos Garantón	320

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

England & Wales

Clive Ransome

Munib Hussain

Milbank, Tweed, Hadley & McCloy LLP

1 Overview

1.1 What are the main trends/significant developments in the project finance market in England and Wales?

2015 has been an interesting year for project finance in and from the UK. The UK market breaks (broadly speaking) into two quite distinct halves – a UK-oriented market where local (as in UK-sited) deals are structured and financed, and a much larger and more geographically diverse finance market where (for one reason or another) international finance is structured, negotiated and documented in the UK (in practice London), but the underlying project is located elsewhere. The two markets are both relatively large in terms of capital and debt requirements and flows, but the international English-law finance market far outstrips the domestic UK market in both volume and size of deals.

In 2014, there was an increased amount of commercial bank liquidity in the project finance market. As the UK emerges from the economic slowdown and moves into a period of economic growth, there is considerable demand for upgrading existing infrastructure or investing in new, greenfield projects. The UK Government's aim, detailed in its National Infrastructure Plan 2013, is to invest over £375bn up to 2020 and beyond in order to ensure that the UK has the infrastructure to support and reinvigorate economic growth. Public and private infrastructure investment has gradually increased over the past three decades. UK infrastructure construction investment grew from £2.5bn in the early 1980s to around £15bn in 2013. A total of £250bn was invested during this period. Investment was boosted by some landmark projects, such as the construction of Crossrail since 2009. Infrastructure construction output was in the range of 0.9% to 1.4% of GDP between 1980 and 2003. Annual investment as a percentage of GDP saw a downward trend for most of the mid-2000s, but has climbed back above 1% since 2010.

In the UK the divide between conventional project finance and the bond and leveraged finance markets continues to narrow. The market saw a continuation of diversification of both sources and types of project-related debt. As with the project bonds market, the trend comes in part from the US; 2014 saw a number of infrastructure and energy sponsors experimenting with Term Loan B structures – sometimes as refinancing tools, sometimes to sit alongside conventional financings and/or less conventional financings – for example inventory and receivables financings.

New multilateral and bilateral institutions have entered the market, and existing institutions have re-branded themselves and introduced new products to help fill the debt financing gaps created by the aftermath of the 2008 credit crunch. By way of example:

- the European Investment Bank introduced the Europe 2020 Project Bond Initiative;
- the UK Green Investment Bank (GIB) was formed with a mandate to finance "green" projects; and
- the UK's Export Credits Guarantee Department (ECGD) has rebranded itself and launched new Direct Lending and Export Refinancing Facilities.

The GIB was launched in October 2012 and is to be capitalised with £3 billion, to be used prior to April 2015. It is the first investment bank worldwide to invest solely in green infrastructure. The funds will be used to leverage private-sector capital to fund projects in priority sectors from offshore wind to waste and non-domestic energy efficiency. Vince Cable, the Business Secretary, marked the launch of the GIB by announcing the commitment of £180 million to a new waste-to-energy plant and an energy saving scheme.

2014 saw a significant shift in approach and appetite for international project finance risk from the former ECGD (now UK Export Finance). UKEF introduced two new funding-related facilities – the Direct Lending Scheme and the Export Refinancing Facility. The Direct Lending Scheme supports exports where buyers need loans of up to £50 million to finance the purchase of capital and semi-capital goods and services from UK exporters, but have been unsuccessful in obtaining export credit from commercial banks.

Under the Direct Lending Scheme (announced by the Chancellor in the 2012 Autumn Statement), UK Export Finance now provides export credit loans up to £3 billion in aggregate to overseas buyers to finance the purchase of capital goods and/or services, from exporters carrying on business in the UK. Loans can be made in Sterling, US Dollars, Euro or Japanese Yen. It directly negotiates the terms and conditions of the loan and disburses funds against the manufacture and supply of the goods and services under the relevant export contract.

UKEF has also introduced a £5 billion Export Refinancing Facility which aims to boost trade by ensuring that long-term funding is available to overseas buyers of British exports supported by UK Export Finance.

The Energy Markets

The new energy sector continues to undergo significant change. The 2009 Renewable Energy Directive sets a target for the UK to achieve 15% of its energy consumption from renewable sources by 2020. The Energy Act 2012 received Royal Assent on 18 December 2013; the Act implements key aspects of Electricity Market Reform ("EMR") – a policy initiative pioneered by the UK Government to mobilise £110 billion (approximately US$175 billion) of capital investment required by 2020 to ensure reliable and diverse supply of low-carbon electricity. The reforms are vital as the UK has seen

© Published and reproduced with kind permission by Global Legal Group Ltd, London

significant power plant closures in the last two years. Around a fifth of capacity available in 2011 will close by the end of this decade, and demand for electricity is set to increase as major sectors such as transport and heat are electrified.

The UK's current electricity mix is dominated by gas and coal-fired plants; however, there has been an increase in renewable-generated electricity. Between 2009 and 2010, electricity supplied from nuclear power decreased from 18% to 16% (although this was largely due to an extended outage at the Sizewell B plant). Coal's share of electricity supplied rose from 27% to 28% and gas's share rose from 46% to 47%. Wind's share and imports were unchanged at 3% and 1% respectively, although overall generation from renewables increased by 2.2% between 2009 and 2010.

The UK Government's energy and climate change goals are to deliver secure energy and a sustainable low-carbon future. This is driven by the need, by 2050, for an 80% reduction in carbon emissions (across the economy) as against 1990 levels and, by 2020, to achieve the legally binding EU target of sourcing 15% of the UK's energy from renewable sources (not including nuclear power). This is coupled with the need, in the UK as a whole, for approximately 59 GW of net new capacity by 2025 – with as much as 33 GW of this coming from renewables and the remaining 26 GW to come from conventional thermal power. In an effort to promote private investment in the development of large-scale infrastructure projects (and in particular the development of low-carbon technology) in the United Kingdom, the UK Government has instituted a series of programmes that are specifically designed to stabilise the economics of financing for such projects.

The UK Government has decided that new nuclear should have a role in the UK's future energy mix, on the basis that nuclear power is low-carbon, affordable, dependable, safe and capable of increasing the diversity of energy supply. This echoes similar pro-nuclear political decisions in other jurisdictions – notably the UAE and Turkey. The events at Fukushima, Japan (March 2011) did not result in a reversal of this policy, unlike the nuclear phase-out announced by Germany and the cancellation of a new-build programme in Italy. Although the UK Government emphasises that it will be for energy companies to fund, develop and build new nuclear power stations in the UK, including meeting the full costs of decommissioning and their full share of waste management and disposal costs, the Office for Nuclear Development (within the Department of Energy and Climate Change) is taking active steps to establish and cement the right framework and conditions in the UK for investment in new nuclear power stations, with the aim of having new nuclear projects generating electricity from around 2018. See question 1.2 for a summary of the current nuclear power market in the UK.

Transformation of the UK Electricity Market

From a policy perspective, the Energy Act, which is aimed at bringing about a "once-in-a-generation transformation" of the UK electricity market, has significant implications for the economics of investing in low-carbon generating technologies. Electricity Market Reform is the UK Government's key policy mechanism for ensuring security of energy supply through the development of low-carbon technology. The key policy measure to incentivise new low-carbon electricity generation is the provision of the Contract for Difference (CfD) instrument. In addition, through the Infrastructure Act, the UK Government has introduced the IUK Guarantee Scheme, which is a liquidity enhancement mechanism that aims to enhance liquidity to ensure that investment in nationally significant and financially credible infrastructure projects does not stall due to adverse credit conditions.

The provision of CfDs is intended to stabilise revenues for investors in low-carbon electricity generation projects such as nuclear (and renewables) by helping developers secure the large upfront capital costs for low-carbon infrastructure. However, the long planning horizon for nuclear new-build projects and massive capital requirements pose substantial financial risks to nuclear power sponsors and investors. In the US, it was determined that US Government guarantees were necessary in order for new-build nuclear projects to be commercially viable. It seems that the UK Government has undertaken to provide guarantees to EDF in order to secure the development of the UK's first new nuclear plant since 1995 (Hinkley Point C).

The CfD is a quasi-power purchase agreement; generators with a CfD will sell their electricity into the market in the normal way, and remain active participants in the wholesale electricity market. The CfD then pays the difference between an estimate of the market price for electricity and an estimate of the long-term price needed to bring forward investment in a given technology (the strike price). This means that when a generator sells its power, if the market price is lower than needed to reward investment, the CfD pays a "top-up". However, if the market price is higher than needed to reward investment, the contract obliges the generator to pay back the difference. In this way, CfDs stabilise returns for generators at a fixed level, over the duration of the contract. This removes the generator's long-term exposure to electricity price volatility, substantially reducing the commercial risks faced by these projects. The Energy Act includes a provision whereby a new Government-owned company (the Low Carbon Contracts Company or LCCC) will act as the counterparty to eligible generators under the CfD. This mechanism was in direct response to concerns about the "credit" behind the CfD economics. Although a CfD is a private law contract between a low-carbon electricity generator and the LCCC, the cost of CfDs will ultimately be met by consumers via a levy on electricity suppliers.

In addition, a carbon price floor was introduced on 1 April 2013, with the aim of encouraging additional investment in low-carbon power generation by providing greater support and certainty to the carbon price. Supplies of fossil fuels used in most forms of electricity generation will become subject to either the Climate Change Levy (CCL) or fuel duty from that date. Such supplies will be charged at the relevant carbon price support rate, depending on the type of fossil fuel used, which will be determined by the average carbon content of each fossil fuel. The carbon price support rates will reflect the differential between the future market price of carbon and the floor price determined by the Government. Again, the measures have been supported by the nuclear industry, although the key will be the level at which the floor is set.

Proposed Regulatory Framework

The Office of Nuclear Development has focused on taking actions which are aimed at reducing regulatory and planning risks for investors. A planning regime has been proposed to aid the installation of nuclear reactors, including, following public consultation, identifying sites for new nuclear power stations to be built by the end of 2025. The Government legislated in the Energy Act 2008 to ensure that operators of new nuclear power stations will have secure financing arrangements in place to meet the full costs of decommissioning and their full share of waste management and disposal. The Energy Act 2012 also introduced measures to create a new independent statutory body, the Office of Nuclear Regulation (ONR), to regulate the nuclear power industry. The ONR and the Environment Agency are undertaking a process of Generic Design Assessment (GDA) of the new nuclear designs, which allows the generic safety, security and environmental implications of new nuclear reactor designs to be assessed before an application is made for a licence and permissions are granted to a particular design of reactor on a particular site. Currently, the EPR developed by Areva (and to be used by EDF in the UK) and the AP1000 developed

© Published and reproduced with kind permission by Global Legal Group Ltd, London

by Westinghouse Electric Company are being assessed in the GDA process; however, following the completion of the sale of Horizon, Hitachi will immediately work towards achieving licence acceptance under the GDA process for its ABWR technology (it is not clear how long this process will take, although press reports suggest a four-year period to complete the GDA process).

December 2014 saw a key milestone for the ONR with the publication of its first strategy as a statutory public corporation. The strategy sets out our three strategic themes for delivering this vision. These are: influencing improvements in nuclear safety and security; achievement of our vision through our people; and inspiring a climate of stakeholder respect, trust and confidence. These themes will, in turn, help the ONR to deliver effectively the UK's nuclear priorities, which are: hazard reduction and remediation at Sellafield; the nuclear new build programme, involving the assessment of generic safety cases for potential new reactor designs and the site-specific safety cases for the licensing, construction, operation and decommissioning of new nuclear power stations; and regulation of the safety and security of the existing fleet of operating reactors, waste management and decommissioning, the nuclear defence platform and radioactive materials transport.

Shale Gas

Shale gas fracking remains an area of great interest and potential within the UK – the British Geological Survey estimates that there could be up to 1,300 billion cubic feet of shale gas in the north of England (primarily in the Bowland shale beneath Manchester, Liverpool and Blackpool) – equivalent to approximately 50 years of UK gas consumption. Further reserves are likely to exist in Central and Southern England. In December 2013 the UK Government's Department of Energy and Climate Change reported that up to half of the UK's land area might be suitable for fracking, including as yet unexplored deposits throughout much of eastern and southern England. US energy costs (partly as a result of significant investment by oil and gas buyers in US shale gas development) are currently one third of those of Western Europe – a major issue for European exporters. Total announced the acquisition of interests in two exploration licences in January 2014; other shale gas developers include Cuadrilla, D'Arcy Oil Exploration, IGas and Dart Energy. Ed Davey has said that shale gas represents a promising new potential energy resource for the UK, which could potentially contribute significantly to energy security by substituting for imports in the face of declining gas production in the North Sea. While UK shale oil is still in the early stages of exploration in the UK, a PwC report published on 14 February 2013 stated that shale oil production could boost UK GDP by up to £50 billion by 2035, whilst also resulting in significantly lower oil prices. In 2013 the BGS released an estimate of the total resources of the entire Bowland Shale layer of 23,000-65,000 bcm. The approach involved mapping the layer to provide information on its thickness. Assuming a North American recovery factor of around 8-20% would indicate potentially recoverable resources of 1,800-13,000 bcm. To put these estimates in context, the UK's remaining potentially recoverable conventional gas resources are 1,466 bcm (of which 493 bcm are reserves) and annual UK gas consumption is 77 bcm.

1.2 What are the most significant project financings that have taken place in England and Wales in recent years?

Notable project finance deals in 2013 included the Scottish Roads Partnership's £500 million M8 financing in Scotland through Allianz Global Investors and the European Investment Bank, the £16 billion Thameslink Rolling Stock PPP, the OFTO financing for the 504MW Greater Gabbard offshore wind farm and the refinancing through the capital markets of the HS1 Channel Tunnel Rail Link. Project bonds activity increased and included in the infrastructure area:

- the HS1 Channel Tunnel rail link refinancing (£415m);
- UPP's and ULiving's social infrastructure bonds;
- Forth Ports PP;
- Leeds Housing; and
- Salford Housing.

There were also numerous energy sector bond issuances, including the following:

- Sterling Resources;
- Xcite Energy; and
- Iona Energy.

Biomass financings include Drax Group's restructuring and financing of a £700 million project to convert half of its 3,960MW coal-fired capacity to biomass. They are focused on manufacturing wood pellets for renewable low-carbon power generation from sustainable biomass – Green Investment Bank provided (in January 2013) a £100 million loan towards the project with the GIB, representing the GIB's largest commercial loan to date, the 450MW Ironbridge Biomass Conversion Plant and the Helios and Newry Biomass projects. Other successfully financed biomass projects included Eggborough, and other biomass conversion projects remain under development.

As mentioned in question 1.1, nuclear power has become central to the UK Government's thinking on energy policy in the UK. In October 2013 the UK Government announced that initial agreement had been reached with EDF to develop the first new nuclear power station in the UK since the start of generation at Sizewell B in 1995 – Hinkley Point C in Somerset. The 430-acre site – reducing to 165 acres once operational – will generate enough electricity to power nearly 6 million homes, bring 900 permanent jobs to the area and create around 25,000 jobs during construction. The guaranteed strike price for power from Hinkley Point C is £92.50 per megawatt hour in 2012 prices; the power price is inflation-linked over a 35-year tariff period. The price will fall to £89.50 per MWH if a new plant at Sizewell is successfully completed. Construction costs are estimated at £16 billion; the key commercial terms include the provision of a UK Guarantee for the debt element of the financing. In June 2013 the UK Government announced that it would guarantee up to £10 billion in loans for Hinkley Point C under the IUK Guarantee Scheme. The UK Government's support for the project was deemed compatible with the Common Market in a formal report by the European Commission, published in October 2014, which found that there was no state aid in this case.

There are currently nine nuclear power stations across England, Scotland and Wales, providing around 16% of the electricity consumed in the UK, which is about 6% of total UK primary energy supplies. On the basis of current plans, however, all but one of the UK's nuclear power stations will have shut by 2023. To date, energy companies have announced plans to build up to 16 GW of new nuclear power generation in the UK by 2025. The three main investors are:

EDF Energy (NNB GenCo) – In January 2009, EDF purchased British Energy and all of its assets for £12.5 billion, including 10 sites in the UK. In addition to running the existing fleet of ex-British Energy nuclear power stations, EDF has publicly made clear its intention to build four new European Pressurized Reactors (EPR) (amounting to 6.4 GW) at Hinkley Point and Sizewell, with the first operational by the end of 2018. Centrica's withdrawal from British Energy will mean that there is no British involvement left in the three consortiums established to build new nuclear plants in the UK. EDF is talking to Chinese investors about a possible investment in the UK nuclear programme. EDF have said it would make an

© Published and reproduced with kind permission by Global Legal Group Ltd, London

investment decision on its £24.5 billion project to build a nuclear reactor in the UK sometime this year but announced in February 2015 that this announcement was unlikely to come before the end of March despite being at the final phase of negotiation with its Chinese partners.

Horizon Nuclear Power – Horizon Nuclear Power is a UK energy company which was established with the objective of developing a new generation of nuclear power stations. Horizon Nuclear Power was a joint venture between E.ON UK and RWE npower; however, in March 2012, E.ON UK and RWE npower announced that they were withdrawing from the joint venture to build new nuclear plants in the UK due to, among other factors, pressure from Germany's decision to phase out all nuclear power. The sale of Horizon Nuclear Power to Hitachi Limited of Japan was announced in November 2012. The Hitachi Horizon programme involves building two to three 1,300 MW plants at each of Horizon's sites at Wylfa, Anglesey, and Oldbury, Gloucestershire, with the first unit becoming operational in the first half of the 2020s and employing its Advanced Boiling Water Reactor (ABWR) technology. Hitachi and Horizon expect to have the full range of licences and permissions in place by 2018 for a new nuclear power plant at Wylfa. External finance will be required to fund construction, from both debt and equity sources.

NuGeneration Ltd (NuGen) – NuGen is a joint venture between GDF Suez and Iberdrola, created to develop new build nuclear opportunities in the UK. Scottish and Southern Energy plc had been part of the original joint venture but sold its 25% stake to the existing parties in 2011. Further to this, NuGen has acquired option rights over 100 hectares of land adjacent to the existing nuclear facilities at Sellafield in West Cumbria. It was announced in December 2014 that NuGen had signed a cooperation agreement with HM Treasury to promote financing for a new nuclear power station at Moorside.

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?

In domestic UK project financings the intention of the parties (and the usual requirement of all types of lenders) is to create security over all, or substantially all, a project company's assets. Project finance borrowing vehicles are normally special purpose vehicles or "SPVs" with no pre-existing businesses, rights or liabilities beyond those associated with the project.

Security is normally granted by way of a general security agreement, such as a debenture, which covers all the SPV's rights and assets (both pre-existing and after acquired) or (less commonly) by way of separate security agreements for each type of asset.

More often than not, lenders will look to achieve "going concern" security on a UK-based project or asset. This is aimed at putting them in a position of default, stepping in if necessary and operating (or selling) the relevant asset as a going concern. Basic legal security is normally insufficient to achieve this type of outcome; conventional legal security is often supplemented by bespoke contractual arrangements providing lenders with specific notice, "cure" and "step-in" rights.

Where (as is very often the case) the viability of a project as a going concern is dependent upon the continuing availability to an operator or owner of permits and licences, special attention will need to be paid to the consequences of default in the wider sense – breach of licence conditions, or change of control by way of example, can result in permits and licences being breached and/or becoming terminable. Certain types of licences and permits are in effect personal to the initial licence-holder; contractual rights can be expressed to be non-assignable in the absence of consents. A careful analysis of the regulatory and practical conditions applicable to the application for, and maintenance of, permits, licences and key contracts is necessary and will differ on a case-by-case basis.

The main types of securities under English law are mortgages (equitable and legal), charges (fixed and floating), assignments (broadly equivalent to charges), pledges and liens. Mortgages, charges and assignments are the most frequently used forms of security. Assignments may be legal or equitable; the process for enforcement of the two types of security differs. A debenture will include a range of mortgages, charges and assignments depending on the nature of the security assets.

English law differentiates between legal and equitable interests in assets (including security interests) and in particular as regards land and shares.

It is possible, in theory, to create security orally (unless it relates to land) but, in practice, security is always documented. There is no prescribed procedure or form of document required to create security, but see question 2.2 below regarding registration.

A legal assignment of an asset must comply with section 136 of the Law of Property Act 1925. If the secured lender wishes to implement a legal assignment of rights by way of security, then section 136 sets out the procedure. A legal assignment must be in writing and signed by the assignor, be absolute (meaning that the assignee has the entire right to the benefit in the action) and not be set out to be by way of charge only, and any third parties against whom the assignor could enforce the assigned rights need to be notified in writing. If the assignment has been perfected, the assignee has the right to sue the third party in its own name. It is often not possible in project financing to comply with section 136; the vast majority of assignments of receivables, accounts and contracts used for the purposes of project financing are equitable assignments. If the requirements under section 136 are not met, the assignee merely has an equitable assignment, which does not grant the right to sue the third party in its own name. Assignments of future contracts can only be by way of equitable assignment.

Other securities, such as a charge and a mortgage, require evidence in writing, which can be effected by means of a debenture. Debentures can create legal mortgages and fixed and floating charges over all the borrower's assets, if agreed, and as set out in the debenture. The debenture is executed as a deed.

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

Security is usually taken over real estate by way of a legal mortgage over (ideally) a freehold title, or by the creation (or assignment) of a leasehold interest. Security over moveables is normally effected by way of a fixed charge over plant, machinery and equipment. Plant and machinery which is fixed to land is normally deemed to be part of that land; pipes and cables can in certain circumstances also constitute fixtures. The depreciation position differs between "fixtures" (which effectively become part of the land or property to which they are affixed) and moveables or "chattels" – so fully analysing the legal standing of an asset is important. Complications arise over the creation of security over assets located on the foreshore or in international waters.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The following are the main types of security which require registration:

- company charges;
- mortgages and charges over interests in land;
- security over certain IP rights; and
- security over ships and aircraft.

Registration is important for the chargee to secure its priority rights and ranking in case of the chargor's insolvency.

The procedure is the same as set out above, namely by agreeing the terms and conditions and setting these out in a debenture. In order to perfect a legal mortgage and a fixed charge following the execution of the debenture, the security has to be registered.

Under the Companies Act 2006, a company must register details of any security it grants (subject to some exceptions) at Companies House within 21 days of the date of creation of the security. Failure to register results in the security becoming void against an insolvency officer appointed in respect of the chargor and against any creditor. Separate registrations regarding security over land and real estate interests will be required at the Land Registry or at the Land Charges Department. Note that security over intellectual property may also be subject to separate registration procedures (for example, at the Trade Marks Registry).

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

Security over receivables is normally taken by way of assignment. Fixed charges over receivables or bank accounts require the secured lender to control both the receivables and the account into which they are paid when collected; this is almost always impossible as a practical matter in the context of a typical project. Security over receivables can also be taken by way of a floating charge, but the practical value of a floating charge (which "fixes" on the assets it covers only on the occurrence of a crystallisation event) to a lender in terms of asset security may be limited. If the benefit of the receivables is assigned to the lender, then, in order to achieve a legal assignment under section 136 of the Law of Property Act 1925, notice in writing of the assignment must be served on the account debtors – often impracticable where there are a wide range of debtors.

As it may be impractical to serve notice or to impose a high degree of control on this asset class, an equitable assignment or floating charge is often used as an alternative form of security. This form of security enables the chargee to take security without unduly restricting or affecting the chargor's ability to carry on its business by dealing pre-default with its receivables as if no security had been created. The formalities for this form of security are fewer but floating charges rank behind fixed charges in terms of priority, and the proceeds of floating charge enforcement are subject to certain other prior ranking claims.

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

Project financings will invariably establish a strict regime in relation to the project's cashflows – this will require revenues to be paid into dedicated accounts held by pre-agreed account banks and will set out clear rules on the priority of application of available cash (the "Cashflow Waterfall"). A typical project account or account bank agreement will establish strict rules as to permitted withdrawals from those accounts.

Withdrawals will cease to be permitted upon the occurrence of an actual or potential Event of Default. Any withdrawal which is not permitted under the relevant accounts or account bank agreement will trigger default; default will permit the lenders to enforce security. In the context of receivables and bank accounts this will include transferring to the lenders full control over receivables and accounts.

Security can be taken over cash deposited in bank accounts by way of either a floating or a fixed charge or by way of assignment of the relevant debt or account, depending on the type of bank account.

Fixed charges over cash are not possible unless the relevant bank account is fully controlled by the secured lender. This is never practicable in the context of a project financing. English law continues to refine its approach to fixed and floating charges, and assignments of debts and receivables – at present every withdrawal from the account must be expressly sanctioned by the secured lender if the charge is to be treated as "fixed" – merely serving notice of charge on the account-holding bank is not sufficient.

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

Security over shares in companies incorporated in England and Wales can either be taken by way of legal mortgage or by way of charge over the shares (an equitable mortgage or charge). The governing law of the mortgage should always be English law. The convention in English law financings for security over shares in the context of projects, is for security to be effected by way of equitable charge; lenders will always (subject to very limited exceptions) resist becoming shareholders of record in an SPV or project vehicle for a wide range of reasons, including incurring shareholder liabilities and reputational risk. Equitable share charges are normally protected by means of a power of attorney in favour of an agent or trustee for the lenders, enabling the lenders to take a legal transfer of shares if default occurs, where absolutely necessary.

In the ordinary course of events secured lenders will normally be happy for the sponsors/relevant chargors to retain legal title to shares until an Event of Default and/or enforcement event occurs.

A legal mortgage of shares involves the transfer of the relevant shares in the company to the lender from the outset, subject to an agreement for their re-transfer once the secured debt is repaid. The lender will be registered in the company's register of members as a fully entitled shareholder of the company, and not just as a mortgagee. As a result, the transfer will operate so as to give the lender all the rights of a shareholder. While the lender is registered as a shareholder, it will receive all dividends and any other money or assets paid in relation to the shares and will be entitled to vote as a shareholder.

With an equitable mortgage or charge of shares, the chargor remains as a registered shareholder and retains legal title to the shares, transferring only its beneficial interest to the lender. The chargor will normally be required to lodge its share certificates and stock transfer forms with the lender, on the basis that the stock transfer forms can be completed by the lender (in favour of itself or a nominee) if an Event of Default or enforcement event occurs. Voting rights and the right to receive dividends will normally remain with the chargor until an Event of Default occurs.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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)?

A nominal fee is payable to Companies House on registration of security by a company. The fee does not vary according to the class of asset or type of security. Separate registration is required for each security document.

Additional fees are also payable for registration to the Land Registry or Land Charges Department as regards security over land. These fees are registration fees and will not usually be significant in the context of the overall transaction. No stamp duty is payable on the registration of security.

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?

Registration with Companies House requires the completion of a specified form and must be undertaken within 21 days of the creation of the security. Companies House is not responsible for inaccuracies in the registered particulars (acceptance of the particulars does not guarantee their accuracy). Inaccuracies in the registered particulars can have serious consequences as regards priority and effective registration. Responsibility for ensuring the accuracy of the registered particulars lies with the presenter (in practice the chargee or its advisors). The 21-day period includes bank holidays and weekends and does not stop running if the Companies House registrar identifies a defect and returns the registration form for correction. As a result, in the context of complicated security documents it is essential to draft and agree the registration particulars in advance of financial close. If necessary these particulars can be pre-agreed with Companies House to reduce the risk of rejection and the loss of time (and priority).

Charges over certain assets, such as land, intellectual property rights, ships and aircraft, need to be registered at other specialist registries related to the asset in question, as well as at Companies House.

On 6 April 2013, a new regime for the registration of security came into force via the Companies Act (Amendment of Part 25) Regulations 2012. The new regime is intended to streamline existing procedures and to reduce uncertainty over registration.

Principal features of the new registration regime include:

Scope of charges covered: All charges created by a company are registrable except for a narrow range of excluded items.

"Voluntary" registration: Failure to register security is no longer a criminal offence. However, commercial sanctions for non-registration (whereby non-registered security becomes void against a liquidator, administrator or creditor and any secured debt becomes immediately re-payable) continue to apply. Security should still be registered within the 21-day window.

Filing, e-filing and statements of particulars: Persons wishing to register security have the option of registering via an electronic filing system. Under this system, a statement of particulars must be filed online together with a certified copy of the charging document. The entire charging document is available to view online, although certain personal information (such as bank account details) can be redacted. There is no longer any need to send an original charging document to Companies House.

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.?

Subject to limited exceptions in relation to certain types of Government-owned, strategic and regulated assets, no regulatory or similar consents are required in relation to most land and real estate rights or in relation to most types of privately held assets. Specific legal regimes apply, however, to different types of regulated assets – for example, certain types of governmental assets (in particular those associated with defence), nuclear generation, nuclear fuel production and reprocessing plants and related sites and certain assets vested in specific types of privatised businesses (for example water and transmission businesses). In addition, licences granted by Ofgem (the gas and electricity regulator in England and Wales), regulatory authorities in relation to exploration for and development of hydrocarbon assets or the Financial Services Authority, may affect the granting of any mortgage, charge or other form of security over an asset. The consent of Ofwat (the regulator of the water and sewage industry in England and Wales) may also be required under the instruments of appointment by the Secretary of State for the Environment for water and sewerage undertaken under the Water Act 1989.

3 Security Trustee

3.1 Regardless of whether England and Wales recognise the concept of a "trust", will they 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?

England and Wales fully recognise the concept of trusts. Trusts are normally used to create beneficial interests in assets which may differ from the strict legal ownership of those assets. Trust deeds are often used alongside debentures in England and Wales to create and regulate the holding of security over assets.

The creation of a trust by a borrower will normally involve the conveyance by the borrower to a trustee (usually a trust corporation – either an eligible financial institution or a specialist trust company such as any Law Debenture or Banker's Trust) who may hold the security for the benefit of itself, the other secured lenders in the transaction and (on a residual basis) for the borrower itself. English law trusts are normally long-term arrangements; beneficial ownership remains with the secured party so the trust assets do not fall within the trustee's estate if the trustee becomes insolvent.

3.2 If a security trust is not recognised in England and Wales, 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?

This is not applicable. Please see question 3.1.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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?

In general, no. In relation to unregulated assets there is no requirement for a public auction following enforcement of security. It is impossible to exclude the possibility of third parties seeking injunctive relief to prevent enforcement of security or the sale of secured assets following enforcement, but generally English courts will oppose any such proceedings where security was validly given and (where required) properly registered.

The Financial Collateral Regulations (the "FCA") came into force in England and Wales in December 2003 in order to implement the Financial Collateral Directive (2002/47/EC), with the aim of simplifying the enforcement of security over cash, financial instruments (including shares, bonds and warrants) and credit claims.

Following the FCA Regulations 2003, paragraph 43(2) of Schedule B1 to the IA 1986 will not apply to any security interest created. This means that neither the consent of the administrator, nor the permission of the court, is required to enforce such a security interest, which would otherwise be applicable when a company is in administration or the subject of a company voluntary arrangement.

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

"Foreclosure" has a narrower meaning under English law than it does in, for example, English usage in the US. Foreclosure involves a mortgagee obtaining a court order under which it becomes the owner of the property. Even in these circumstances a mortgagee normally has certain obligations to the mortgagor – including an obligation to obtain a reasonable price on sale of a mortgaged asset, and (pursuant to the "equity of redemption") to return any excess proceeds over the secured debt finalised by it to the mortgagor. In general, under English law, foreign investors are treated differently from businesses established in England and Wales in relation to the enforcement of security.

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?

There are different types of insolvency proceedings under English law:

- administration;
- receivership/administrative receivership;
- liquidation;
- company voluntary arrangements (CVAs); and
- schemes of arrangement.

From a lender's perspective, administration and administrative receivership are the most important regimes.

Lenders to a project normally insist on taking security over all, or substantially all, the Project SPV's rights and assets. Special rules apply to security created by "Project Companies" (prior to the Enterprise Act 2002 these rules were capable of applying to all businesses). An administrative receiver is generally appointed over the whole of the company's assets by, or on behalf of, the holders of any of the company's charges which, as created, were floating charges. Since the coming into force of the Enterprise Act 2002, only lenders holding security created before 15 September 2003 are able to appoint an administrative receiver, subject to certain exceptions. The key exception in the case of project finance is that set out under section 72E of the Insolvency Act 1986. Section 72E states that the appointment of an administrative receiver by a project company is not prevented if the project is a "financed" project and is subject to step-in rights. A project is "financed" if, under an agreement relating to the project, a project company incurs (or when the agreement entered into is expected to incur) a debt of at least £50 million for the purposes of carrying out the project. The administrative receiver's primary duty is to the secured lender who appointed him, but he is also an agent of the company. If the secured lender has the highest priority fixed charge over the company's assets, the lender may appoint one or more fixed-charge receivers over the secured assets. Appointing its own receiver offers the lender more control over the realisation of the assets.

Out of court, an administrator can be appointed by the holder of a "qualifying" floating charge, provided that the charge relates to the whole or substantially the whole of the company's assets, and the company has triggered an Event of Default under the financing documentation. A company need not be insolvent in order for administration to occur. Once appointed, the administrator owes his duties to all creditors, not only to the project lenders. His primary objective is to rescue the company as a going concern. If a lender has the right to appoint an administrative receiver (as described above), that lender may veto the appointment of the administrator.

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?

Following the formal insolvency of a company, an administrator or liquidator may challenge transactions entered into by the company before the start of the relevant insolvency procedure. The period when such transactions are vulnerable to being challenged is known as a "hardening period". Such transactions include transactions at an undervalue, preferences, extortionate credit transactions, avoidance of floating charges and transactions defrauding creditors. The hardening period ranges from two years (transactions at an undervalue) to six months (preferences).

Employees are usually the only preferential creditors following the introduction of the Enterprise Act 2002. In order of priority, a party secured by way of mortgage or fixed charge will rank ahead of any preferential creditors. Preferential creditors are paid from the proceeds of floating charges, which are ranked below the fixed-charge creditors but above all other unsecured creditors.

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

Private-sector entities incorporated in England and Wales are generally not excluded from bankruptcy proceedings in England and Wales.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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?

Injunctive relief may be available from the English courts in unusual and/or extreme circumstances. As described in questions 2.1 to 2.5 above, typical project security arrangements will include:

- detailed contractual controls over project receivables, cash and bank accounts; and
- "step-in" and related contractual arrangements with counterparties to key project documents providing protection against borrower non-performance, insolvency and other matters.

There are specific insolvency regimes relating to the insolvency of PPP/PFI projects and in relation to the preservation of certain types of strategically important assets (for example certain pipelines and transmission assets).

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?

Part 26 of the Companies Act 2006 provides a procedure for companies to make a compromise or arrangement with its creditors (or any class of them) which will be binding on all creditors in the relevant class(es) if the requisite majorities vote to approve the scheme. A scheme requires the approval of a majority in number of creditors holding 75% in value of each affected class and the sanction of the High Court of England and Wales. The court will consider any objections from creditors, which commonly relate to the provision of insufficient information or notice of the scheme and/or the fairness of class composition. There is no statutory moratorium attached to the scheme, although lock-up agreements, whereby creditors commit in advance to vote in favour of the scheme and agree not to take enforcement action, are common in practice. Since the legislation does not prescribe the subject matter of a scheme, it is a highly flexible device and is available to any company which can be wound up under the Insolvency Act 1986. This includes UK-registered companies, unregistered companies and foreign companies, provided a sufficient connection with England is established. This is a determination on the facts, but the presence of English law governed debt, often together with English creditors or bank accounts, will typically be considered sufficient.

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

Under English law, a director will potentially be liable for wrongful trading if "at some time before the commencement of the winding up of the company, that [director] knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation" (section 214(2), Insolvency Act 1986). A director will have a defence if, after that director knew or should have concluded that there was no reasonable prospect of avoiding an insolvent winding-up, the director took every step with a view to minimising the potential loss to the company's creditors which he ought to have taken (section 214(3), Insolvency Act 1986). This will generally give conscientious directors facing financial difficulties sufficient time to organise a restructuring while continuing to trade, provided there continues to be a reasonable prospect that restructuring negotiations will successfully conclude (even if in fact they do not). Liability for fraudulent trading (that is, knowingly carrying on the business of the company with the intent to defraud creditors) can also extend to directors, who may be personally liable in an action brought by a liquidator. Directors could also face criminal liability for fraud, misconduct, falsification of the company's books, material omissions from statements and false representations under sections 206 to 211, Insolvency Act 1986 and are liable to disqualification from being a director of any company for up to 15 years under the Company Directors Disqualification Act 1986.

6 Foreign Investment and Ownership Restrictions

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

There are no restrictions on foreign investors investing in UK companies as a general rule under English law, but there are specific statutory regimes in place for certain industries. Authorisation is required for investment in specific regulated areas including the nuclear industry, banking, media, financial services and defence.

UK and EU competition rules may impact ownership by companies with UK, EU or global business turnovers exceeding specific thresholds.

Compliance with EU directives (for example the Third Energy Package) may impact an entity's ability to invest in or own certain assets.

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

The United Kingdom and Northern Ireland has signed bilateral investment treaties, protecting investor rights, with around 120 countries.

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

Expropriation of assets or companies is generally rare in the UK in the absence of hostilities, breach of international sanctions or financial markets turmoil. Certain public-private assets are subject to compulsory purchase powers; compulsory purchase is also possible (subject to public processes and appeal rights, and to the payment of "market value" compensation) for the development of infrastructure and other assets (such as new railway lines). Subject to limited exceptions (for example the state's ability to acquire shareholdings in financial institutions in certain circumstances), the state has no special legal right to expropriate private-sector assets.

7 Government Approvals/Restrictions

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

The exact nature of the project will determine which regulatory bodies and/or Government agencies will have authority over the project. However, there are a number of bodies who have an

© Published and reproduced with kind permission by Global Legal Group Ltd, London

overarching function in respect of development related to the typical project sectors.

Local Authorities: The majority of onshore projects will require planning permission and the identity of the body granting planning permission depends on the nature of the project. Planning permissions are usually granted by the local authority of the relevant area. Local authorities are also responsible for granting consent for the storage of large quantities of hazardous substances, such as natural gas and chemicals. Local authorities, and the London Mayor, may also charge the Community Infrastructure Levy, which is a charge attached to development once it has been granted planning permission to fund and pay for the maintenance of local infrastructure.

National Infrastructure Directorate: Where a proposed development in England is classed as a Nationally Significant Infrastructure Project (e.g. power plants, airports, and major road schemes), planning permission/development consent for these will be dealt with by the National Infrastructure Directorate. The ultimate decision-maker for such projects will be the relevant Secretary of State, e.g. the Secretary of State for Energy and Climate Change in the case of energy projects.

Welsh Assembly Government: Planning decisions which would be taken by the relevant Secretary of State in England will be made by the Welsh Ministers when these projects are in Wales.

Environment Agency (EA): The EA is the main environmental regulator in England and is responsible for the environmental permitting regime which covers a variety of areas including waste management, water pollution and air pollution. There is a separate Welsh Environment Agency which, on 1 April 2013, was merged into a new environmental body for Wales alongside the Countryside Council for Wales and Forestry Commission Wales.

Health and Safety Executive (HSE): The HSE is the principal regulator for all health and safety issues in Great Britain.

Marine Management Organisation (MMO): The MMO implements and regulates the UK's marine planning and licensing system in respect of all offshore construction works.

A number of other public, private or semi-public regulators may also have authority over projects, depending on their exact nature. These may include Natural England, The Crown Estate, the Office of Gas and Electricity Markets (Ofgem), the Water Services Regulation Authority (Ofwat) and the Office of Communications (Ofcom).

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?

In general, no. Registration of prescribed particulars at Companies House and/or other applicable registrars must however comply with the relevant registration requirements.

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

Land

There is no requirement for a licence to own land in England and Wales, nor is there any general bar on foreign ownership of private-sector land.

Water

In order to impound or abstract groundwater and surface water, a licence must be obtained from the Environment Agency.

Wind, wave, tidal and solar energy

No licences are required to use any renewable energy resources, although the usual planning permissions and consents required to carry out construction and engineering works will be required. A licence to generate electricity (or an exemption from obtaining such a licence) must also be obtained from the Secretary of State for Energy and Climate Change.

Minerals (other than oil and gas, coal, gold and silver)

Ownership rights of minerals located in privately owned land (except oil and gas, coal, gold and silver) will generally reside in the owner of the surface land, although these rights may be retained by a previous landowner.

The Crown Estate generally holds the right to exploit all minerals on the UK foreshore and continental shelf, with the exception of gas, oil and coal.

Oil and gas

Ownership of all onshore and offshore oil and gas in Great Britain (to the limits of the continental shelf) is vested in the Crown. The Department of Energy and Climate Change grants exclusive rights to explore for and extract oil and gas onshore within Great Britain. The rights granted by onshore licences do not include any rights of access, which must be obtained from the relevant landowner, and the licensees must also obtain any consents required under other legislation, such as planning permissions and environmental permits. Licensees wishing to enter or drill through coal seams for coal-bed methane and coal mine gas must also seek the permission of the Coal Authority (see below). Within UK territorial waters, consent for placing installations and laying pipelines on the seabed must be obtained from the Crown Estate.

Coal

Following the privatisation of the coal industry in 1994, the ownership of almost all coal now resides with the Coal Authority, which grants licences for coal exploration and extraction.

Gold and silver

Rights to gold and silver in most of England and Wales are owned by the Crown, and a licence for the exploration and development of these metals must be obtained from the Crown Estate.

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

Owners of minerals may receive royalties in relation to the extraction of minerals. Such royalties would be subject to UK tax. There may be restrictions in place in relation to the extraction and exploitation of natural resources. For example, the Environment Agency has discretion to refuse to grant water abstraction licences if it believes there will be a detrimental environmental effect.

Customs procedures and/or duties may apply on certain exports.

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

There are no general restrictions on foreign currency exchange. The Money Laundering Regulations apply to various categories of businesses, including those active in the UK financial sector.

Fees may be imposed by banks in the UK when dealing in foreign currencies. Corporation taxes may arise on exchange gains and losses, depending on the asset or liability in question.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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?

Under English law there are no restrictions on repatriation of profits or exchange control rules for foreign companies.

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

Subject to UK and EU sanctions and the Money Laundering Regulations, project companies in England and Wales can establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions.

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 England and Wales or abroad?

No, only as agreed contractually amongst the shareholders of a project company, its lenders and the 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?

Legislation and regulations, in addition to the permits and licences already mentioned above, that may affect a project include:

Environmental impact assessment

Where a development may have adverse impacts on the environment, the developer will be required to submit an environmental impact assessment to the relevant planning authority when applying for planning permission/development consent.

Contaminated land regime

The contaminated land regime contained in Part 2A of the Environmental Protection Act 1990 may apply to any project that either pollutes land and/or water or is located on previously contaminated land. Under the regime, liability for the clean-up of contaminated land falls on any person who causes or knowingly permits contamination in, on or under land. If such people cannot be found, then liability passes to the current owners and/or occupiers, regardless of their awareness of the contamination. However, if a project involves redevelopment of a site, then it is likely that the planning regime will govern clean-up rather than the contaminated land regime.

Common law

A person (including a company) who has suffered loss as a result of environmental or health and safety issues such as noise, odour or other pollution, may in some cases be entitled to bring a civil claim under the common law of nuisance, negligence, trespass and/or the rule in *Rylands v Fletcher* against those who have caused the loss.

Statutory nuisance

Certain nuisances such as noise and dust are regulated by local authorities as "statutory nuisances".

EU Industrial Emissions Directive (2010/75/EU)

The Industrial Emissions Directive aims to prevent or reduce emissions to air, land and water from industrial installations. The Directive requires installations within its scope to operate under a permit and streamlines permitting, reporting and monitoring requirements to simplify and reduce the administrative burden on operators.

Most installations will have to comply with the Industrial Emissions Directive from 7 January 2014, but this depends on the type of installation.

Environmental Permitting regime

The Environmental Permitting regime is an integrated permitting regime which regulates a range of activities which may give rise to pollution, including those covered by the EU Industrial Emissions Directive, such as waste management, air pollution and water pollution.

Climate change

Emissions of greenhouse gases may be regulated by the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (which implement the EU's Greenhouse Gas Emissions Trading Scheme in the UK) or the CRC Energy Efficiency Scheme Order 2010.

Environmental Damage (Prevention and Remediation) Regulations 2009

These Regulations implement the EU Environmental Liability Directive (2004/35/EC) in England. There are equivalent regulations in Wales. They apply to damages to species, habitats or water, or risks to human health from contamination of land and require those responsible to take immediate action to prevent damage occurring or remediate damage where it does occur.

Nature conservation legislation

The Environment Agency and Natural England are responsible for enforcing laws implementing the EU Wild Birds Directive (2009/147/EC) and the EU Habitats Directive (92/43/EC) which protect certain species and habitats.

Health and safety legislation

The Health and Safety at Work etc. Act 1974 provides the framework for health and safety regulation in England and Wales. The Act is enforced by the Health and Safety Executive and local authorities, although in general the HSE will be the regulator for major projects. Other legislation such as the Control of Major Accident Hazards Regulations 1999 may also apply to major projects.

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

The EU procurement laws (as implemented in England and Wales) are applicable to project companies developing public-sector projects, if the public contracts fall within the scope of the rules and exceed certain financial values. The rules ensure that the award process is transparent, non-discriminatory and respects the principles of equal treatment.

EU procurement laws apply to contracts awarded by central Governments, local authorities or other public-sector bodies.

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?

There are no restrictions on insurance policies over project assets provided by foreign insurance companies, unless the foreign

© Published and reproduced with kind permission by Global Legal Group Ltd, London

insurance company is not "carrying out and effecting the insurance in the UK".

If the foreign insurance company is carrying out and effecting the insurance in the UK, it may require authorisation by the Prudential Regulation Authority (PRA), and may also have to comply with the PRA rules. The PRA was created by the Financial Services Act 2012 and is part of the Bank of England.

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

Foreign banks, and other foreign creditors, can be co-insured by the insurance company over the project assets.

9 Foreign Employee Restrictions

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

The general position is that European Economic Area (EEA) nationals have the automatic right to work in the UK by virtue of being an EU citizen. In addition, Swiss citizens and Commonwealth nationals who have a grandparent born in the UK or the British Islands have been granted permission to work in the UK. Unless an individual falls into one of these categories, they must obtain immigration permission to work in the UK under the Points Based System (PBS) by falling into one of the new tiers (employers must be aware there are 5 distinct tiers) of the PBS or be a dependant of a migrant coming to the UK under one of the tiers. Employers should also be aware that in April 2011, a new annual quota system was introduced. Some foreign nationals will require employer sponsorship if they are classified as skilled migrants coming to the UK to fill a gap in the UK labour market (compliance with UK Border Agency rules is strict and there are penalties for non-compliance).

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?

As the European Union (EU) is a customs union, UK companies can buy most goods from other member countries without restrictions – although VAT and excise duty will normally still apply. If a UK company imports from outside the EU, it may have to comply with import licensing requirements and with common customs tariffs that apply across the EU. Apart from the general restrictions concerning materials that are deleterious to health and safety and the environment, there are no legal restrictions or controls which apply exclusively to importing construction equipment.

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

This is not applicable. Please see the response to question 10.1.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Force majeure provisions and exclusions are set out in virtually all project documents and are enforceable under English law. Normally *force majeure* exclusions do not apply to payment obligations.

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 Bribery Act 2010 received Royal Assent in April 2010 and came into force on 1 July 2011. It repeals previous statutes in relation to bribery, including the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (the "Bribery Act" or the "Act"). The legislation arms prosecutors with a range of criminal offences which will cover a wide range of conduct that they may employ to prosecute any potentially corrupt activity. The Bribery Act's arrival coincides with a significant shift in the UK's approach to fighting corruption which has seen prosecutors bring companies into the criminal courts for corruption on numerous occasions in recent years. The Act reflects a general tightening of anti-bribery laws globally in line with the OECD Convention on the Combating of Bribery, as well as an increased level of international cooperation to enforce such legislation; however, the Act raises the bar even higher than equivalent legislation in other jurisdictions, such as the US Foreign Corrupt Practices Act.

The Act affects all UK businesses and those incorporated abroad who do business in the UK, and creates four new offences related to bribery (the offering or receipt of financial or other advantages) of a person with the intent of bringing about improper performance of that person's duties. These are:

(1) Offering a bribe (or promising or giving), intending that another person perform their duties improperly (or rewarding them for having done so).

(2) Accepting a bribe (or requesting or agreeing to accept) intending that duties will be performed improperly.

(3) Bribing a foreign public official in order to retain business or to gain an advantage in the conduct of business.

(4) Failure of commercial organisations to prevent bribery on behalf of the organisation is a new corporate offence. If any person associated with an organisation is found guilty of bribery then the organisation is deemed guilty of an offence unless it can show it had adequate procedures in place to prevent those people from committing bribery.

Individuals found guilty of certain of these offences can be imprisoned for up to 10 years and/or receive an uncapped fine. Commercial organisations found guilty of any of the above offences can receive an uncapped fine. Directors and senior officers of commercial organisations may also be convicted if they are deemed to have given their consent or connivance to the offence.

For natural resources companies operating in countries where Government offices are seen by some in positions of influence as

© Published and reproduced with kind permission by Global Legal Group Ltd, London

an opportunity to accumulate personal wealth and as involving tasks which justify small additional financial incentives, the Bribery Act presents a significant compliance challenge, not least because the list of those who can expose the company and risk a criminal conviction extends well beyond its employees.

The corporate offence of failing to prevent bribery means that senior management may be held accountable for the actions of persons associated with the organisation. A company's only defence is to show it had adequate bribery prevention procedures in place. These would include establishing policies which define acceptable behavioural limits, procedures to record all related events with a means of seeking approval in uncertain cases, and training and briefing for all staff likely to be affected by the provisions of the Act.

The Act has forced natural resources companies which do business in the UK and UK companies which do business overseas to re-examine their approach to assessing and managing bribery risk throughout their operations in the UK and abroad to ensure that adequate anti-corruption procedures are in place internally. Such procedures also need to address the risk that third-party service providers will expose the company to criminal liability by bribing in connection with the company's business.

13 Applicable Law

13.1 What law typically governs project agreements?

Project agreements relating to projects located in England and Wales are generally governed by the laws of England and Wales. Scottish law is substantially different to English law and normally applies to some or all project documents relating to projects located in Scotland. Northern Irish law is broadly similar to English law, subject to a number of qualifications.

13.2 What law typically governs financing agreements?

Financing agreements for English projects are generally governed by the laws of England and Wales. Financing agreements for a broad range of projects located throughout the world are often subject to English law.

13.3 What matters are typically governed by domestic law?

Land-related agreements, concessions and the like, and permits and consents, are normally governed by the law of the location of the project.

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?

A party's submission to a foreign jurisdiction may be legally binding and enforceable, provided the conditions for recognition of judgments are fulfilled. Judgments of courts of EU and EFTA Member States, where the court took jurisdiction relying on a contractual submission to that court, will be enforced in England and Wales pursuant to the Judgments Regulation (EC Reg 44/2001) and the Lugano Convention. Judgments of courts of some non-EU States (mainly Commonwealth members) with which reciprocal conventions exist will be enforced by an analogous process of registration under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. Judgments of courts of all other States where the jurisdiction was based upon submission will usually be enforced through new English proceedings. Typical exceptions to these regimes include: judgments obtained following fundamental procedural irregularities; proceedings brought in breach of arbitration and similar clauses, in breach of statutory or international convention obligations; or where the judgment is based upon fraud, is contrary to English public policy or natural justice, or is contrary to the Protection of Trading Interests Act 1980 (e.g. for multiple damages).

It is possible to waive immunity as a matter of English law, but sovereign immunity is governed by the State Immunity Act 1978. If the usual conditions for recognition of a judgment are fulfilled, a State will not benefit from immunity if it would not have been able to claim immunity had the proceedings been brought in the United Kingdom. Ordinarily, where a sovereign entity is acting in a private or commercial capacity it will not be entitled to claim state or sovereign immunity.

15 International Arbitration

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

Contractual provisions in project documents governed by the laws of England and Wales requiring submission of disputes to international arbitration are generally recognised, and supported by the courts of England and Wales. The UK is a signatory to the New York Convention under which arbitral awards may be recognised and enforced.

15.2 Is England and Wales a contracting state to the New York Convention or other prominent dispute resolution conventions?

The United Kingdom and Northern Ireland (which includes England and Wales) have been contracting States to the New York Convention since December 1975.

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

Arbitration is, in general, limited to civil proceedings. Criminal or family law matters, or matters relating to status, are not capable of being submitted to arbitration.

Disputes in which the Government has a direct interest, such as criminality, cannot be submitted to arbitration. However, a claim for compensation arising out of a criminal act may well be arbitrated (for example in respect of a claim for trespass to the person or property, as these would be civil actions). Divorce also cannot be arbitrated and can only be granted by the courts in England and Wales, though the division of property might be subject to arbitration proceedings provided that the arbitrator is not involved in the initial divorce proceedings. Similarly, succession issues do not lend themselves to arbitration and wills can only be contested in court, though certain matters involving trusts might well be arbitrated. Again, the beneficiaries of a will can agree to a different method of sharing out the estate and could enlist the help of an arbitrator in reaching a settlement. Arbitration of issues involving minors and the insane is sometimes possible, but enforcement will be subject to the same

© Published and reproduced with kind permission by Global Legal Group Ltd, London

constraints as apply to the courts in respect of enforcement of claims against minors and the insane for public policy reasons.

In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal. However, the validity of a patent could not be arbitrated, as patents are subject to a system of public registration. Therefore, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination. In addition, a recent decision of the English court has suggested that an arbitration agreement will be considered "null, void and inoperative" insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law (see *Accentuate Ltd v ASIGRA Inc.* [*2009*] *EWHC 2655*). This decision appears to contradict the long-held view that EU competition law claims are indeed arbitrable (see e.g. *ET Plus SA v Jean-Paul Welter* [*2005*] *EWHC 2115* (*Comm.*) (*Q.B.*) and *Eco Swiss China Time Ltd v Benetton International NV* [*1999*] (*Case C-126/97*)).

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

As a general principle, arbitration is consensual rather than mandatory. If a matter is arbitrable pursuant to agreement by the parties, then it is subject to the relevant dispute resolution and jurisdiction clause in a contract.

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?

There have not been any calls for political risk guarantees in England and Wales in recent years. Lenders will typically require direct agreements with governmental authorities if the project is a PPP or PFI project. Direct agreements are commonly entered into by lenders with key project contract counterparties in all types of UK-based projects. Following retroactive changes to regulatory support regimes for renewable energy projects in countries such as Spain, Greece, Bulgaria and the Czech Republic, investors in renewable energy are understandably wary of "change in law" risk in the renewable sector and the damaging effect that such retroactive changes can have on a project's economics. For this reason both the CfD and IUK Guarantee contain provisions safeguarding the generator/guaranteed beneficiary against UK "change in law" risk.

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?

The UK imposes a withholding tax at the basic rate of income tax (currently 20%) on any payment of yearly interest arising in the UK. Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20% of such interest payment and account for this withheld amount to the UK tax authorities. Double tax treaties exist with many other jurisdictions which in many cases will reduce withholding tax.

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 no UK tax incentives provided preferentially or specifically to foreign investors or creditors. Specific incentives are afforded to foreign investors in relation to the construction and operation of projects and businesses in specified locations.

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 England and Wales?

Currency exchange risk will always be a consideration for foreign investors in UK-based projects, where revenues are almost always Sterling-based.

Change of law remains (as in all other jurisdictions) a risk for investors in the UK (albeit a risk of very low magnitude) given the inability of any administration to tie the legislation hands of its successors.

EU, US and UK sanctions can be an issue if a project or business might involve dealing with sanctioned persons, entities or assets.

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.

There are no legal requirements that apply exclusively to project companies seeking to issue bonds or similar capital markets instruments.

Any project company seeking to issue debt instruments (securities) on the London Stock Exchange (LSE) must comply with the UK Listing Authority (UKLA)'s Listing Rules (the "Listing Rules"). The UKLA, a division of the Financial Services Authority, is the body responsible for regulating all securities listed on the LSE. The Listing Rules contain (i) the rules and regulations for listing debt securities, and (ii) the continuing obligations that apply to issuers and bondholders for the duration of the listing. The Listing Rules cover principles ranging from corporate governance and executive remuneration to accounting standards and full disclosure of information to prospective investors.

Debt securities admitted to the Main Market of the LSE must be listed in accordance with Chapters 2 and 17 of the Listing Rules. Debt securities admitted to the Professional Securities Market must be listed in accordance with Chapter 4. All debt securities admitted to trading must comply with the LSE's Admission and Disclosure Standards and the relevant Disclosure and Transparency Rules.

Rules may differ according to the issuer's market sector. For example, mineral, oil and natural gas companies are subject to the additional disclosure requirements set out in Chapter 6 of the Listing Rules. Rules may also differ according to the issuer's investor base. For example, an issuer will be subject to more stringent obligations if marketing its securities to retail investors as opposed to solely professional investors.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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 England and Wales.

Although these instruments have been used in other financing contexts in England and Wales (such as acquisition finance, corporate finance and capital markets), they have not yet been used in the project financing context in England and Wales. Were they to be employed, then it would be likely that an *Istina'a* or *Wakala* arrangement would be used for the purposes of financing the construction of the assets during the pre-completion period and such assets would then be leased by the financier (as direct or indirect owner of the assets) to the project company pursuant to the *Ijarah*. The *Ijarah* is the mechanism by which the principal and the profit margin are returned to the financier during the post-construction period of a project financing as rental consideration comprising the purchase price of the asset as well as a fixed and/or floating profit margin calculated by reference to LIBOR. A *Murabaha* instrument could be used to make available either a working capital facility to the project company or equity bridge loans to the project company with full recourse to the sponsors.

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?

Shari'ah is not applied in the UK and English law does not recognise *Shari'ah* as a system of law capable of governing a contract, on the basis that English law does not provide for the choice or application of a system of law other than a system of national law. This is based on the Convention on the Law Applicable to Contractual Obligations 1980 (the Rome Convention) which requires that a governing law of an agreement must belong to a country, and *Shari'ah* does not belong to a particular country (albeit that *Shari'ah* has been adopted, through legislation, by countries such as Saudi Arabia).

The approach of the English courts, in the main, has been to distinguish between the *Shari'ah* and the contractual governing law of an Islamic finance agreement by ruling that *Shari'ah* issues are not justiciable in the English courts. That element of the agreement is deemed as forming part of the commercial agreement (which English courts will rarely interfere with) and not the legal agreement. Instead the dispute will be dealt with by applying the ordinary principles of English law, and an English court will avoid ruling or commenting on the compliance of the agreement with *Shari'ah* (see *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [*2003*] *2 All ER* (*Comm*) *84*).

Parties may still elect to have a dispute in relation to a contract determined and resolved in accordance with *Shari'ah* principles by submitting to arbitration. Under Section 46 of the Arbitration Act 1996, arbitral tribunals are obliged to decide disputes with reference to either the national law chosen by the parties or any other agreed considerations (including *Shari'ah* considerations).

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

Generally, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability in England and Wales, unless that interest payment obligation is deemed a penalty offending the rules laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garages & Motor Co Ltd* [*1915*] *AC 79*. Note that a contractual provision for payment of a higher rate of interest after a default in payment by a borrower could be deemed to be a penalty. However, a provision that provides for interest to increase on default is not likely to be held to give rise to a penalty if: (i) the increase is levied only from the date of default (and not before); (ii) the main purpose of the clause is not to deter default; and (iii) the increase is modest and commercially justifiable by reason of the increased credit risk represented by a debtor in default.

Acknowledgment

The authors would like to thank Grace Durkin for her assistance in preparing this chapter. Grace is a member of the Project Finance team at Milbank (Tel: +44 20 7615 3260; Email: gdurkin@milbank.com).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Clive Ransome
Milbank, Tweed, Hadley & McCloy LLP
10 Gresham Street
London EC2V 7JD
United Kingdom

Tel: +44 207 615 3144
Fax: +44 207 615 3100
Email: cransome@milbank.com
URL: www.milbank.com

Clive Ransome is a partner in the London office of Milbank, Tweed, Hadley & McCloy and is a member of the firm's Global Project Finance Group. He has also worked extensively in the Far East, having been based in Hong Kong for six years.

Clive focuses on energy financing, projects, project finance, export credit and banking law. Clive has extensive experience of: major power, infrastructure, and oil & gas financings; advising ECAs, banks and borrowers on major international cross-border financings; and advising key multilaterals (and borrowers from key multilaterals) including the European Bank for Reconstruction and Development (EBRD), the International Finance Corporation (IFC), the European Investment Bank (EIB) and the Multilateral Investment Guarantee Agency (MIGA) on major international cross-border financings. Clive has excellent and extensive on-the-ground experience of developing, negotiating and documenting major project financings in Europe, the Middle East and Africa.

Clive has excellent experience of advising power developers including International Power, RWE, GDF Suez, EDF, AES and others on hydropower projects and on conventional coal and gas-fired power projects, wind and solar power projects.

Clive has long been recognised as a top-ranked/leading project finance and energy expert by industry journals, including the *International Who's Who of Project Finance Lawyers*, *Who's Who Legal*, *Legal Experts*, *The Legal 500*, *Chambers Global* and *Chambers UK*.

Munib Hussain
Milbank, Tweed, Hadley & McCloy LLP
10 Gresham Street
London EC2V 7JD
United Kingdom

Tel: +44 207 615 3013
Fax: +44 207 615 3100
Email: mhussain@milbank.com
URL: www.milbank.com

Munib Hussain is an associate in the London office of Milbank, Tweed, Hadley & McCloy and is a member of the firm's Global Project Finance Group and Islamic Finance Business Unit. Munib has advised both lenders and sponsors on a number of international project financings, specialising in multi-sourced financings involving export credit agencies (ECAs), multilaterals, Islamic banks and *Sukuk* holders.

His recent experience includes:

- advising the ECAs, commercial banks and Islamic banks on the Sadara Integrated Chemicals Project;
- advising the joint lead managers of the US$2 billion project sukuk on the Sadara Integrated Chemicals Project;
- advising the lenders on the petrochemicals expansion of the PetroRabigh combined refinery and petrochemicals facility in Saudi Arabia; and
- advising the unsecured creditors committee of Arcapita Bank B.S.C. (c) in relation to the issuance of a US$550 million *Sukuk*.

Munib authored a chapter on Islamic project finance in *International Project Finance – Law and Practice* published by Oxford University Press, authored the UK chapter in *Getting the Deal Through – Islamic Finance & Markets 2014* and authored the England & Wales chapter in *The International Comparative Legal Guide to Project Finance* – 2014 and 2015 editions.

Munib is recognised as an expert for Capital Markets – Islamic Finance in the 2014 edition of *Who's Who Legal 100*.

Milbank

Milbank, Tweed, Hadley & McCloy LLP is an international law firm that provides a broad range of legal services to many of the world's leading commercial, financial and industrial enterprises, as well as to international institutions, individuals and governments. Project Finance is among our firm's core practice areas and our Global Project Finance Group comprises more than 100 dedicated attorneys, including 20 partners. We operate on an integrated basis with project finance teams in each of our offices in the U.S., São Paulo, London, Frankfurt, Seoul, Singapore, Hong Kong and Tokyo.

From the largest petrochemical, power, mining and renewables project financings in the world to a global satellite project providing Internet access to Africa, clients recognise Milbank's Project Finance Group as the leading choice for the financing and development of the most critical and pioneering infrastructure projects across the globe. Over the last three years, Milbank has advised on over 175 project financings, that have raised more than US$90 billion for infrastructure projects worldwide.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk