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The International Comparative Legal Guide to:

Project Finance 2019

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A practical cross-border insight into project finance

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CEO
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Group Consulting Editor
Alan Falach

Publisher
Rory Smith

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Global Legal Group Ltd.
59 Tanner Street
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Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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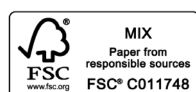

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USA

Daniel J. Michalchuk

Milbank LLP

Richard M. Hillman

1 Overview

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

The project finance market in the United States remains active, with transactions continuing to be executed across a diverse range of industries and asset classes. In 2019, we are expecting the infrastructure build-out in the oil and gas sector to continue as the shale oil and gas boom continues and major LNG export facilities reach final investment decisions and seek to tap markets for debt capital. In electricity markets, innovation and the growing demand by States and energy consumers for a diverse and clean energy mix is driving investment into new areas, including offshore wind and battery storage. Consumers are influencing new business models as corporates continue to enter into distributed generation, distributed storage and wholesale power contracts. On the policy side, market participants are closely watching U.S. trade policy, key decisions will be made (or not made) at FERC, environmental matters remain at the forefront of regulatory discussions and industries continue to adapt to the revised Federal tax laws.

I. U.S. Crude Oil Exports Continue to Set Record Levels

2018 set another record for annual U.S. crude oil exports, continuing the trend from the removal of the U.S. crude export ban in December 2015. This growth has been spurred by the U.S. shale oil boom, relatively flat domestic demand, increased demand from Asia and reductions in supply from other sources. The U.S. Energy Information Administration ("EIA") estimated that net imports fell from an average of 3.8 million bbl/day in 2017 to an average of 2.4 million bbl/day in 2018, with the United States briefly becoming a net exporter during the last week of November. EIA projections are for net imports to continue to fall over the next two years with the United States becoming a net exporter in the fourth quarter of 2020.

The record export growth has placed considerable strain on midstream oil infrastructure, particularly key transportation pipelines and storage terminals. These bottlenecks are particularly acute in the Permian Basin, the engine of growth in U.S. crude production, where the pipelines to the Gulf Coast and northbound to the storage hub in Cushing, Oklahama are operating close to full capacity. In some cases, rather than shutting in wells, producers without firm pipeline capacity have sought to take advantage of higher prices by continuing production and transporting their crude by rail and trucking. Rail lines are also backed up with capacity substantially devoted to moving in sand required for hydraulic fracturing. The differential discount between the West Texas Intermediate at the Midland Hub in the Permian Basin and the West Texas Intermediate at Cushing was deep in the double digits for many months in 2018.

The global crude oil industry is expected to face challenges and opportunities in 2019 from U.S. policy. The U.S. government has now fully implemented its sanctions programme against Iran (subject to waivers for certain nations, which the U.S. has indicated will not be reissued), and has initiated sanctions against PDVSA, the Venezuelan State-owned oil company. Gulf Coast refineries have generally prepared for shortfalls in availability of Venezuelan heavy crude, with increased demand from other sources in Canada, Mexico and Iraq. Steel tariffs on most non-U.S. steel have increased the delivery costs of pipeline and rail infrastructure and, at the beginning of 2019, trade tensions with China are being closely watched across industries. For the first seven months of 2018, China imported an average of 377,700 barrels of U.S. crude oil per day, according to the EIA, and surpassed Canada as the biggest foreign buyer of U.S. product during that period. Exports suddenly halted on August 1, as part of the ongoing trade dispute between the nations. Although China ultimately did not impose a tariff on U.S. oil imports, and deliveries recommenced in December 2018, Chinese buyers remain wary that tariffs may be imposed in an escalation of the trade conflict, and have pursued diversity in their crude supply mix.

To alleviate transportation bottlenecks, substantial investment is planned or committed to optimisation, expansion and greenfield projects. Tallgrass Energy is developing the Seahorse Pipeline, a new 800,000 bbl/day crude pipeline from Cushing to St. James, Louisiana that is expected to start commercial operations in the third quarter of 2021 and a binding open season was announced for the Capline reversal project in January 2019, which would connect Patoka, Illinois to St. James. Both projects move volumes directly into Louisiana, where the Louisiana Offshore Oil Port ("LOOP"), which was previously a crude import terminal, became the first U.S. port to load oil into a Very Large Crude Carrier in February 2018. Other deep-water terminals are under development throughout the Gulf Coast, although none are expected to be operational before late 2019. Where sanctions and other factors have caused increased demand for alternative supply of heavy crude oil, this has also resulted in the development of infrastructure solutions to deal with capacity constraints. In January 2019, Tallgrass and Kinder Morgan announced a joint venture to develop the Rockies Crude Oil Transportation Service, capable of delivering up to 800,000 bbl/day of light crude oil and 150,000 bbl/day of heavy crude oil from points in Wyoming and Colorado that connect into the Williston Basin and Western Canada to Cushing (where it is intended to link up with the Seahorse Pipeline).

II. Continued Development of U.S. LNG Exports

Over the last decade, the shale gas boom in the U.S. has propelled

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the country from net LNG importer to exporter and the U.S. LNG export market remains firmly in a build-out mode. Dominion Energy's Cove Point LNG Terminal in Maryland entered commercial operation in April 2018 and the first train of Cheniere's Corpus Christi project commenced LNG production in November 2018. These projects join Cheniere's Sabine Pass as the only facilities currently producing LNG in the contiguous United States. They represent the tip of the wave with Elba Island, Cameron, Freeport and additional trains for Corpus Christi and Sabine Pass all expected to come online in 2019 and four FERC-approved projects subject to financial investment decisions this year as well.

Each of Sabine Pass, Corpus Christi and Cove Point have utilised project finance facilities, with Cove Point closing a $3 billion three-year term loan facility in September to refinance intercompany loans provided for construction. The scale of capital required in respect of these LNG projects is anticipated to generate considerable demand for additional project financing in 2019 which, given the amounts required, can be expected to result in challenges and capital constraints in securing commitments for the LNG pipeline.

The ability of export facilities to secure long-term offtake arrangements will underpin the viability of new construction and the availability of capital. Certain offtakers overcommitted to volumes in contracts executed from 2011–2013 and, with those contracts up for renewal, buyers are increasingly seeking more flexibility on take-or-pay arrangements and shorter tenors. The new and anticipated U.S. export capacity has also fuelled concerns about how the market will absorb the increasing supply. Competitively priced U.S. shale gas has traditionally been attractive to buyers in Asia, however alternative new capacity has recently come online in Australia and Asia, including from the $40 billion Ichthys project, and the world's biggest producer Qatar is expanding its production. Although China has announced plans to substantially ramp-up its intake of LNG, U.S. exports to China have significantly declined as a result of the ongoing trade dispute between the two countries, with a 10% tariff on United States LNG imposed in September 2018. These trade tensions have already impacted the infrastructure build-out. Australia's LNG Limited announced in 2018 that it was delaying its final investment decision on its Magnolia LNG project in Louisiana as a result of the difficulties it faced in securing a final commitment from its prospective Chinese offtakers. Despite the uncertainty regarding access to markets in China, there are new opportunities arising in Europe, with Poland's PGNiG executing a long-term offtake agreement with Cheniere in November 2018 and Germany announcing plans to build an LNG import terminal. Perhaps reflecting the competitive nature of large capacity LNG offtakes, there has been renewed interest among sponsors in looking to smaller-scale LNG export terminals, including offshore floating options.

III. Challenges for the Natural Gas Infrastructure Sector

The Marcellus/Utica shales in Appalachia have been the cornerstone of the natural gas boom in the United States, although in recent years the growth of these natural gas heavy fields has been constrained by limitations on pipeline takeaway capacity. Some of these limitations were alleviated in 2018 as the Rover, Atlantic Sunrise and Nexus lines were placed into service, although there is a continuing need for pipeline infrastructure in the region and in other major shale plays in the Permian Basin, Bakken shale, Anadarko Basin and Haynesville shale. Siting and building natural gas infrastructure has nevertheless become increasingly contentious and challenging. Some local opposition to energy infrastructure projects is generally anticipated, however the debate over energy infrastructure is now firmly on a national level, as interest groups opposed to the continued use of fossil fuels have stepped up challenges to energy infrastructure projects. In the political sphere, a proposal for a "Green New Deal" has been announced, which proposes moving the entire U.S. energy system to renewable resources by 2030. As the current administration reportedly mulls executive actions to encourage fossil fuel production and exports, including action to limit State discretion on water permitting, we anticipate this to be a continuing area of controversy in 2019.

FERC, which is the lead agency for the environmental review under the National Environmental Policy Act ("NEPA"), has been placed under pressure to undertake more comprehensive reviews and further scrutinise new pipeline projects, including fulsome reviews of the climate change effects of pipeline projects. On August 22, 2017, the D.C. Circuit Court of Appeals issued an order (*Sierra Club, et al., v. FERC, Nos. 16-1329 and 16-1387*) finding that FERC's assessment of the environmental impact of the $3.5 billion, 685 mile-long Southeast Market Pipelines Project ("SMP Project") was inadequate in that FERC's environmental impact statement ("EIS") did not contain sufficient information on the greenhouse-gas emissions that would result from burning the gas that the pipelines would transport. The Court also vacated FERC's approval of the SMP Project and required FERC prepare a conforming EIS. FERC's ultimate approval of the certificate in that case, and its order denying rehearing in respect of Dominion Transmission's New Market Project in New York, demonstrated a 3-2 partisan split on the question as to FERC's responsibility to evaluate the carbon emission impacts from building the pipelines. In the New Market Project approval, FERC's majority ultimately determined that an analysis of indirect carbon emissions associated with a project's impact on production and consumption of natural gas was speculative and that only direct emissions impacts would be accounted for in the FERC review. The Democratic-appointed commissioners have dissented on this point and FERC's determination is under challenge in the D.C. Circuit (*Otsego 2000, Inc. v. FERC, No. 18-1199*).

Environmental groups have had successes in challenging the grant of key permits, particularly with respect to water crossings. A string of 2018 court decisions in the 4th U.S. Circuit Court of Appeals have resulted in permits being set aside for the Atlantic Coast and Mountain Valley pipelines in Appalachia. In September 2018, EQT Midstream announced the anticipated cost of the Mountain Valley pipeline had increased from $3.7 billion to $4.6 billion and in February 2019 Dominion Energy announced its projection of project costs had increased by $1 billion from its original projection to between $7 to $7.5 billion with the expected commercial operation date delayed to early 2021 from an original expected date of late 2019. In each case a substantial portion of the delay and increased cost has been attributed to the continued court challenges.

Although FERC is the co-ordinating agency for interstate pipelines, Sponsors must also navigate State and local approval processes. Section 401 of the Federal Clean Water Act requires a State water quality permit to be granted for the construction of facilities that may result in a discharge of pollution in that State. The success of new build pipelines in any particular State may depend on that State's view on shale-sourced gas. New York has been one challenging jurisdiction where the State government has taken a negative view of new gas pipeline construction. In February 2019, the 2nd U.S. Circuit Court of Appeals ruled that the New York's Department of Environmental Conservation did not provide sufficient information to support its denial of a water quality permit for the Northern Access pipeline. Similar denials from the New York regulator have impacted the Constitution pipeline and a lateral line from the Millennium pipeline to CPV's Valley project in New York only had its water quality certification granted after the 2nd U.S. Circuit Court of Appeals determined that the regulator had waived its authority to rule on the water quality permit by failing to

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act within the statutory period. The controversy is not confined to New York State. In December 2018, the State Water Control Board in Virginia voted 4-3 to reconsider a certification for the Mountain Valley pipeline, in the midst of enforcement action brought by Virginia's environmental regulators for alleged violations of erosion and sediment control measures. Pennsylvania's Department of Environmental Protection announced in February 2019 that it is not approving any further clean water permits for Energy Transfer Partners until it complies with an October 2018 order related to an explosion on the Revolution pipeline.

IV. Deadlock as Key Decisions Fall to FERC

For most of 2018 FERC operated normally with a full complement of five commissioners, three Republicans and two Democrats, under the leadership of Kevin J. McIntyre (R) as Chairman. However, in October, Chairman McIntyre notified President Trump that he could no longer serve as FERC Chairman due to health issues, and the President promptly named Commissioner Neil Chatterjee (R) as his replacement. Kevin McIntyre passed away on January 2, 2019. At the start of 2019, FERC has four commissioners, with two from each political party. A split vote of 2:2 would fail to advance a FERC order. In addition, FERC Commissioner Bernard McNamee (R), a former Department of Energy Office ("DOE") of Policy Executive Director, assumed office on December 11, 2018 after a difficult Senate confirmation process, culminating in a 50-49 vote. In early FERC meetings, Commissioner McNamee declined to vote on matters for decision and agreed to recuse himself from any discussions regarding the DOE's grid resiliency pricing measure, although he received ethics clearance to participate in proceedings that do not closely resemble the DOE proposal. Faced with two voting commissioners of the opposition party, Chairman Chatterjee has removed many controversial items, including natural gas pipeline orders, from the FERC agenda.

Such turmoil at the top has challenged the ability of FERC to reach consensus and issue orders on energy infrastructure, markets and policy. The deadlock has generated some controversy, with the Democratic commissioners Cheryl Glick and Richard LaFleur publicly criticising FERC's failure to act on an emergency request by Vineyard Wind to stay ISO-New England's February 2019 capacity auction for the 2022–2023 commitment period. Vineyard Wind was seeking a waiver to allow its planned offshore wind farm to enter the primary auction as a renewable technology resource, despite not being located within the physical borders of a New England State. Offshore wind, which has greater consistency of wind resource and is generally located closer to load centres, is expected to expand significantly in the United States as developers leverage technical expertise from Europe (the first US offshore wind project, Deepwater Wind's 30 MW Block Island Wind Farm, has demonstrated a good operational record and was refinanced in spring 2018). The challenges in delivering and financing these capital intensive projects, including the lengthy and multi-faceted construction process, a heavy European supply chain and a multi-contract procurement model, are compounded where there is a lack of clarity on available revenue sources.

There are a number of other contentious matters upon which FERC is expected to grapple with in 2019, and any nomination of a new commissioner by the current administration will be closely watched. Key matters expected to come before FERC in 2019 include: (1) price formation issues in energy and capacity markets administered by Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"); (2) natural gas pipeline certificate reform under Section 7 of the Natural Gas Act; (3) review and possible revision to the Commissions' regulations implementing the Public Utility Regulatory Policies Act of 1978; and (4) the ongoing proceeding on grid resilience which follows from FERC's rejection of the DOE's grid resiliency pricing measure in January 2018 (the DOE proposal would benefit plants that can demonstrate 90 days' worth of fuel on site, such as coal and nuclear facilities). Additionally, State regulatory authorities in Texas have voiced concern that the continued independence of Texas' grid operator, the Electric Reliability Council of Texas ("ERCOT"), from FERC jurisdiction is also currently under threat. ERCOT has remained independent because its synchronous electrical interconnections are contained wholly intrastate, however commentary by FERC in *EP Energy Partners, Inc.*, 164 FERC 61,056 (Docket No. TX18-1-000) suggests that developments outside Texas, which ERCOT has no control over, could create the potential to commingle power with other States through Mexico's national grid.

In June 2018, FERC issued an order, on a split 3-2 vote, responding to PJM's proposed revisions to its capacity market that would address State-subsidised generating resources (e.g. nuclear power plants receiving zero emissions credits, and wind and solar projects backed by a State renewable portfolio standard). PJM had presented FERC with a choice between two alternative proposals, either of which, PJM argued, would satisfy the "just and reasonable" standard of review under the Federal Power Act. In its order, FERC rejected both proposals, and took the additional step of declaring the existing structure of PJM's capacity market as "unjust and unreasonable". FERC proposed a new plan and ordered that PJM develop a new market design. FERC's proposal would give State-subsidised generating resources a choice between participating in the capacity market under a stringent minimum offer price rule that would effectively negate the bidding advantages of the State subsidy, or withdrawing from capacity market participation altogether. PJM has had difficulty reaching a consensus on the capacity market revisions under its stakeholder process and FERC has agreed to delay the capacity auction for the 2022–2023 delivery year to August 2019, to allow implementation of the new rules for generators.

FERC has been embroiled in another heavily scrutinised jurisdictional battle arising out of the bankruptcy of two large utilities, PG&E and FirstEnergy Solutions Corporation. Prior to PG&E's bankruptcy filing, FERC ruled on petitions filed by NextEra and Exelon, finding that it has "concurrent jurisdiction" with Federal Bankruptcy Courts on the question whether bankrupt utilities can reject FERC-jurisdictional power purchase agreements. At the time of that ruling, a similar question was the subject of a pending appeal arising from the bankruptcy of FirstEnergy Solutions Corporation in the U.S. Court of Appeals for the Sixth Circuit. That appeal concerns the Bankruptcy Court's decision to grant a preliminary injunction barring FERC from ruling on the matter. PG&E is seeking similar relief in its case, including an injunction and order that the Bankruptcy Court has exclusive jurisdiction over the rejection of PG&E's executory contracts.

On February 15, 2018, FERC issued Order No. 841 – "Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators". The FERC order requires each RTO and ISO to revise its tariff in order to facilitate the participation of electricity storage resources in organised markets for energy, capacity and ancillary services. Storage solutions, such as pumped-storage hydro and battery storage, can operate as alternatives to gas-peaking plants in periods of peak demand, enhancing reliability and assisting to manage the continual integration of intermittent renewable energy into the grid. The FERC order seeks to institute a consistent legal framework for storage projects within energy markets and follows an increasing level of investment in battery storage projects as the costs of lithium-ion batteries falls and movements are made towards the large-scale commercialisation of business models for these projects.

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In implementing Order No. 841, FERC granted liberal deadlines for tariff amendments to be submitted and additional time after that for implementation of the tariff revisions. In the meantime, battery projects have progressed supported by revenues from utility and corporate customers and capacity markets. In December 2018, Macquarie Capital raised a $100 million debt financing to support a 52.5 MW / 315 MWh behind-the-meter battery storage portfolio developed by Advanced Microgrid Solutions and backed by contracted revenue with Southern California Edison. These distributed storage projects demonstrate some similarities with the successful distributed solar generation model, as they are located at customer facilities where they provide energy efficiencies to the host. On February 5, 2019, an aggregate residential distributed generation solar-plus-storage bid by Sunrun for 20 MW of distributed grid capacity was accepted into ISO-NE's capacity auctions for the 2022–2023 commitment period. This was followed, on February 25, 2019, by FERC's acceptance of revisions to ISO-NE's tariff that expand energy storage resources' ability to provide capacity, energy and ancillary services in ISO-NE's markets.

IV. Impact of the Tax Cuts and Jobs Act ("TCJA") and Other Tax Decisions

The TCJA enacted at the end of 2017 has resulted in the most significant changes to Federal tax law since the Tax Reform Act of 1986. The headline policy takeaway from the TCJA is a cut in the highest corporate income tax rate from 35% to 21% and the highest individual income tax rate from 39.6% to 37%. In implementing this policy, the TCJA has also made fundamental changes to available deductions and the manner in which the United States taxes income of U.S. taxpayers generated outside of the United States. Certain of the more important changes affecting project financing in the United States are summarised below.

The TCJA included favourable treatment for infrastructure, with certain regulated transmission assets granted an exemption from a new limitation on the deductibility of interest expense against taxable income. The implications of the legislation were nevertheless not universally favourable. Although not a direct policy objective of the TCJA, regulated infrastructure assets faced a significant challenge from the implementation of the TCJA following the 2016 decision of the D.C. Circuit in *United Airlines v. FERC* (No. 11-1479), where the court vacated FERC's approval of the tariff for the SFPP pipeline, finding that the pipeline operator was receiving a "double recovery" of income tax costs. On March 15, 2017, to address the *United Airlines* decision and a need to re-evaluate pipeline revenue requirements for tax costs as a result of the income tax reductions provided by the TCJA, FERC stated that it would no longer allow a master limited partnership ("MLP") to include tax distributions (a hypothetical tax amount reflecting a distribution to the MLP's equity owners for the payment of income tax) as a cost for ratemaking purposes. In making its order, FERC also commented that other partnership and pass-through entities must, if claiming an income tax allowance, address the double-recovery concern. The final rule was issued on July 19, 2018. The rule has seen pipeline companies elect to be treated as corporations for tax purposes, in order to preserve their expected rate base (which may be crucial for project economics, for example, where anchor shippers have a "most favoured nation" provision in respect of their negotiated rates).

The United States renewables market has relied on a substantial amount of tax equity investment, where financial institutions and large corporates invest capital in renewable energy transactions (principally wind and solar projects) based largely upon the tax benefits (tax credits and depreciation deductions) expected from their investment. By reducing the Federal income tax payable by those investors the TCJA has reduced the value of the tax benefits associated with tax equity investments (for example, the economic value of depreciation and interest deductions has declined from $0.35 to $0.21). This shift has resulted in a transition of renewable project capital sources towards greater debt, which is usually lent in a "back-leverage" loan that is structurally subordinated to the tax equity investment.

Among the revenue raising provisions in the TCJA is the "Base Erosion and Anti-Abuse Tax" (the "BEAT"), which is a minimum tax imposed on certain large taxpayers that make certain tax-deductible payments to non-U.S. based related parties. The way the BEAT is calculated may cause an equity investor otherwise subject to the BEAT to permanently lose a portion of the tax credits it claimed with respect to its investments in renewable projects. The BEAT is measured at the end of the tax year, making it difficult for investors to definitively predict whether it would apply, and to what extent, particularly early in the year when investors are committing to fund projects. Some large investors have been cautious about committing to project financing investments until they determine their potential exposure to the BEAT and those investors most likely to be impacted have generally built certain protections into their tax equity investment documents against the application of the BEAT.

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

See the financings referred to in question 1.1 above. We expect the Block Island Wind Farm financing (and the aborted Cape Wind financing) and recent LNG financings to prove to be useful reference points for the larger project financings expected to hit the market in the coming year.

2 Security

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

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

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

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

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

A lien may be taken over real property, subject to the real property laws of the State in which the real property is located, through a mortgage,

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

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

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

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

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

Yes. Perfection of rights in deposit accounts and money deposited in those accounts is achieved by control rather than by the filing of a UCC-1 (subject to special rules that apply to proceeds of collateral in which the secured party had a perfected interest). Control in accounts is generally achieved by the secured party entering into an agreement with the debtor and the depositary bank under which the depositary bank agrees to comply with the secured party's instructions on disbursement of funds in the deposit account without further consent by the debtor.

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

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

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

Depending on the relevant State, city and county laws, recording fees and taxes for perfecting a security interest in certain property may apply.

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

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

Please see question 2.6 above. A UCC-1 financing statement is typically filed on the same day as closing, and may be filed prior to that date. For transactions involving a real estate mortgage, the longest lead-time item is typically the process of obtaining a real estate survey and preliminary title report and obtaining certain deliverables necessary for the title insurance company to provide requested endorsements. This process can take one to two months depending on how large the property is or the location of the property.

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

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

3 Security Trustee

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

Yes. Under New York law-governed security documents where

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there are multiple lenders or syndication is contemplated, a collateral agent is nearly always appointed to act on behalf of the lenders with respect to the collateral.

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

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

4 Enforcement of Security

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

The cost and time required to execute enforcement decisions depends on the location and nature of the project and the identity of the project parties. For example, a direct or indirect change in control over electric power assets subject to the jurisdiction of FERC must be approved by FERC. FERC has jurisdiction over most sellers into wholesale electric markets and electric power transmission facilities in the contiguous U.S. States other than in the ERCOT region, which is subject to the jurisdiction of the State of Texas. Certain small power generators known as "qualifying facilities" may qualify for exemption from FERC approval of changes in control. Moreover, if the remedies to be exercised involve direct taking of assets subject to FERC hydroelectric licensing rules, or an interstate natural gas pipeline or underground gas storage facility that holds a FERC certificate of public convenience and necessity, transfer of the licence or certificate may be required. Certain State laws and regulations may also require approvals, such as New York State, which generally parallels FERC regulations. Most States, however, require approval only if the assets are in the nature of a "traditional" public utility serving captive customers under cost-based rates or are subject to a certificate of public convenience and necessity issued under State law.

Similar considerations arise with nuclear facilities, for which the operator will hold a licence from the Nuclear Regulatory Commission ("NRC"), and any transfer of such licence that might need to accompany an enforcement action would require separate NRC approval, recognising that only the licensed operator may operate a nuclear power plant. It should be noted that foreign entities are not allowed to hold an NRC nuclear power plant operating licence or to exercise control over the licensee. Many energy facilities include a radio communication system licensed by the Federal Communications Commission ("FCC"), and a transfer of ownership of the FCC licence related thereto will require prior approval from the FCC. In addition, there are restrictions on the grant of a security interest in an FCC licence; generally, such security interests are limited to an interest in the proceeds thereof rather than the licence itself.

Any foreclosure or enforcement action is also subject to: (i) the possible imposition of the automatic stay under the Federal Bankruptcy Code, Title 11 of the United States Code ("Bankruptcy Code"), if the title-holder commences a case under the Bankruptcy Code; and (ii) more generally, for any non-judicial foreclosure, the obtaining of a specified injunction halting the auction or other proceeding. The consummation of collateral disposition transactions may require notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (as amended) and expiration or termination of a waiting period prior to completion. An exemption applies to certain acquisitions by a creditor in the ordinary course of business (such as in connection with an acquisition in foreclosure, default, or a *bona fide* debt workout). There are certain restrictions on the exemption's applicability to sales out of bankruptcy and subsequent disposals by the creditor.

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

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

See section 6 below. As noted in question 4.1 above, foreign investors or creditors may also need to structure their holdings to avoid adverse consequences of taking a direct or an indirect ownership interest in any tax equity investment.

5 Bankruptcy and Restructuring Proceedings

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

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

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A secured creditor is not, however, without protection in a case under the Bankruptcy Code. For instance, a secured creditor is generally entitled to "adequate protection" of its interest in a debtor's collateral, and there are limits on the ability of the project company to use some types of collateral, or to dispose of collateral, without the secured creditor's consent. In particular, the project company will not be permitted to use cash collateral (cash and cash equivalents) without the agreement of the secured party or an order of the Bankruptcy Court. In any sale of collateral (other than ordinary-course-of-business sales, such as sales of inventory in normal business operations) during a bankruptcy case, the secured creditor generally has the right to "credit-bid" its claim against the debtor, although that right can be limited by the Bankruptcy Court for cause. The determination of cause is fact-intensive, and in several recent cases Bankruptcy Courts have found that such cause existed, in order to facilitate an auction with active, competitive bidding. It should also be noted that in the context of a plan of reorganisation, a secured creditor cannot be compelled to accept a plan through a "cramdown" when the plan provides for the auction of the secured creditor's collateral without giving the secured creditor the right to credit-bid. But it is still possible to cramdown a secured creditor by providing it with the indubitable equivalent of its secured claim, which can include substitution of collateral.

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

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

Under the Bankruptcy Code, the term "transfer" is broadly defined, and includes the grant or perfection of a security interest. The grant of a security interest to a lender may be "avoided", or set aside, if the security interest is unperfected. In addition, a lender's perfected security interest may be avoided as either a "preference" or a "fraudulent transfer". It is important to note that there is no requirement for there to be actual fraud or wrongdoing for a transfer to be avoided under either of these theories. A lender's security interest in a project company's property may be avoided as a preference if (i) the lender perfects the security interest during the 90 days (or one year, if the lender is an "insider" of the project company) preceding the commencement of the project company's bankruptcy case, (ii) that transfer is made for or on account of an antecedent debt owed by the project company to the lender, (iii) the transfer enables the lender to receive more than it otherwise would have received in a liquidation of the project company, and (iv) the lender has no affirmative defence (which include that the transfer was a contemporaneous exchange for new value, that the lender gave subsequent new value, or that the transfer was in the ordinary course of business) to such preference. Under the Bankruptcy Code and applicable State laws, a constructive fraudulent transfer claim can be asserted to avoid a transfer that the project company made to the lender if both (i) the project company made the transfer in exchange for less than reasonably equivalent value, and (ii) the project company at the time of the transfer was, or was thereby rendered, insolvent, inadequately capitalised, or unable to pay its debts as they matured. For this purpose, the securing or satisfaction of a present or antecedent debt of the project company will generally constitute reasonably equivalent value (although it may be an avoidable preference). Under the Bankruptcy Code, the look-back period for constructive fraudulent transfer claims is two years before the commencement of the bankruptcy case. Under State laws, the look-back period can vary, depending on the State, and can be up to six years. If a transfer is avoidable as either a preference or a fraudulent transfer, the project company may be able to cancel the security interest and force a return of the property, which may be used to pay all creditors. It should be noted that not all transfers made during the applicable look-back period are avoidable, and these inquiries are generally fact-intensive.

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

The Bankruptcy Code excludes from the category of entities that are eligible to be debtors in a bankruptcy case: governmental entities (other than municipalities); domestic insurance companies; domestic banks; foreign insurance companies engaged in such business in the U.S.; and foreign banks with a branch or agency in the U.S. In addition, the Bankruptcy Code has special provisions for particular types of eligible entities, such as railroads, municipalities, stockbrokers and commodity brokers.

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

Outside of court proceedings, creditors may be permitted to exercise self-help remedies depending upon the nature of the collateral, provisions of the applicable security agreements, and the governing law. For example, the UCC generally authorises a secured creditor, after default, to take possession of, to collect on, and to dispose of (such as by public or private sale), personal-property collateral without first commencing a court proceeding, provided that the secured creditor complies with particular formalities and proceeds without breach of the peace.

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

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

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

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

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6 Foreign Investment and Ownership Restrictions

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

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

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

As noted above in question 4.1 above, a foreign entity cannot hold a U.S. nuclear plant operating licence issued by the NRC or otherwise control the licensee. A foreign entity cannot directly hold a FERC hydroelectric licence, but may own or control a U.S. company that holds such a licence.

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

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

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

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

7 Government Approvals/Restrictions

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

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

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

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

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

The Environmental Protection Agency ("EPA") governs the issuance and enforcement of most Federal environmental permits. Environmental permits can also be required by State, local and other Federal governmental authorities.

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

There are a number of registration and filing requirements for financing or project documents that depend on the nature of the project and identity of the parties. For example, pursuant to Section 204 of the Federal Power Act, FERC requires approval of issuances of securities or assumptions of liabilities (e.g. incurrence of debt), subject to certain exceptions, for companies subject to its electric power jurisdiction. FERC customarily grants electric power generators with MBR Authority blanket approval for jurisdictional financings, and the owners of certain qualifying facilities are exempt from FERC regulation of financings. It should be noted that FERC will not regulate such financing approvals if a State regulatory authority with jurisdiction actively regulates the proposed financing.

Please refer to question 18.2 below for SEC-related requirements.

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

Please see questions 4.1, 6.1 and 7.1 above. In addition, the operation of certain U.S. telecommunications infrastructure that is licensed by the FCC may be subject to direct or indirect foreign ownership restrictions, and, with the exception of broadcast radio and television assets, in many cases waivers of such foreign ownership restrictions are available for investors that are domiciled in countries that provide reciprocal market access for U.S. investors to own or invest in similar telecommunications infrastructure.

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

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

In general, no specific Federal taxes are imposed on the extraction of natural resources, although income taxes are imposed on profits from sales. Domestic crude oil used in or exported from the United States is also subject to Federal tax. Income taxes may apply to sales outside of the United States to the extent such sales are related to business conducted in the United States.

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

The United States does not generally impose controls or fees on foreign currency exchange. However, U.S. persons, which include U.S. companies and their foreign branches, are generally prohibited from engaging in transactions with foreign individuals or entities that are, or are owned or controlled by one or more individuals or entities that are, (i) designated on U.S. sanctions-related restricted party lists (including the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC")), (ii) organised or resident in a country or territory against which the United States has imposed comprehensive sanctions (currently, the Crimea region of Ukraine, Cuba, Iran, North Korea and Syria), or (iii) otherwise the subject or target of economic or financial sanctions imposed by the U.S. government (including the OFAC and the U.S. Department of State), subject to limited exceptions. In addition, U.S. persons and foreign persons engaged in business in the United States are subject to U.S. Federal and State income taxes on foreign currency exchange gains. Additionally, under the Currency and Foreign Transactions Reporting Act of 1970 (as amended by the USA PATRIOT Act of 2001) and the implementing regulations issued thereunder (collectively referred to as the "Bank Secrecy Act"), U.S. financial institutions are required to establish and implement an effective anti-money laundering ("AML") compliance programme. Elements of an effective AML compliance programme include, among others, establishing effective policies and procedures to manage AML risks, detecting and reporting suspicious activity, and complying with reporting and recordkeeping requirements with respect to currency transactions that exceed certain monetary thresholds. In addition, U.S. persons and foreign persons engaged in business in the United States are subject to U.S. Federal and State income taxes on foreign currency exchange gains.

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

Other than the withholding taxes discussed in question 17.1 below, there are no such generally applicable restrictions. However, under the BEAT, described above, restrictions may apply to certain very large U.S. companies that make payments of interest, which are deductible against their U.S. income, to foreign affiliates.

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

Yes, they can.

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

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

Apart from the withholding taxes discussed under question 17.1 below, New York law financing documents, which often impose restricted payment conditions on the issuance of dividends, and shareholders' agreements, typically contain restrictions. In addition, project companies subject to FERC regulation of issuances of securities and assumption of liabilities under Section 204 of the Federal Power Act, other than blanket authority under MBR Authority (discussed at question 7.2 above), are subject to certain restrictions, such as restrictions requiring parent debt obligations to follow up to the parent company if a project company borrows at the public utility level and "dividends up" the proceeds to its non-public utility parent.

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

The Clean Air Act and the Clean Water Act are generally the most material Federal statutes that would impact power project construction and operation. Permits related to air emissions and water discharges under these statutes and similar State laws may be required by the EPA or by State or local governmental authorities prior to the start of construction and for operation. In addition, known or likely contamination could be governed by the Federal Superfund statute and other laws.

Any major Federal action or decision, including the granting of certain permits by the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, or the approval of a loan guarantee by the DOE, is subject to a comprehensive environmental review under NEPA. Some States, notably California, require a similar State-level comprehensive environmental review of discretionary governmental actions relating to power project permitting and siting. There are opportunities for public notice, comment and challenge in the application process for some permits and pursuant to NEPA.

In terms of international frameworks, the Equator Principles are voluntary and would only be used with respect to a project if required by the applicable financial institution and for certain types. As of January 1, 2019, 94 financial institutions in 37 countries have adopted the Equator Principles. Since the U.S. has comprehensive environmental laws and is considered a designated country,

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covenants to comply with environmental law in conjunction with the performance of standard due diligence are often deemed sufficient for projects located in the U.S. As a result, representations and warranties and covenants expressly related to the Equator Principles are often either not included in the applicable project agreement or limited to a general statement of material compliance with the Equator Principles. However, the Equator Principles are currently under review for amendment by the Equator Principles Association and can potentially, at least in part, result in additional obligations related to domestic projects, which, in turn, could increase the scope and extent of related covenants and representations in applicable project agreements.

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

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

8 Foreign Insurance

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

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

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

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

9 Foreign Employee Restrictions

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

Generally, and subject to State law, foreign persons may be appointed as corporate officers or directors of a project company. To be employed by a project company or receive a salary or compensation for services provided within the United States as a foreign person, there is a requirement to have work authorisation in accordance with U.S. immigration laws. This can be achieved via various "non-immigrant" or temporary visa categories, which are typically based on employer sponsorship. In addition, work authorisation might be obtained via permanent resident status (also known as green card or immigrant status), often through sponsorship from an employer (which can be a difficult and lengthy process) or from sponsorship by an immediate family member who is a U.S. citizen (which may be less difficult than employer sponsorship but is generally a lengthy process).

Note that for most project finance transactions, project companies do not typically hire employees, who are often engaged by the operator and asset manager.

10 Equipment Import Restrictions

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

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

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

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

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

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

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

12 Corrupt Practices

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

Yes, the Foreign Corrupt Practices Act of 1977 ("FCPA") contains two sets of relevant provisions: (i) its anti-bribery provisions prohibit U.S. persons and persons otherwise subject to U.S. jurisdiction from making corrupt payments (including bribes, kick-backs and other improper payments) to officials and agents of foreign governments and State-owned enterprises; and (ii) its accounting provisions require companies whose securities are listed on stock exchanges in the United States to (a) make and keep books and records that accurately and fairly reflect the transactions of the company (including transactions involving foreign government officials or agents), and (b) devise and maintain an adequate system of internal accounting controls.

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

13 Applicable Law

13.1 What law typically governs project agreements?

Project agreements may be governed by the law of any State but may be subject to the doctrine of *lex situs* (i.e. the rule that the law applicable to proprietary aspects of an asset is the law of the jurisdiction where the asset is located).

13.2 What law typically governs financing agreements?

New York law typically governs financing documents given the status of New York City as a major financial centre that provides for a reasonably settled and certain application of commercial laws and legal precedents and that permits liberal enforcement of the choice of New York law. Certain security documents, such as a real estate mortgage, may be legally required to be governed by the law of the State in which the collateral is located.

13.3 What matters are typically governed by domestic law?

Please see questions 13.1 and 13.2 above.

14 Jurisdiction and Waiver of Immunity

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

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

15 International Arbitration

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

Yes, they are typically recognised by local courts.

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

Yes, the United States is a Contracting State to the New York Convention, which requires courts of Contracting States to give effect to arbitration agreements and recognise and enforce awards made in other States, subject to reciprocity and commercial reservations. The United States made a reservation that it will apply the New York Convention only to awards made in the territory of another Contracting State and only to disputes arising out of legal relationships (whether contractual or not) that are considered commercial under the relevant national law.

The United States is also party to: (i) the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), which governs international arbitral awards where expressly agreed by the parties or where "a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified or acceded to the Panama Convention and are member States of the Organization of American States" only; and (ii) the International Convention on the Settlement of Investment Disputes ("Washington Convention"), which is applicable to disputes between a government entity and a national of another Signatory State.

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

Yes, certain disputes involving family law and criminal law are not arbitrable. Claims under securities laws, Federal antitrust laws and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act have been found by the U.S. Supreme Court to be arbitrable.

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

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

16 Change of Law / Political Risk

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

Generally, no.

17 Tax

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

Withholding of U.S. Federal income tax at a rate of 30% is generally required on payments of interest, dividends, royalties and other amounts (not including principal on loans or distributions by corporations that are treated as returns of capital) to foreign persons unless attributable to a branch office maintained by the recipient within the United States. The United States maintains treaties with numerous jurisdictions that reduce or eliminate these withholding taxes on amounts paid to qualified residents of the counterparty treaty country. In addition, interest paid to foreign persons, other than banks on loans made in the ordinary course of business, is exempt from this withholding tax if certain requirements are satisfied, including that the loan is not in bearer form and the lender is unrelated to the borrower.

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

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

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

There are very few Federal incentives targeted at foreign investors or lenders other than the broad exemption from withholding tax on interest payment described in question 17.1 above.

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

18 Other Matters

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

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

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

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

19 Islamic Finance

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

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

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

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

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

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

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

In the U.S. Bankruptcy Court case of *In re Arcapita Bank, B.S.C.(c), et al.*, Case No. 12-11076 (SHL) (Bankr. S.D.N.Y.), an investor of the debtors objected to the debtors' motion to approve debtor-in-possession and exit financing, asserting, among other things, that the financing was not *Shari'ah*-compliant. In statements made on the record, the court noted that the financing agreement was governed by English law and expressly provided that no obligor was permitted to bring a claim based on *Shari'ah* compliance of the finance documents. The court then appeared to adopt the English courts' approach of avoiding ruling or commenting on compliance of an agreement with *Shari'ah* law, citing a recent English court case that found that, irrespective of *Shari'ah* compliance, *Shari'ah* law was not relevant in determining enforceability of a financing agreement governed by English law, and that *Shari'ah* principles are far from settled and subject to considerable disagreement among clerics and scholars. However, the precedential value of the *Arcapita* Bankruptcy Court's refusal to consider whether the financing was *Shari'ah*-compliant may be limited, given that the district court dismissed the objector's appeal of the Bankruptcy Court's approval of the financing (along with an appeal asserted by the objector of confirmation of the debtors' chapter 11 plan of reorganisation) as equitably moot.

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

No, subject to State usury laws restricting excessive interest.

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Daniel J. Michalchuk

Milbank LLP
55 Hudson Yards
New York, NY 10001
USA

Tel: +1 212 530 5079
Email: dmichalchuk@milbank.com
URL: www.milbank.com

Daniel J. Michalchuk is a partner in the New York office of Milbank LLP and a member of the firm's Global Project, Energy and Infrastructure Finance Group. Mr. Michalchuk represents project sponsors and financial institutions in numerous domestic and international project financings. Mr. Michalchuk received a B.A. from Queen's University, Canada, an M.A. in International Relations from Carleton University, Canada, an LL.B. from University of Ottawa, Canada and an LL.M. in International and Comparative Law from Georgetown University Law Center. He is top ranked by *Chambers USA* in Projects-Nationwide. Mr. Michalchuk is admitted to practise in New York.

Richard M. Hillman

Milbank LLP
55 Hudson Yards
New York, NY 10001
USA

Tel: +1 212 530 5326
Email: rhillman@milbank.com
URL: www.milbank.com

Richard M. Hillman is a special counsel in the New York office of Milbank LLP and a member of the firm's Project, Energy and Infrastructure Finance Group. Mr. Hillman's experience includes advising lenders, sponsors and other project participants on a range of U.S. and international project and structured finance transactions. Mr. Hillman received a LL.B. (Hons) and B.Com (Hons) from The University of Western Australia and a Master of Banking and Finance Law from The University of Melbourne. He is admitted to practise in New York and Victoria, Australia. Mr. Hillman has published papers in the *Company and Securities Law Journal* and the *Australian Resources and Energy Law Journal* and was a student editor at *The University of Western Australia Law Review*.

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

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