The Projects and Construction Review

Ninth Edition

Editor
Júlio César Bueno

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THE PROJECTS AND CONSTRUCTION REVIEW

NINTH EDITION

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Júlio César Bueno

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PREFACE

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

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from new jurisdictions in this edition: Ghana and the Philippines. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors, and their law firms who graciously agreed to participate.

Finally, I dedicate this ninth edition of *The Projects and Construction Review* to a dear friend, the late John (Jack) Bernard Tieder, Jr, who died on 3 December 2017. Jack was the founding partner of Watt, Tieder, Hoffar & Fitzgerald LLP and the Global Construction and Infrastructure Law Alliance. He is much missed and I am most grateful for his friendship, and all his support and guidance during my path as a construction lawyer. He leaves behind a large extended family and many close friends and esteemed associates around the world.

Júlio César Bueno
Pinheiro Neto Advogados, São Paulo
June 2019

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A dedication to Jack Tieder (1946-2017)
by Professor Doug Jones AO

Jack Tieder was one of the doyens of the International Construction Bar.

Graduating from John Hopkins University and Syracuse and American University School of Law in 1971, he commenced practice as lawyer with the firm of Lewis Mitchell & Moore where he progressed to the ranks of partnership. In 1978 he was a founding partner of the firm then called Watt Tieder Killian & Hoffar and was the senior partner of the firm now known as Watt Tieder Hoffar & Fitzgerald from March 1978 until his passing.

Over the course of his career he contributed to international construction projects practice through the establishment of project delivery and financing structures that ensured success for many major projects around the world. As counsel in court and arbitration he was formidable.

Jack though was more than an attorney. He was a contributor to legal education around the world and to the development of collegiate practice of construction law in the United States and elsewhere in the world. An example only was his foundation fellowship of the American College of Construction Lawyers.

I knew Jack for many years and his commitment in a variety of ways outside the law to the assistance of young people wanting to make their way in the law and to education of lawyers in parts of the world outside his home country was quite extraordinary. For many years he coached teams at the Willem C Vis Moot and regularly lectured in eastern Europe and Russia to local practitioners to bring to them an international perspective of the practice to which they aspired.

Jack was a runner of some note, who during his life maintained a fitness regime that was the envy of his friends. His expertise in, and love of, beer was legendary.

In recent times, Jack undertook a significant amount of work as an arbitrator and it has been my privilege to sit with him in that role. His experience of practice around the world equipped him well to decide disputes in the international construction context and his capacity for incisively cutting to the chase on the key issues in complex cases was awe-inspiring.

In a case recently concluded I worked with Jack in hearings during the period in which he was undergoing some quite significant medical procedures. His cheerful acceptance of what for many would be regarded as seriously debilitating effects of surgery and other treatment was inspiring to those of us who were working with him. His mind remained sharp until the end and in very recent times his dedication to the conclusion of issues in the case was remarkable, his work insightful and his judgement impeccable. Upon recent news of the return of his illness, he faced the position with courage and amazing good humour.

We have lost a giant of the construction law industry, who will remain a legend to all who knew him.

It has been our privilege to have Jack as a Fellow and mine to have him as a colleague and a friend.

He will be missed by all of us, but not nearly as much as by Rufus and the family. At this time all our thoughts and prayers are with Rufus and the children and grandchildren with whom doubtless the memories of Jack's personality and contribution to their lives will remain strong forever.

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Chapter 19

UNITED KINGDOM

Munib Hussain and Yi Ming Chan[1]

I INTRODUCTION

The United Kingdom has an established history of using project finance to fund infrastructure projects nationally in most sectors, including transport, telecommunications, schools, hospitals, power and water. A number of different project finance structures have been developed and adopted for this purpose, including the private finance initiative (PFI) and other variants of the public-private partnership (PPP) model, which have been used extensively to fund key infrastructure projects. The PFI and PPP models are discussed further later in this chapter.

The UK is also a key hub from where international project financings are structured, negotiated and documented, despite the underlying project being located elsewhere. The international English-law finance market far outstrips the domestic UK project finance market in both volume and size of deals.

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. Each year, the UK government publishes a National Infrastructure and Construction Pipeline (the NIP). In 2018, the NIP confirmed that the current value of UK projects, relating to the transport, energy, utilities, digital infrastructure and flood and coastal, science and research, and social infrastructure sectors was at more than £188 billion (combined public and private investment), of which at least £125 billion is expected to be delivered by 2020–2021. Through these investments and projects, the government aims to improve living standards, drive economic growth and boost productivity. The two largest sectors, energy (which boasts investment of £51.7 billion from 2018–2019 to 2020–2021) and transport (£54.9 billion from 2018–2019 to 2020–2021), account for over half of the infrastructure pipeline's total value.

Multilaterals and export credit agencies have continued to participate in the market, and existing institutions (re-branded with additional products to help fill debt financing gaps) have continued to invest in the UK's energy and infrastructure sectors (especially in light of the UK's anticipated exit from the European Union, which has, seemingly, buoyed government commitment to investing in UK infrastructure, and the availability of funds for UK bilateral and multilateral institutions investing abroad – this is particularly the case in the government's treatment of UK Export Finance's (UKEF) Direct Lending Facility).

1 Munib Hussain is a senior associate and Yi Ming Chan is an associate at Milbank LLP.

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By way of example:

a the European Investment Bank continues to maintain its Europe 2020 Project Bond Initiative;

b the UK Green Investment Group, with a mandate to finance 'green' projects, saw its £250 million energy-to-waste project (Rookery South Energy Recovery Facility) reach financial close in March 2019; and

c UKEF's Direct Lending Facility was granted a £2 billion direct lending capacity expansion, which is expected to come on-stream in two £1 billion amounts in 2020–2021 and 2021–2022.

II THE YEAR IN REVIEW

The year 2018 marked a dramatic change in the UK projects and construction landscape. The most prominent development was the government's announcement that it would no longer be using the controversial PFI approach for future infrastructure projects. This move was not entirely unexpected, however. PFI had become politically unpopular owing to the public's perception that PFI projects were not good value for money[2] and that the operation of public infrastructure under the PFI model was sub-optimal.[3] Moreover, the use of PFI had already been on a steady decline – PFI projects signed before May 2010 had a capital value of £50.6 billion, compared to £8.4 billion for projects after May 2010,[4] while newly commissioned PFI projects had fallen from a high of 68 in 2004 to just one in 2018.[5]

Nevertheless, PFI will still be a feature in the UK projects and construction sector. The government has promised to continue to honour its commitments for existing PFI projects,[6] partly because of the high cost of compensation required to voluntarily terminate PFI contracts.[7] PFI contracts also typically run for between 25 and 30 years;[8] there is even one contract with a term of 52 years that concludes in 2049–2050.[9] Furthermore, capital spending on public infrastructure is a devolved policy area, and thus the devolved administrations of Northern Ireland, Scotland and Wales are still free to commission new PFI projects.[10] PFI projects will thus be quietly humming in the background for many years to come.

2 See House of Commons Library, Briefing Paper Number 6007, 13 May 2005, pages 9 and 10, https://researchbriefings.files.parliament.uk/documents/SN06007/SN06007.pdf.

3 See HM Treasury, 'A new approach to public private partnerships', December 2012, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf.

4 See HM Treasury and Infrastructure and Projects Authority, 'PFI and PF2 data for current and in procurement projects as at 31 March 2017 and summary data document', https://www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2017-summary-data.

5 See House of Commons Library Podcast, 'Goodbye PFI', https://commonslibrary.parliament.uk/parliament-and-elections/government/goodbye-pfi/.

6 ibid.; see also HM Treasury, Budget 2018 – Private Finance Initiative (PFI) and Private Finance 2 (PF2), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752173/PF2_web_.pdf.

7 See footnote 5.

8 See footnote 2, above, (Briefing Paper Number 6007), page 2.

9 See footnote 5.

10 See HM Treasury, Budget 2018 – Private Finance Initiative (PFI) and Private Finance 2 (PF2), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752173/PF2_web_.pdf.

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Another recent and significant development in the projects and construction sector is the collapse (or near collapse) of several major UK private outsourcing and construction groups. The slow descent of UK construction giant Carillion into liquidation in January 2018 with debts of £1.5 billion[11] sent the sector into a tailspin, compounding its misfortune. Lenders to the sector were put on notice as to the creditworthiness of outsourcing and construction firms, restricting liquidity and forcing these firms to fix their balance sheets.[12] Public infrastructure projects with which Carillion was involved, such as the HS2 rail project, required joint-venture partners to pick up the pieces after Carillion's liquidation, further putting stress on their operations and finances.[13] The UK government had to guarantee £100 million of business loans to thousands of Carillion's suppliers[14] and shoulder an estimated £148 million in losses associated with Carillion's suppliers,[15] which was undoubtedly a factor that influenced its eventual decision to abolish the use of PFI.

Few firms came out of this unscathed. For example, Interserve, one of the UK's largest government contractors, went into administration in March 2019,[16] and Kier, another major UK construction and services company, had to launch a £264 emergency rights issue in the year end of 2018 to shore up its balance sheet and pay down its debts.[17] There is likely to be further volatility in this sector during the rest of 2019 and the years ahead.

On a separate note, at the time of writing (late May 2019), it remains unclear how the legal landscape for the UK projects and construction sector will be affected post-Brexit. The original date planned for the UK's exit from the European Union (29 March 2019) was not met and the deadline has been extended to 31 October 2019 to allow the UK government to conduct further negotiations with the EU and pass legislation to approve the EU withdrawal agreement. Hence, there have been no concrete indications as to how important legal issues affecting the sector, such as tariffs on construction materials, access to the credit markets (including the European Infrastructure Bank) and the impact of the EU procurement directives (such as the Public Contracts Regulations 2015 SI 2015/102), would be resolved. Nevertheless, it has been suggested that there is cause for optimism regarding UK government liquidity support for infrastructure projects post-Brexit, such as through the creation of a UK infrastructure bank.[18]

11 See 'Carillion collapse to cost taxpayers £148m', BBC News, 7 June 2018, https://www.bbc.co.uk/news/business-44383224.

12 See 'Interserve shares sink as it battles to avoid Carillion's fate', Reuters Business News, 10 December 2018, https://uk.reuters.com/article/uk-interserve-stocks/interserve-shares-sink-as-it-battles-to-avoid-carillions-fate-idUKKBN1O90QJ.

13 See 'Carillion: Kier Group boss foresees new bid process', BBC News, 24 January 2018, https://www.bbc.co.uk/news/business-42801161.

14 See 'Carillion collapse: UK puts up £100m to back Carillion contractor loans', BBC News, 3 February 2018, https://www.bbc.co.uk/news/business-42925155.

15 See footnote 11.

16 See 'Interserve: UK contractor completes fast-track sale', BBC News, 15 March 2019, https://www.bbc.co.uk/news/business-47582406.

17 See 'Rising debts force Kier to launch £264m rights issue', *Construction Enquirer*, December 2018, https://www.constructionenquirer.com/2018/11/30/rising-debts-force-kier-to-launch-264m-rights-issue/.

18 See 'UK infrastructure bank could be needed to plug the post-Brexit funding gap, says Lords EU Committee', House of Lords Media Notices, 31 January 2019, https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/2019/january-2019/uk-infrastructure-bank-could-be-needed-to-plug-the-post-brexit-funding-gap-says-lords-eu-committee/.

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Notable recent project finance deals include Hinkley Point C in Somerset, the Moray East offshore wind farm project, the Beatrice Offshore Wind Farm, the Triton Knoll Offshore Wind Farm, the Galloper Offshore Wind Farm, the £2.2 million Thames Tideway Tunnel, the £6.5 billion Thameslink Programme and the Intercity Express Programme Phase 1 PPP Refinancing.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

The contractual framework for project financings in the United Kingdom varies depending on the size, nature and revenue generation model of the project. Since 1992, the UK government has primarily used the PFI model for public infrastructure projects that are of a smaller scale and capital value, most notably in the health, roads, prisons and education sectors, while larger projects use other variants of the PPP model, such as the concession or joint venture model. What separates the PFI model from other PPP models is that the public sector enters into a contract with the private sector to purchase services in relation to an infrastructure project, rather than, for example, the public sector entering into a contract with the private sector to construct an infrastructure project and then granting the latter a concession to operate the infrastructure project. On the other hand, project financing for private infrastructure projects follows more generic models, such as build-operate-transfer or build-own-operate-transfer.

In most cases, a project financing will include the sponsors of a project and a project company, a government entity, lenders, a special purpose vehicle (SPV) of the project company to facilitate financing, contractors and subcontractors, an operator for the project, insurers and offtakers.

ii Documentation

The types and quantity of documents involved in a project finance transaction will depend on various aspects of the project, such as the sector and use of the project, the ownership structure, regulatory involvement and nature (public or private) of the project.

The sponsors of a project will typically incorporate a limited liability company to be the project company. The articles of association of the project company will govern the relationship between the sponsors as shareholders of the project company and the project company itself, as well as dictate the project company's internal rules and decision-making process. In addition, if there is more than one sponsor of a project, the sponsors will usually enter into a shareholders' agreement that governs their relationships with each other and how the project company should be operated.

The project company would typically will enter into a concession agreement with a government entity, under which the project company is required to, for example, construct, operate and maintain a facility during the concession period. The concession agreement is usually a lengthy document that contains, among other things, the parameters of the project, details and specifications of what the project company must achieve and the allocation of risks between parties.

As it is an SPV with few resources, the project company will seek to subcontract its construction obligations under the concession agreement to a single contractor or several contractors through a single engineering, procurement and construction (EPC) contract or

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several construction contracts. The project company will also enter into a separate operation and maintenance (O&M) contract for the operation of the infrastructure facility, for when the construction work has been completed.

The project company will need to acquire debt to fund the aforementioned activities and will therefore require project financing. This kind of financing is provided through non-recourse financing that is secured against income streams of the project company, typically at high debt-to-equity ratios. As such financing is typically risky for lenders, various security agreements will be required, such as debentures, direct agreements and account bank agreements. It is also typical for parties to enter into a common terms agreement if there are multiple lenders to separate loan facilities for the project.

Depending on the kind of project, the project company may be required by the lenders to enter into offtake agreements to mitigate risks by ensuring a stable revenue stream once the project has been completed. The project company may also be required to agree to fuel and other supply agreements, especially if the project involves the project company processing raw materials.

iii Delivery methods and standard forms

As has been explained, a project company will enter into construction contracts so as to pass down its construction obligations under the concession agreement to a more competent party. Under such a contract, a contractor will undertake to complete the whole or part of the construction of the project and will assume liability for performance defects, cost overruns and construction delays in relation to the project.

In contrast, under an EPC contract, a single contractor is engaged by a project company to deliver a completed project on a turnkey basis. This will require the contractor to manage all aspects of the design, procurement and construction of the project, including the procurement and management of multiple subcontractors. EPC contracts are typically used for complex building projects, especially in the petrochemical, mining and power industries.

Depending on the nature and location of the project, construction contracts may be bespoke or follow standard forms used in the construction industry (such as those from the International Federation of Consulting Engineers (FIDIC)), though these standard forms are often significantly amended to reflect the realities and risks associated with the project.

Project documents for PFI projects were not standardised until 2012 when the UK government introduced a new set of standard documents to be used in PFI projects.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The United Kingdom is generally a safe and stable country and the risk of non-economic-related adverse events occurring (such as natural disasters and wars) is low. Risks associated with project financing transactions are therefore usually confined to:

a construction risk – for example, the risk of there being design or construction issues, unforeseen problems and construction delays;

b operational risk – for example, the risk of failure to complete a project to the standards required under the concession agreement and ongoing O&M issues;

c revenue risk – namely the risk of a project not being able to repay its debt under the project financing because, for example, the project does not produce sufficient output or the anticipated market for the project fails to materialise;

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d insolvency risk – namely the risk of an important party to the project, such as a contractor or the operator, becoming insolvent;

e environmental risk – namely the risk relating to any environmental liabilities that may arise out of the construction or operation of the project; and

f political risk – for example, the risks associated with political instability or policy changes brought about as a result of change in government that could affect the construction or operation of the project or the production of the project.

In so far as is possible, the lenders and the project company will seek to transfer as many risks relating to the construction, completion and operation of the project to the contractors, subcontractors and operators through the various project documents. Insurance may be obtained to mitigate risks that are not successfully transferred under the project documents, and the project company may enter into offtake agreements to reduce revenue risks and hedging agreements to reduce currency risks.

The UK government may also help to reduce project risks, for example by providing contracts for difference for the purchase of electricity or using the regulated asset base model for public infrastructure projects.

ii Limitation of liability

Project companies and their contractors and subcontractors will typically seek to limit their liabilities for any loss or damage caused by their actions, unless their actions resulted in any death or personal injury or such loss or damage was caused by that party's fraud, gross negligence or wilful default. The cap on liabilities under construction contracts will usually be based on a percentage multiple on the construction contract itself, and there may also be a separate cap for damages as a result of delays in the construction. Liability for consequential losses will generally be limited or excluded by the parties.

Project agreements will typically include relief from liability in respect of force majeure. Under such provisions, parties may be required to mitigate losses and seek alternative means of delivering the project, and terminate the agreement if a force majeure event continues for a specific period. Provided that they are properly defined in the agreement, force majeure provisions and exclusions will be enforceable under English law. It must be noted that force majeure events are distinguishable from relief events, in that the latter entitle parties only to an extension of time to perform an obligation but not the right to terminate the agreement.

iii Political risks

Being a free market economy with few barriers for foreign investment in infrastructure projects, project finance transactions in the United Kingdom have not historically been exposed to significant political risks. However, there is a rising threat of (re)nationalisation of public infrastructure and the uncertainty surrounding Brexit's effect on the projects and construction landscape still looms far ahead.

At the time of writing (late May 2019), the Labour opposition party has unveiled its plans to renationalise UK public utility companies and compensate the shareholders of those companies at less than the market value. As some legal commentators have noted, this low level of compensation could be in violation of the European Convention on Human

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Rights or the UK's many bilateral investment treaties, and would not stand in international arbitration tribunals.[19] Despite this, the threat of renationalisation could still deter foreign investors and reduce much-needed private investment in UK infrastructure.

It is still uncertain how and when (and to a certain extent even whether) the United Kingdom will be leaving the European Union, and what the relationship between the two will be like in the future. If the UK and EU do end up agreeing to a deal, it is likely that there will be a transition period for a number of years, during which the UK will continue to be subject to EU laws.

V SECURITY AND COLLATERAL

The main types of securities under English law are mortgages (equitable and legal), charges (fixed and floating), assignments (equitable and legal), pledges and liens. Under English law, security interests over land and floating charges over a company's property or undertaking need to be registered at HM Land Registry and Companies House, respectively. Failure to register a security interest over land will prejudice the priority of the security (but not render the security void), while failure to register a floating charge over a company's property or undertaking within 21 days of the creation of the security will result in the charge being void against an insolvency officer or any creditor of the project company.

In domestic UK project financings, lenders will typically seek to obtain security over all, or substantially all, a project company's assets. This is achieved through multiple agreements with various entities related to the project company.

The lenders will usually enter into a general security agreement, such as a debenture, with the SPV that is used for the project financing. This debenture will include a range of mortgages, charges and assignments depending on the nature of the security assets, and cover all the SPV's rights and assets. The lenders will also seek to further obtain 'cure' and 'step-in' rights to supplement the security, which will allow the lenders to step into the project (or appoint a representative) to complete or operate the project in the event of a project company's default under any of the project documents. This is based on the rationale that the lenders would not be able to recoup their loans even if they were successfully to realise their security over the project, if the project was half-completed.

Lenders may also seek to obtain parent company guarantees from the project company, a charge over the shares of the project company, equity support from the sponsors of the project, and assignments over important EPC contracts and subcontracts.

Finally, the lenders will also seek to restrict the distributions made by the SPV, to ensure that the lenders are paid first from any revenue generated by the project. This is typically done by requiring income streams from the project to be paid into multiple bank accounts with funding institutions and restricting how that money can be withdrawn from those accounts, for example by requiring the project company to hold enough funds in one or more accounts to maintain a specific ratio to the outstanding amount under the project financing. A payment 'waterfall' mechanism is also typically used to direct to whom the income streams of the project should be applied.

19 See 'Labour renationalisation plans "ignore bilateral treaties"', *Utility Week*, 16 May 2019, https://utilityweek.co.uk/labour-renationalisation-plans-ignores-bilateral-treaties/.

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VI BONDS AND INSURANCE

It is common for contractors and subcontractors to provide bonds to employers in project finance transactions in the United Kingdom, so as to secure payments made by the employer against the release of retained monies. These types of bonds are payable on demand (i.e., upon the presentation of the stipulated documentation to an issuing bank).

Performance bonds may also be used in project finance transactions. In contrast to the aforementioned bonds, a beneficiary to a performance bond will only be entitled to the monies promised under a bond if a stipulated default occurs and the beneficiary has evidence of that default.

As mentioned in Section V, the lenders to a project financing may also take parent company guarantees from the sponsors of a project.

Projects may be funded by project bonds issued in the London market and there are no legal requirements that apply exclusively to project companies seeking to issue project bonds. Project companies seeking to issue and list securities on the London Stock Exchange will need to comply with, among other things, the UK Listing Authority's Listing Rules, the London Stock Exchange's Admission and Disclosure Standards, and the relevant Disclosure and Transparency Rules. The applicable rules may also differ according to the project company's market sector and investor base. For example, mineral, oil and natural gas companies are subject to the additional disclosure requirements set out in Chapter 6 of the Listing Rules, whereas there will be less stringent disclosure obligations if the project company is issuing securities to solely professional investors.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

There are different types of insolvency proceedings under English law: administration, receivership or administrative receivership, compulsory liquidation, company voluntary arrangements and schemes of arrangement. In the event of insolvency, existing security will crystallise in relation to the relevant asset, and secured creditors will, in terms of priority in relation to being entitled to the relevant asset, rank ahead of all other parties. In contrast, unsecured creditors will rank behind various preferred creditors, including tax authorities and, to an extent, employees and pension interests.

Many security interests, such as step-in rights and charges of receivables, may be enforced outside insolvency proceedings.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Projects in the United Kingdom are subject to onerous UK and EU environmental regulations (at the time of writing). Environmental considerations are generally dealt with through the planning permission procedure regime in the UK, and specific licences may be required in relation to the construction and operation of projects. Carbon-reduction legislation and emissions trading schemes may also apply.

Note that environmental liability attaches to the polluter, which, in most cases, is the owner of the land on which the project is situated. Hence, lenders must be wary of any potential environmental liability relating to the project when exercising their security rights.

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ii Equator Principles

The Equator Principles is an internationally recognised risk management framework adopted by financial institutions to determine, assess and manage environmental and social risk in project finance transactions and project-related corporate loans and bridge loans. Financial institutions that adopt the Equator Principles commit to not providing project finance or project-related corporate loans to projects if the borrower will not, or is unable to, comply with the Equator Principles. As at late May 2019, 96 financial institutions in 37 countries have adopted the Equator Principles. EP III is the current form of the Equator Principles, and an update EP IV is expected in the second half of 2019.

The Equator Principles do not have legal status in the United Kingdom and it is not mandatory for lenders to project finance transactions in the UK to adopt them. However, most financial institutions that are active in project financing in the UK have adopted the Equator Principles and are members of the Equator Principles Association.

iii Responsibility of financial institutions

As discussed above, financial institutions are not required to adopt the Equator Principles, but most have done so anyway. Financial institutions have in recent times also placed greater emphasis on their environmental, social and governance policies in their lending policies.

Financial institutions are typically liable for any money laundering and sanctions issues that may appear in a project financing.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

The UK government has used various PPP models for public infrastructure projects, ranging from projects in the health and education sectors to prison infrastructure and defence projects. Since it was implemented in 1992, PFI has been the most commonly used PPP model in the United Kingdom.

There is no formal statutory and legal framework for the PFI model and there is some standardised documentation under the PF2 model. Under a PFI model, the UK government contracts a project company for the provision of services in relation to a public infrastructure facility – the government does not pay fees in relation to the construction of the project, but rather the operation of the project to the standards as specified in the project documents. There are often financial (and even termination) penalties for failure to meet these standards.

As mentioned in Section II, the UK government announced as part of its 2018 Budget that it would no longer use the PFI model to commission the construction and operation of new public projects.

ii Public procurement

The EU procurement laws, as implemented by the Public Contracts Regulations 2015, Concession Contracts Regulation 2016 and Utilities Contracts Regulations 2016, are applicable to project companies developing public infrastructure projects in the United Kingdom, if the public contracts fall within the scope of the rules and exceed certain financial values. These will include most PFI contracts and must be advertised by the contracting authority in the EU's Official Journal. They must also follow a specified award procedure, which will depend on the nature of the contract.

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After it has decided to award a public contract, the contracting authority must notify all bidders of its decision, thereby starting a period during which successful bidders may challenge the award and apply for it to be set aside. The English courts have the power to grant injunctions to prevent parties from entering into the public contracts, to set aside awards made by the contracting authority, and to award damages for any breach of the aforementioned Regulations.

Note, however, that it remains unclear whether these public procurement rules will remain after the United Kingdom leaves the European Union.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There are no specific restrictions or special licensing requirements for foreign investors and contractors, 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 affect ownership by companies that have UK, EU or global business turnovers exceeding specific thresholds. Compliance with EU directives may affect an entity's ability to invest in or own certain assets.

The United Kingdom does not offer specific incentives to encourage foreign investments. For as long as the UK remains a member of the European Union, all UK investment must be satisfactory from the perspective of EU procurement regulations and wider EU law, including in relation to the restrictions on state aid. In terms of investor protection, the United Kingdom is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The UK is also a party to a large number of bilateral investment treaties (BITs) with a range of other states. UK BITs afford protection to investors that include protection against expropriation without compensation, the right to fair and equitable treatment and the right to repatriate profits.

The United Kingdom does not generally impose restrictions on foreign investments in particular industries, although this is a changing landscape in Europe. The European Parliament, Council and Commission reached an agreement in November 2018 on an EU legal framework for screening foreign direct investments into the European Union, which will apply to investments by non-EU investors. This framework placed particular emphasis on foreign state-backed acquisitions of European infrastructure and technology. Key sectors that will be subject to the framework include critical infrastructure, critical technologies, sensitive information, media, land and water supply infrastructure. The EU proposal also identifies control of a foreign investor by the government of a country outside the European Union, including through significant funding, as a potentially sensitive factor. Given the current uncertainty relating to Brexit, it is not clear how the proposed EU legal framework will apply to the UK.

In the event of foreclosure on a project or related companies in the context of security over an asset, the mortgagee could obtain a court order under which it becomes the owner of the property. A mortgagee's right to foreclose arises once the liabilities secured by the mortgage have become repayable. Even in these circumstances, a mortgagee normally has certain obligations to the mortgagor, including an obligation to obtain a reasonable price for the sale of a mortgaged asset, and (pursuant to the 'equity of redemption') to return any excess

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proceeds over the secured debt finalised by it to the mortgagor. In general, under English law, foreign investors are not treated differently from businesses established in England and Wales in relation to the enforcement of security.

Removal of profits and investment

The United Kingdom does not impose currency exchange controls, nor are there any laws that preclude the removal of profits or investments from the UK. There is an unrestricted regime in relation to the repatriation of profits. Other than the normal incidents of taxation, there are no particular restrictions on remittances of investment returns. The UK imposes a withholding tax at the basic rate of income tax (currently 20 per cent) on any payment of yearly interest arising in the United Kingdom. Consequently, a UK company paying yearly interest on a debt security will generally have an obligation to deduct 20 per cent of that interest payment and account for this withheld amount to the UK tax authorities.

The UK may impose withholding tax on repatriated profits. There is also a comprehensive regime of double taxation treaties.

XI DISPUTE RESOLUTION

Disputes arising from construction and engineering work in projects are commonly dealt with by three separate regimes: adjudication, arbitration and high court litigation.

i Special jurisdiction

Under the Housing, Grants, Construction and Regeneration Act 1996, all construction contracts in the United Kingdom must include provisions for the adjudication of disputes. If a construction contract does not include a provision for adjudication, then the statute will imply an adjudication regime into it. Statute will also imply an adjudication scheme if the adjudication provisions of a construction contract do not comply with the requirements of the Local Democracy, Economic Development and Construction Act 2009.[20]

However, there are several exceptions to these rules. Parties may avoid the statutory adjudication regimes if the construction contracts relate to energy and process plants or offshore construction works. Project companies and government authorities who are party to concession agreement in relation to a PPP project are also exempt from the adjudication regime; however, note that the other project contracts will not be able to rely on such an exemption.

The statutory adjudication regime requires construction contracts to include provisions that allow disputes to be referred to adjudication at any time. Upon making a referral, parties must appoint an adjudicator within seven days, following which the adjudicator must make a decision on the dispute within 28 days of their appointment. Such period may also be extended by the parties.

Any kind of dispute may be referred to adjudication, and the adjudicator's decision is binding and enforceable through the English courts. However, either party may subsequently

20 This scheme is contained in a statutory instrument and sets out default terms for adjudication: The Scheme for Construction Contracts (England and Wales) Regulations 1998 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. The latter applies to construction contracts covered by the Local Democracy, Economic Development and Construction Act 2009. Similar schemes apply in Scotland and Northern Ireland.

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litigate or arbitrate the same dispute without restriction. The English courts are generally reluctant to refuse to enforce adjudicators' decisions, unless the adjudicator clearly lacked jurisdiction or there had been a breach of natural justice in the adjudicative process.

ii Arbitration and ADR

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 English courts. Under the Arbitration Act 1996, and provided that the arbitration agreement is in writing, the English courts will stay any proceedings brought in breach of that agreement, unless the court is satisfied that the arbitration agreement itself is null and void (Arbitration Act 1996). The UK is a signatory to the New York Convention, under which arbitral awards may be recognised and enforced.

Arbitration has historically been used by the construction sector and most arbitral proceedings are conducted by industry specialist arbitrators, including former engineers, architects or chartered surveyors who have subsequently trained and qualified as arbitrators. The Royal Institution of Chartered Surveyors is one of the largest nominating bodies for arbitrators and adjudicators in the United Kingdom. However, since the implementation of the statutory adjudication regime, construction arbitration has diminished significantly.

Matters that are arbitrable under English law are generally limited to civil proceedings; that is to say, criminal and family law matters, or matters relating to status, may not be submitted to arbitration. However, a claim for compensation arising out of a criminal act or property relating to a divorce may well be arbitrated. Note, however, that, although the English courts at one point suggested that an arbitration agreement would be considered 'null, void and inoperative' insofar as it purports to require the submission to arbitration of issues relating to mandatory EU law,[21] this approach has not been followed in subsequent cases.[22] The *Fern Computer Consultancy Ltd v. Intergraph Cadworx & Analysis Solutions Inc* case has subsequently received positive judicial treatment. However, there has not yet been any ruling by an appellate court in relation to this issue and, therefore, some ambiguity remains.

XII OUTLOOK AND CONCLUSIONS

The United Kingdom continues to be committed to using project finance to finance domestic infrastructure projects and this will be a key source of funding for the significant infrastructure projects for which there is a commitment that they be completed during the course of the next decade. Furthermore, given the preference of project finance lenders and investors to use English law as one of the preferred laws to govern project and project finance documentation, the UK is well positioned to remain a key hub for international project financings.

Brexit will continue to affect project finance, not least the English legal framework relevant to project finance, since much of it draws from EU law. During any possible transition period, it is likely that the UK will continue to be subject to EU procurement directives (such as the Public Contracts Regulations 2015 SI 2015/102). This means that organisations subject to those rules must continue to advertise and award public contracts in accordance with the EU directives. It is unclear what the position will be regarding procurement post-exit and

21 See *Accentuate Ltd v. ASIGRA Inc.* [2009] EWHC 2655.

22 See, e.g., *Fern Computer Consultancy Ltd v. Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch).

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post-transition period, but it is likely that Parliament will not repeal the relevant legislation unless a pressing need arises. If the UK seeks to retain membership of the European Single Market, it would have to continue to apply all EU public procurement directives.

It has been suggested in the legal press that there is cause for optimism regarding government liquidity support for projects post-Brexit, such as the adoption of a looser monetary policy in the UK or potential policies to stimulate the economy via investment in infrastructure. Standard and Poor's have commented that PFIs should maintain their credit strength. They have also noticed that, in the short term, projects have benefited from the higher inflationary environment. Whether this trend will continue remains to be seen.

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Appendix 1

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Munib Hussain is a senior associate in the London office of Milbank LLP and a member of the firm's global project, energy and infrastructure finance group. Munib has significant expertise in advising lenders, sponsors and sovereigns on 'first-of-a-kind' international projects, energy and infrastructure financings in the oil and gas, power and mining sectors, and in particular specialises in multi-sourced financings involving ECAs, multilaterals, commercial and Islamic banks.

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